

# UNILATERAL-MODIFICATION PROVISIONS IN EMPLOYMENT ARBITRATION AGREEMENTS

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## I. INTRODUCTION

A computer software company hiring for a Staff Product Consultant

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position sent an offer letter to an applicant, along with other documents, enclosing the company's Internal Dispute Solution ("IDS") Program, which culminated in arbitration.<sup>1</sup> The IDS policy stated that the company reserved the right to make changes to the IDS Program without notice.<sup>2</sup> The applicant accepted the job, signed all the documents, and began work. After the company failed to respond to harassment complaints and a Demand for Arbitration, the employee filed suit in district court.<sup>3</sup> The district court denied the company's motion to compel arbitration and concluded that the reserved right to change its IDS policy created no real promise to arbitrate and, therefore, lacked sufficient consideration to be enforceable.<sup>4</sup> However, on appeal, the United States Court of Appeals for the Fourth Circuit reversed, finding that the lower court erred when it looked beyond the four corners of the separate arbitration agreement.<sup>5</sup> The circuit court reasoned that when looking solely at the arbitration agreement there was adequate consideration to bind the parties and remanded the case with instructions to compel arbitration.<sup>6</sup> This single case illustrates the widespread conflict among state and federal courts over the enforceability of arbitration agreements containing unilateral-modification clauses.

Unilateral-modification clauses give one party the unfettered right to amend or reject the underlying contract, often with neither notice to, nor consent from, the other party.<sup>7</sup> While some courts enforce employment arbitration agreements containing these clauses,<sup>8</sup> most courts refuse to enforce them for a variety of reasons, such as lack of consideration, illusory promise, indefiniteness, or unconscionability.<sup>9</sup> Other courts refuse enforcement simply because it may give employers

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1. Hill v. PeopleSoft U.S.A., Inc., 333 F. Supp. 2d 398, 401 (D. Md. 2004).

2. *Id.*

3. *Id.* at 401-02. The applicant sued "alleging sexual harassment (Count I), hostile work environment (Count II), retaliation (Count III) and discrimination based on race (Count IV) pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.*, 42 U.S.C. §1981(a), as amended, and the Civil Rights Act of 1991, as amended, and discrimination based on race (Count V) pursuant to 42 U.S.C. §1981, as amended, and the Civil Rights Act of 1991, as amended." *Id.* at 400.

4. *Id.* at 405.

5. Hill v. PeopleSoft U.S.A., Inc., 412 F.3d 540, 544-45 (4th Cir. 2005).

6. *Id.* at 543-44.

7. See Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 310 (6th Cir. 2000) (noting that the arbitration agreement gave the employer the unlimited right to modify the rules of arbitration without the employee's consent).

8. See, e.g., Hill, 412 F.3d at 545; Blair v. Scott Specialty Gases, 283 F.3d 595, 604 (3d Cir. 2002).

9. See Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1262 (9th Cir. 2005); Dumais v. Am. Golf Corp., 299 F.3d 1216, 1220 (10th Cir. 2002); Floss, 211 F.3d at 316; Cheek v. United Healthcare of Mid-Atl., Inc., 835 A.2d 656, 657 (Md. 2003).

the ability to alter arbitration rules after a dispute has arisen, potentially in the middle of an arbitration hearing.<sup>10</sup>

This article argues that courts should not compel arbitration where employers have retained the unilateral, unrestricted right to modify a contract containing an arbitration agreement. Unrestricted rights to alter or remove the obligation to arbitrate give employers the freedom to choose the nature of their performance while binding an employee, who has relinquished significant statutory rights, to the arbitration agreement. Unrestricted unilateral-modification clauses make an employer's promise to arbitrate illusory, and the arbitration agreement unconscionable.

Part II of this article examines the legal background of arbitration agreements, the Federal Arbitration Act,<sup>11</sup> and the role of state contract law. Part III discusses the current split in federal and state courts on the enforceability of arbitration agreements containing unilateral-modification provisions. Part IV analyzes the theories of enforceability and proposes a three-step approach courts should use when reviewing these arbitration agreements. Part V concludes that courts should not compel arbitration when unilateral-modification rights are unrestricted. However, courts should compel arbitration when the employer's right to modify is sufficiently limited to require notice, sufficient consideration, and conscionable terms. This article provides a step-by-step framework that courts can use to analyze the enforceability of unilateral-modification clauses in employment arbitration agreements.

## II. BACKGROUND

### *A. ENACTMENT OF THE FEDERAL ARBITRATION ACT*

Congress passed the Federal Arbitration Act ("FAA") in 1925. The purpose of the Act was to reverse the judicial hostility toward arbitration agreements that existed under the English common law, which was later adopted by the American courts, and "to place arbitration agreements upon the same footing as other contracts."<sup>12</sup>

The FAA manifests "a liberal federal policy favoring arbitration

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10. *See* *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999).

11. 9 U.S.C. §§ 1-16 (2000).

12. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 n.6 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974)).

agreements.”<sup>13</sup> When a valid agreement to arbitrate exists between parties, and covers the matter in dispute, the FAA commands federal courts to stay any ongoing judicial proceedings<sup>14</sup> and compel arbitration.<sup>15</sup> The Supreme Court has interpreted the FAA as establishing that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,”<sup>16</sup> as a matter of federal law.

Initial skepticism regarding the ability of an arbitration hearing to resolve statutory claims<sup>17</sup> gave way to a growing acceptance of mandatory arbitration.<sup>18</sup> Between 1985 and 1989, a series of three cases, known as the Mitsubishi Trilogy,<sup>19</sup> created the presumption of arbitrability under the FAA when one party to an arbitration agreement seeks enforcement of the agreement as a defense to another party’s statutory claim.<sup>20</sup> In the Mitsubishi Trilogy cases, the Supreme Court approved compulsory arbitration of statutory claims arising under business transactions outside of the employment setting.<sup>21</sup> The Supreme Court’s rising confidence in arbitration as an alternative to litigation for statutory business transaction claims led the Court, in *Gilmer v. Interstate/Johnson Lane Corp.*, to grant certiorari to decide the arbitrability of statutory employment claims.<sup>22</sup>

The Supreme Court in *Gilmer*, following the Mitsubishi Trilogy cases, required arbitration of a claim filed under the Age Discrimination in Employment Act (“ADEA”), and thus extended the presumption of arbitrability to statutory claims in the employment context.<sup>23</sup> Robert Gilmer was a financial services manager who had signed an arbitration agreement contained in a registration packet for the New York Stock

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13. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

14. 9 U.S.C. § 3.

15. *Id.*

16. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

17. *See Wilko v. Swan*, 346 U.S. 427, 438 (1953).

18. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

19. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *see also* Richard A. Bales, *The Discord Between Collective Bargaining and Individual Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U. L. REV. 687, 727 nn. 210-12 (1997) (discussing the significance of the Mitsubishi Trilogy).

20. *See Bales, supra* note 19, at 727.

21. *Id.* at 728; *see also Rodriguez de Quijas*, 490 U.S. at 485-86 (deciding the arbitrability of claims arising under section 12(2) of the Securities Act of 1933); *Shearson/Am. Express, Inc.*, 482 U.S. at 238, 242 (deciding the arbitrability of claims arising under RICO and section 10(b) of the Securities Act of 1934); *Mitsubishi Motors Corp.*, 473 U.S. at 616, 640 (deciding the arbitrability of claims arising under the Sherman Antitrust Act).

22. *Gilmer*, 500 U.S. at 20.

23. *Id.* at 35.

Exchange.<sup>24</sup> The agreement required arbitration of any claim between him and his employer arising out of his employment or termination.<sup>25</sup> When his employer discharged him, Gilmer filed a civil suit in United States District Court for the Western District of North Carolina.<sup>26</sup> The district court refused to compel arbitration, but the Fourth Circuit Court of Appeals reversed.<sup>27</sup> The Supreme Court affirmed the Fourth Circuit's order to compel arbitration.<sup>28</sup>

In the *Mitsubishi Trilogy* cases, the Supreme Court recognized that by "agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>29</sup> This statement, quoted with approval by the *Gilmer* Court, extended the application to statutory claims in the employment context.<sup>30</sup> The Court explained that employment arbitration agreements must be reviewed on a case-by-case basis when objections of procedural unfairness and unconscionability are raised.<sup>31</sup> However, arbitration agreements would be enforceable absent "the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'"<sup>32</sup>

### B. ROLE OF STATE CONTRACT LAW

The FAA governs nearly all arbitration agreements,<sup>33</sup> and the FAA preempts inconsistent state law.<sup>34</sup> However, section 2 of the FAA expressly adopts state contract law as the basis for the enforcement, or revocation of, arbitration agreements.<sup>35</sup> By providing that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon grounds that exist at law or in equity for the revocation of any

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24. *Id.* at 23.

25. *Id.*

26. *Id.* at 20.

27. *Id.*

28. *Id.* at 35.

29. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

30. *See Gilmer*, 500 U.S. at 26.

31. *See id.* at 32-33.

32. *Id.* at 33 (quoting *Mitsubishi*, 473 U.S. at 627).

33. *See* Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, LAW & CONTEMP. PROBS., Winter/Spring 2004 at 167, 170 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-77 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984)).

34. *Id.* (citing U.S. CONST. art. VI, §1, cl. 2). "This Constitution . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, §1, cl. 2.

35. Federal Arbitration Act, 9 U.S.C. § 2 (2000).

contract,”<sup>36</sup> the FAA’s express terms make room for state contract law.<sup>37</sup> Since the FAA does not provide an independent basis for federal question jurisdiction<sup>38</sup> it is frequently enforced in state courts,<sup>39</sup> where arbitration provisions are to be placed “upon the same footing as other contracts.”<sup>40</sup>

The Supreme Court has directed courts to “apply ordinary state-law principles that govern the formation of contracts,”<sup>41</sup> in determining the “validity, revocability, or enforceability of contracts generally.”<sup>42</sup> Thus, courts may use generally applicable contract defenses, such as insufficient consideration, fraud, duress, and unconscionability, to invalidate arbitration agreements without contravening section 2 of the FAA.<sup>43</sup>

### III. ENFORCING UNILATERAL-MODIFICATION CLAUSES – THE SPLIT

Currently, state and federal courts are split on the issue of enforcing arbitration provisions when an employer retains unilateral-modification rights.<sup>44</sup> As previously stated in Part II, the FAA requires that courts look to state contract law to analyze the enforceability of arbitration agreements.<sup>45</sup> Since contract laws vary from state to state, the rationales for enforcing or rejecting arbitration agreements also vary. The result is that even when courts agree on the enforceability determination, they often differ in the rationale for the holding.<sup>46</sup> Courts in different states,

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36. *Id.*

37. See Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415, 421 (2006).

38. *Id.* (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983)).

39. See Bales, *supra* note 37, at 421. “There is a split of authority in the federal circuit courts over whether the presence of a federal question in an underlying dispute is sufficient to support subject matter jurisdiction.” *Id.* at n.39 (citing *Discover Bank v. Vaden*, 396 F.3d 366 (4th Cir. 2005); *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe*, 177 F.3d 1212 (11th Cir. 1999); *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263 (2d Cir. 1996)).

40. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

41. *Hill v. Peoplesoft U.S.A., Inc.*, 412 F.3d 540, 543 (4th Cir. 2005) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

42. *Id.* (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987)).

43. See Ware, *supra* note 33, at 170 (quoting *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 686-87 (1996)).

44. See Bales, *supra* note 37, at 451-52.

45. See *id.* at 416.

46. See *Oakwood Mobile Homes, Inc. v. Sprowls*, 82 S.W.3d 193, 194-95 n.3 (Ky. 2002) (discussing the employer’s ability to unilaterally alter the conditions of employment in an at-will relationship as requiring “reasonable notice” in Michigan or a “meeting of the minds” in Kentucky

reviewing the same unilateral-modification provision contained in an arbitration agreement, may disagree on whether the agreement is supported by consideration yet still arrive at the same result.<sup>47</sup>

### A. ILLUSORY PROMISE THEORY (CONSIDERATION REQUIREMENT)

A contract must be supported by consideration if it is to be enforceable.<sup>48</sup> However, what constitutes adequate consideration for arbitration clauses differs among the states.<sup>49</sup> Some states do not require mutuality of obligation in order to find adequate consideration in support of arbitration clauses.<sup>50</sup> Other states have the view that “absent a mutuality of obligation, a contract based on reciprocal promises lacks consideration.”<sup>51</sup> Where an employer retains the unilateral right to modify or delete an arbitration provision, most courts that require mutuality of obligation will hold that the employer’s retained right to terminate or change its obligation to arbitrate will fail the mutuality requirement.<sup>52</sup> These courts reason that since the promise to arbitrate is discretionary, it is illusory and, therefore, unenforceable.<sup>53</sup>

#### 1. Refusing To Compel

The overwhelming majority of courts refusing to compel arbitration

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(citing *Harlan Pub. Serv. Co., v. E. Constr. Co.*, 71 S.W.2d 24 (1934))).

47. Compare *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 315 (6th Cir. 2000) (noting that there is no binding obligation if an employer retains the right to revoke an arbitration provision in an employee handbook (citing *Trumbell v. Century Mktg. Corp.*, 12 F. Supp. 2d 683, 686 (N.D. Ohio 1998))), and *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 792 (8th Cir. 1998) (explaining that as long as the contract as a whole is supported by consideration, a unilateral-modification provision in an arbitration agreement will not make the contract unenforceable), with *David Roth’s Sons, Inc. v. Wright & Taylor, Inc.*, 343 S.W.2d 389, 391 (Ky. 1961) (explaining that a unilateral right to terminate is not a controlling factor in determining whether or not there is an obligation under the contract).

48. See RESTATEMENT (SECOND) OF CONTRACTS §§ 71-78 (1981).

49. Compare *Barker*, 154 F.3d at 792 (concluding that under Oklahoma law, “mutuality of obligation is not required for arbitration clauses so long as the contract as a whole is supported by consideration”), with *Floss*, 211 F.3d at 315 (“A promise constitutes consideration for another promise only when it creates a binding obligation. Thus, absent a mutuality of obligation, a contract based on reciprocal promises lacks consideration.” (citing *Dobbs v. Guenther*, 846 S.W.2d 270, 276 (Tenn. Ct. App. 1992))).

50. See *Barker*, 154 F.3d at 792.

51. *Floss*, 211 F.3d at 315 (citing *Dobbs*, 846 S.W.2d at 276; *David Roth’s Sons, Inc.*, 343 S.W.2d at 390).

52. See *Piano v. Premier Distrib. Co.*, 107 P.3d 11, 16 (N.M. Ct. App. 2004).

53. See *id.* at 16.

cite lack of consideration as the primary rationale.<sup>54</sup> For example, in *Piano v. Premier Distributing Co.*, an at-will employee sued her employer in state court alleging wrongful termination.<sup>55</sup> During her employment, the employee signed an arbitration agreement containing a unilateral-modification provision.<sup>56</sup> Since the employer retained the right to modify any of the terms of employment, including the arbitration agreement, the employee claimed that the arbitration agreement lacked consideration.<sup>57</sup> The employer argued that sufficient consideration to enforce the arbitration agreement was supplied by the reciprocal promise to arbitrate, as well as by allowing the at-will employee to keep her job.<sup>58</sup>

The trial court refused to compel arbitration, finding that the agreement was not supported by consideration, and the New Mexico Court of Appeals affirmed.<sup>59</sup> The appellate court found that since the employee's at-will status did not change after the arbitration agreement was signed, the employer's retention of the employee was entirely discretionary. The court explained that a discretionary promise for continued at-will employment is completely illusory, and could not be consideration for an employee's promise to submit her claims to arbitration.<sup>60</sup> The court also found that the employer's return promise to arbitrate was insufficient to provide consideration for the agreement. Although the company limited its ability to make changes to the arbitration agreement, the only requirements were that the changes be in writing and signed by the "Owner of the Company."<sup>61</sup> The arbitration agreement gave the employer unilateral authority to modify arbitration terms without requiring the employee's approval or notification. As such, the court found that the employer "remain[ed] free to selectively abide by its promise to arbitrate,"<sup>62</sup> thus making the promise illusory and

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54. See Bales, *supra* note 37, at 451.

55. *Piano*, 107 P.3d at 13.

56. *Id.*

57. *Id.* at 15.

58. *Id.* at 14.

59. *Id.* at 17.

60. *Id.* at 14 (citing Bd. of Educ., Gadsen Ind. Sch. Dist. No. 16 v. James Hamilton Constr. Co., 891 P.2d 556, 561 (N.M. Ct. App. 1994)).

61. *Id.* at 15-16.

62. *Id.* at 16 (quoting *Heye v. Am. Golf Corp.*, 80 P.3d 495, 500 (N.M. Ct. App. 2003)); see also *Salazar v. Citadel Commc'ns Corp.*, 90 P.3d 466, 469-70 (N.M. 2004) (finding an agreement to arbitrate illusory and unenforceable because it gave the employer the right to modify any of its provisions at any time); *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) ("[A]n arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory.").



inadequate as consideration for the employee's promise.<sup>63</sup>

Other courts have refused to compel arbitration while explicitly holding that continued at-will employment *can* supply the consideration for an agreement to arbitrate.<sup>64</sup> For example, in *Comfort v. Mariner Health Care, Inc.*, the United States District Court for the District of Connecticut specifically rejected an employee's claim that continued at-will employment was insufficient consideration for a binding arbitration agreement.<sup>65</sup> Mariner set forth its arbitration policies in an Employment Dispute Resolution Program Handbook, which referred to a separate arbitration agreement that it required its employees to sign.<sup>66</sup> An employee filed a Title VII claim in district court, arguing that the arbitration agreement was not enforceable because it lacked consideration, mutuality of obligation, and a meeting of the minds.<sup>67</sup>

The United States District Court of Connecticut has defined consideration as "a benefit to the party promising, or a loss or detriment to the party to whom the promise is made."<sup>68</sup> Although consideration and mutuality of obligation are related concepts, the district court in *Comfort* cited the Connecticut Supreme Court's approval of the Restatement (Second) of Contracts, which provides "if the requirement of consideration is met, there is no additional requirement of mutuality of obligation."<sup>69</sup> Applying these contract principles to an arbitration agreement in the at-will employment context, the district court held that continued employment is sufficient consideration to render an arbitration agreement binding.<sup>70</sup> However, when the court analyzed the Employment Dispute Resolution Handbook, it denied Mariner's motion to compel arbitration.<sup>71</sup> The court reasoned that the revision of any arbitration provision could result in a "substantive change to the terms of the Arbitration Agreement . . . [and] Mariner's ability to render such change unilaterally evidences a lack of mutuality."<sup>72</sup>

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63. *Piano*, 107 P.3d at 16.

64. See *Comfort v. Mariner Healthcare Inc.*, No. Civ.A.304CV2142JCH, 2005 WL 977062, at \*2-3 (D. Conn. Apr. 26, 2005).

65. See *id.* at \*2 (citing *Fahim v. Cigna Invs., Inc.*, No. 3:98CV232, 1998 WL 1967944, at \*2 (D. Conn. Sept. 10, 1998)).

66. *Id.* at \*3.

67. *Id.* at \*1-2.

68. *Christian v. Gouldin*, 804 A.2d 865, 871 (Conn. App. Ct. 2002) (quoting *Finlay v. Swirsky*, 131 A. 420, 423 (Conn. 1925)).

69. *Comfort*, 2005 WL 977062, at \*2 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981)).

70. *Id.* (citing *Fahim v. Cigna Invs. Inc.*, No. 3:98CV232, 1998 WL 1967944 (D. Conn. Sept. 10, 1998)).

71. *Id.* at \*3.

72. *Id.* (citing *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 314 (6th Cir. 2000)).

Further, the court placed an additional consideration requirement, mutuality of obligation, on the separate arbitration agreement.<sup>73</sup> Although the court had already stated that continued employment *could* be adequate consideration for an arbitration agreement, the employer's unilateral-modification rights gave rise to the need for additional consideration.<sup>74</sup>

Thus, many courts refusing to enforce arbitration agreements subject to unilateral-modification clauses cite lack of consideration as the rationale.<sup>75</sup> Some of these courts reason that an employer's retention of an employee is entirely discretionary, and cannot supply consideration for the employee's agreement to arbitrate.<sup>76</sup> Other courts, arriving at the identical outcome, have held that continued employment could be adequate consideration.<sup>77</sup> However, when the return promise to arbitrate is subject to unilateral-modification, these courts reason that such a promise is illusory and fails to provide the additional consideration needed.<sup>78</sup>

## 2. Compelling Arbitration: No Additional Consideration

In states that do not require mutuality of obligation, or that define it differently, courts often find that the consideration for a contract containing an arbitration provision extends to the promise to arbitrate.<sup>79</sup> Some states define mutuality as requiring nothing more than consideration on both sides of the agreement.<sup>80</sup> These courts often compel arbitration regardless of an unrestricted unilateral-modification

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73. *See id.* at \*3.

74. *See id.* at \*2-3. After stating that mutuality was not a requirement when a contract is supported by consideration, and that continued employment was adequate consideration, the court required mutuality and found continued employment insufficient. *Id.* It would have made more sense for the court to deny the motion to compel on grounds of unconscionability. To bind an employee to arbitration procedures that could change at any time, even during the arbitration, would be unconscionable.

75. *See, e.g.,* Trumbull v. Century Mktg. Corp., 12 F. Supp. 2d 683, 686 (N.D. Ohio 1998).

76. *See, e.g.,* Piano v. Premier Distrib. Co., 107 P.3d 11, 14 (N.M. Ct. App. 2004) ("The implied promise of continued at-will employment placed no constraints on [the employer's] . . . decision to continue Plaintiff's at-will employment . . . ." (citing Bd. of Educ. v. James Hamilton Constr. Co., 891 P.2d 556, 561 (N.M. Ct. App. 1994); Heye v. Am. Golf Corp., 80 P.3d 495, 500 (N.M. Ct. App. 2003))).

77. *See, e.g.,* Comfort, 2005 WL 977062, at \*2-3.

78. *See Piano*, 107 P.3d at 14 (citing *Heye*, 80 P.3d at 499; RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a (1981)).

79. *See, e.g.,* Kelly v. UHC Mgmt. Co., 967 F. Supp. 1240, 1258-60 (N.D. Ala. 1997).

80. *See, e.g., id.* at 1259 ("[W]hen the promise of each party is legally sufficient consideration for the other's promise, there is no lack of mutuality." (quoting *Marcum v. Embry*, 282 So. 2d 49, 51 (Ala. 1973))).

provision because consideration is supplied by the employer's act of continuing to employ the employees, and not by the terms subject to modification.<sup>81</sup> Since additional consideration is not required, an employer's ability to modify the terms does not render an arbitration agreement unenforceable.<sup>82</sup>

For example, in *Kelly v. UHC Management Co.*, a group of African-American employees brought Title VII and § 1981 claims against their employer in the United States District Court for the Northern District of Alabama.<sup>83</sup> Among several arguments, the employees claimed there was no mutuality in the arbitration agreements with UHC and, therefore, the agreements were invalid.<sup>84</sup> The district court answered this issue by looking to Alabama case law on mutuality and consideration.<sup>85</sup>

The Alabama Supreme Court, in *Macrum v. Embry*, emphasized that mutuality in a contract does not mean that parties will have equal rights under the contract.<sup>86</sup> A valid contract need only have valuable consideration moving from one side to the other, or binding promises from each party to the other.<sup>87</sup> Although a contract lacking mutuality is unenforceable, "when the promise of each party is legally sufficient consideration for the other's promise, there is no lack of mutuality."<sup>88</sup> This follows the approach of the Restatement of Contracts: "If the requirement of consideration is met, there is no additional requirement of . . . 'mutuality of obligation.'"<sup>89</sup>

In *Kelly*, the court first considered whether the requirement of consideration had been met. It found that since the employer had the option of firing any employee, at any time and for any legal reason, consideration was given by continuing to employ their employees in exchange for the promise to arbitrate.<sup>90</sup> The promise to "not fire you on the spot if you sign this agreement," was adequate consideration for the court.<sup>91</sup> The consideration supporting the arbitration agreement was exclusive of the agreement itself, and the court flatly rejected the employees' contention that the right to unilaterally modify the

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81. See, e.g., *id.* at 1260.

82. See *McNaughton v. United Healthcare Servs., Inc.*, 728 So. 2d 592, 596-97 n.5 (Ala. 1998) (citing *Kelly*, 967 F. Supp. at 1258-60).

83. *Kelly*, 967 F. Supp. at 1242.

84. *Id.* at 1242-43.

85. *Id.* at 1258-60.

86. *Macrum v. Embry*, 282 So. 2d 49, 51 (Ala. 1973).

87. *Id.*

88. *Id.*

89. RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981).

90. *Kelly*, 967 F. Supp. at 1260.

91. *Id.*

agreement terms evidenced a lack of mutuality.<sup>92</sup>

### 3. Limiting The Unilateral-Modification Right

Consideration analysis for arbitration agreements containing unilateral-modification provisions can hinge on whether the retained right to modify the agreement is unlimited.<sup>93</sup> Where an employer can modify arbitration procedures at any time, without notice, and effective immediately, most courts will hold that the unlimited right to modify creates an illusory promise to arbitrate.<sup>94</sup>

In order to retain the right to modify the terms of employment, including arbitration terms, some employers have placed limitations on their modification procedures. In *Morrison v. Circuit City Stores, Inc.*,<sup>95</sup> the U.S. Court of Appeals for the Sixth Circuit considered an arbitration agreement where Circuit City retained the power to alter or terminate the agreement on December 31<sup>st</sup> of each year, upon thirty days notice to employees.<sup>96</sup> An employee claimed that the modification provision created an illusory promise to arbitrate, and sued in state court.<sup>97</sup> Circuit City removed the action to federal court, and the United States District Court for the Southern District of Ohio dismissed the action and compelled arbitration.<sup>98</sup> Applying Ohio law, the Sixth Circuit upheld the motion to compel arbitration.<sup>99</sup>

In Ohio, a promise is illusory when the promisor retains unlimited rights to determine the extent of his or her performance; "the unlimited right, in effect, destroys his promise and thus makes it merely illusory."<sup>100</sup> The question for the Sixth Circuit Court was whether the limitation on Circuit City's right to alter, or terminate, the arbitration agreement on a specified date, and only upon thirty days notice, created sufficient consideration.<sup>101</sup> The court concluded that Circuit City's limitations of the modification rights created sufficient consideration to

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92. *Id.*

93. See *Century 21 Am. Landmark, Inc. v. McIntyre*, 427 N.E.2d 534, 536-37 (Ohio Ct. App. 1980) (citing 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 43 (Walter H.E. Jaeger ed., 3d ed., Baker, Voorhis & Co., Inc. 1957) (1920)).

94. See, e.g., *id.*

95. *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003).

96. *Id.* at 655.

97. *Id.* at 655-56.

98. *Id.* at 656.

99. *Id.* at 666-67, 675.

100. *Id.* at 667 (quoting *Century 21 Am. Landmark, Inc. v. McIntyre* 427 N.E.2d 534, 537 (Ohio Ct. App. 1980)).

101. *Id.*

enforce the contract and compel arbitration.<sup>102</sup> The court partially relied on the Restatement (Second) of Contracts, which considers a thirty-day notice provision, by itself, sufficient to constitute consideration.<sup>103</sup>

### B. FAILING FOR INDEFINITENESS

Contract terms are defined differently from state to state, but most state contract principles overlap in some way. The requirement for consideration in some states is very similar to the requirement for mutuality in others.<sup>104</sup> Failing for indefiniteness in one state would often be analyzed in a different state as an illusory promise, or a consideration issue.<sup>105</sup> An example of the “failure for indefiniteness” standard is found in *Floss v. Ryan’s Family Steak Houses*, in which the Sixth Circuit Court of Appeals found the promise to provide an arbitral forum by the employer’s arbitration service “fatally indefinite” because the arbitration service had “unfettered discretion in choosing the nature of that forum.”<sup>106</sup>

Ryan’s Family Steak Houses (“Ryan’s”) required prospective employees, as a prerequisite to future employment, to sign an arbitration agreement with Employment Dispute Services, Inc. (“EDSI”), a third party arbitration service provider.<sup>107</sup> EDSI had complete discretion over arbitration procedures and reserved the right to alter the arbitration rules and procedures without notice or consent.<sup>108</sup> An employee sued Ryan’s in the United States District Court for the Eastern District of Kentucky after being harassed by Ryan’s management for complaining to the Department of Labor regarding Ryan’s wage practices.<sup>109</sup> The district court dismissed the action and compelled arbitration, but the Sixth Circuit Court of Appeals reversed.<sup>110</sup> It held that EDSI’s promise to

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102. *Id.*

103. *Id.* at 667-68 (citing RESTATEMENT (SECOND) OF CONTRACTS § 77 (1981)).

104. *See, e.g.,* *Grovier v. N. Sound Bank*, 957 P.2d 811, 815 (Wash. Ct. App. 1998) (citing *Ebling v. Gove’s Cove, Inc.*, 663 P.2d 132 (Wash. Ct. App. 1983)) (“The promise of each party is consideration supporting the promise of the other.”); *Davis v. Ford Motor Credit Co.*, 882 A.2d 557, 560 (R.I. 2005) (quoting *Filippi v. Filippi*, 818 A.2d 608, 624 (R.I. 2003)) (stating that “[m]utuality of obligation fulfills the consideration requirement of contracts.”).

105. *See, e.g.,* *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 315 (6th Cir. 2000) (citing *David Roth’s Sons, Inc. v. Wright & Taylor, Inc.*, 343 S.W.2d 389, 391 (Ky. Ct. App. 1961); *Jamestowne On Signal, Inc. v. First Fed. Sav. & Loan Ass’n*, 807 S.W.2d 559, 564 (Tenn. Ct. App. 1990)).

106. *Id.*

107. *Id.* at 309.

108. *Id.* at 310.

109. *Id.*

110. *Id.* at 311, 316.

provide an arbitral forum was too indefinite for legal enforcement.<sup>111</sup> Citing Professor Williston on contracts, the court explained that “[w]here a promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is too indefinite for legal enforcement.”<sup>112</sup> EDSI’s unfettered discretion to choose the nature of the arbitral forum destroyed its promise and made it illusory. The court found that a binding obligation to arbitrate was never created, and refused to grant Ryan’s motion to compel.<sup>113</sup>

### C. UNCONSCIONABILITY APPROACH

Some courts have refused to enforce arbitration agreements when unrestricted unilateral-modification rights create agreements so one-sided that they are unconscionable.<sup>114</sup> In many unilateral-modification cases, however, courts fail to reach the employees’ claims of unconscionability because the courts first find that the agreements lack consideration.<sup>115</sup> In a separate Ryan’s Steakhouse case, *Saylor v. Wilkes*, the Supreme Court of West Virginia addressed an employee’s claim of unconscionability.<sup>116</sup> The court reached the unconscionability issue and analyzed the contract of adhesion argument raised in the case.<sup>117</sup>

The West Virginia court recognized that the bulk of contracts signed in the United States are contracts of adhesion, and are generally enforceable.<sup>118</sup> However, where a “gross inadequacy in bargaining power” is combined with “terms unreasonably favorable to the stronger party,” a contract of adhesion will be found to be unconscionable and, thus, such an agreement will be held to be unenforceable.<sup>119</sup> Unconscionability analysis requires a determination as to: (1) the “existence of unfair terms in the contract,” (2) the “relative positions of the parties,” (3) the “adequacy of the bargaining position” and (4) the “meaningful alternatives available to the plaintiff.”<sup>120</sup>

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111. *Id.* at 315-16.

112. *Id.* at 316 (quoting 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 43 (Walter H.E. Jaeger ed., Baker, Voorhis & Co., Inc., 3d ed. 1957) (1920)).

113. *Id.* at 316.

114. *See, e.g.,* *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1261 (9th Cir. 2005); *State ex rel. Saylor v. Wilkes*, 613 S.E.2d 914, 922 (W. Va. 2005).

115. *See Floss*, 211 F.3d at 316; *Cheek v. United Healthcare of Mid-Atl., Inc.*, 835 A.2d 656, 662 (Md. 2003); *Bales*, *supra* note 37, at 451.

116. *Wilkes*, 613 S.E.2d at 922.

117. *Id.* at 922-23.

118. *Id.* at 922 (citing *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002)).

119. *Id.* (quoting *Troy Mining Corp. v. Itmann Coal Co.*, 346 S.E.2d 749, 753 (W. Va. 1986)).

120. *Id.* (quoting *Art’s Flower Shop, Inc., v. Chesapeake & Potomac Tel. Co.*, 413 S.E.2d 670 (W. Va. 1991)).

As with the employees in *Floss*, in *Saylor*, Ryan's employees entered into an arbitration agreement with EDSI, Ryan's arbitration service provider.<sup>121</sup> Applying West Virginia contract law, the court held that the Arbitration Agreement entered into by Saylor and EDSI was an unconscionable contract of adhesion.<sup>122</sup> The court found a gross inequality in bargaining power given Saylor's minimal education and understanding of the law, specifically in regard to arbitration.<sup>123</sup> The arbitration agreement had been fashioned by an EDSI attorney to meet the needs of EDSI and Ryan's Steakhouses.<sup>124</sup> Accordingly, EDSI retained the right to unilaterally modify the rules of arbitration at any time, without having to provide notice of the changes being made.<sup>125</sup> The court also emphasized the attempt by Ryan's to overcome the one-sidedness of the agreement by highlighting a provision that gave the job applicant the right to consult with an attorney prior to signing. The court found it highly unlikely that an applicant for a low-paying job could afford to pay an attorney to review an arbitration agreement and, therefore, rejected the notion that this opportunity placed the applicant on equal footing with a corporation such as EDSI.<sup>126</sup>

Retaining the unrestricted unilateral right to modify the terms of an arbitration agreement provides the drafting party employer complete control over the rules and procedures governing the arbitral forum. This right, when unlimited, so greatly favors employers that courts may refuse to enforce such a contract on grounds of unconscionability.<sup>127</sup>

#### D. COURTS PERMITTING UNILATERAL MODIFICATION

Jurisdictions across the country recognize the right of an at-will employer to unilaterally modify employment policies.<sup>128</sup> In order for such unilateral policy changes to be binding, most jurisdictions have required the existence of either "reasonable notice"<sup>129</sup> or "a meeting of the minds."<sup>130</sup> At least one court, however, has found these

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121. *Id.* at 917.

122. *Id.* at 922.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *See id.*

128. *See Oakwood Mobile Homes, Inc., v. Sprowls*, 82 S.W.3d 193, 194 (Ky. 2002).

129. *See Highstone v. Westin Eng'g. Inc.*, 187 F.3d 548, 553 (6th Cir. 1999).

130. *See Oakwood Mobile Homes, Inc.*, 82 S.W.3d at 195 n.3 (citing *Harlan Pub. Serv. Co. v. E. Constr. Co.*, 71 S.W.2d 24 (Ky. 1934)).

requirements unnecessary.<sup>131</sup>

In contrast to most jurisdictions, the Third Circuit Court of Appeals in *Blair v. Scott Specialty Gases* upheld employer modifications that provided questionable notice and that were immediately effective.<sup>132</sup> In *Blair*, an employee handbook with a mandatory arbitration provision provided that the “[employer] can change this Handbook, and the change must be in writing. If [employer] makes any *material changes*, it will give me a copy of them, and by remaining employed . . . I will be deemed to have accepted these changes.”<sup>133</sup> The Third Circuit interpreted this provision as limiting the employer’s right of unilateral modification to only “non-material” changes to the Handbook.<sup>134</sup>

The language of the agreement, however, specifically gave the employer the right to make material changes.<sup>135</sup> The only requirement was that a copy of the material changes be given to the employees.<sup>136</sup> As a result, the employer was free to modify the entire arbitration agreement and was only required to provide notice to its employees when material changes were made to the Handbook.<sup>137</sup>

In addition, the material changes became immediately effective upon the employee’s return to work the next day.<sup>138</sup> Allowing “non-material” changes to the arbitration agreement without notice by itself sets *Blair* apart from most courts.<sup>139</sup> Furthermore, even if the notice requirement applied to all modifications, most courts would find a modification providing less than twenty-four hours notice for review to be insufficient to constitute “reasonable” notice.<sup>140</sup> Such a short period of time for review prior to achieving “implied” consent, when the employee returns to work, would often be found unreasonable.<sup>141</sup> As

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131. See *Blair v. Scott Specialty Gases*, 283 F.3d 595, 604 (3d Cir. 2002) (allowing an employer to unilaterally alter an agreement as long as it is put in writing, provided to the employee, and the employee accepts the change by continuing employment).

132. See *id.*

133. *Id.* (emphasis added).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. See *id.*

139. See, e.g., *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) (joining the opinions of the Fourth, Sixth, and Seventh Circuits in holding that allowing an employer to alter the arbitration agreement without notice to the employee renders the agreement illusory).

140. See, e.g., *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 667-68 (6th Cir. 2003) (holding that thirty days notice is sufficient to constitute consideration (citing RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. b, illus. 5 (1979))).

141. See, e.g., *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 383 (S.D.N.Y. 2002) (holding an arbitration agreement unconscionable where an employee was not given adequate time to review the contract).



such, this case is understood to stand against the majority rule that unilateral-modification rights failing to provide reasonable notice or a meeting of the minds are unenforceable for lack of consideration.<sup>142</sup>

#### IV. ANALYZING UNILATERAL-MODIFICATION PROVISIONS

Part III described the many ways in which courts have handled arbitration agreements subject to unilateral-modification provisions. Some courts will enforce unilateral-modification provisions, despite insufficient consideration challenges, indefiniteness, and unconscionability, in furtherance of the strong federal policy favoring arbitration.<sup>143</sup> However, courts must consider whether an employer's retained right to modify an arbitration agreement is limited such that it preserves an alternative to litigation in the arbitral forum, rather than effecting a *de facto* waiver of statutory rights.<sup>144</sup>

Courts should refuse to compel arbitration when an employer retains unrestricted unilateral rights to modify an arbitration agreement.<sup>145</sup> An employer in a non-contractual at-will employment relationship retains unilateral rights to modify its employment policies and change the governing terms of employment as the employer sees fit.<sup>146</sup> An employee is free to quit if the employee finds the changes unacceptable, and is free to vindicate alleged violations of statutory rights in court. However, an arbitration agreement necessarily changes the nature of the at-will relationship by imposing a binding contractual term on an otherwise non-contractual employment relationship.<sup>147</sup>

Employers' longstanding unilateral-modification rights in at-will employment relationships must be limited to ensure the protection of

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142. See Bales, *supra* note 37, at 451; see also *Oakwood Mobile Homes, Inc. v. Sprowls*, 82 S.W.3d 193, 195 n. 3 (Ky. 2002) (citing *Harlan Pub. Serv. Co. v. E. Constr. Co.*, 71 S.W.2d 24, 29 (Ky. 1934)) (requiring a meeting of the minds to constitute a valid contract as one cannot be bound by uncommunicated terms without his consent).

143. E.g., *Kelly v. UHC Mgmt., Co.* 967 F. Supp. 1240, 1259-60 (N.D. Ala. 1997).

144. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

145. See, e.g., *Morrison*, 317 F.3d at 667-68; *Century 21 Am. Landmark, Inc., v. McIntyre*, 427 N.E.2d 534, 536-37 (Ohio Ct. App. 1980) (stating that when the promisor retains unlimited rights to determine the extent of his performance, "the unlimited right, in effect, destroys his promise and thus makes it merely illusory." (quoting 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 43 (Walter H.E. Jaeger ed., Baker, Voorhis & Co., Inc., 3d ed. 1957) (1920))).

146. See, e.g., *Oakwood Mobile Homes, Inc.*, 82 S.W.3d at 194 ("Without a doubt, jurisdictions across the country recognize that employers may unilaterally alter the terms and conditions of a person's employment.").

147. See *infra* text accompanying notes 170-71.

“substantive rights afforded by statute” when employees give up the right to litigate.<sup>148</sup> These limitations help to protect the contractual validity of the arbitration agreement while keeping the employment at-will relationship intact. By placing limits on employers’ modification rights, arbitration agreements are saved from fatal contract formation defects which render them unenforceable.<sup>149</sup> Consequently, the liberal federal policy favoring resolution in the arbitral forum will be furthered through enforcement.<sup>150</sup>

This Part provides a step-by-step framework that courts can use when faced with a motion to compel arbitration and an agreement containing a unilateral-modification provision. As discussed in Parts II and III, the FAA directs courts to use state contract law, which varies from state to state, to determine enforceability issues. The framework provided in this section draws on contract law principles common to all the states. While courts in some states may need to adjust the terminology somewhat (e.g., using mutuality instead of consideration), courts can overlay this framework on top of existing contract doctrines to achieve consistency in case outcomes.

### A. NOTIFICATION

Courts faced with an employee challenge to a unilateral-modification provision should first look to see if modification rights are limited so as to require some form of adequate notice. There are many ways an employer can provide notice of changes made to an arbitration agreement.<sup>151</sup> Changes distributed through first-line supervisors, or through certified mail, which allow several days for review prior to the effective date, would be an effective means for notification.<sup>152</sup> Other methods can fall short of providing effective notice. For example, website or bulletin board postings, as well as e-mail notifications, can present problems if employers cannot show that employees knew of the posting or opened an email attachment.<sup>153</sup> In addition, requiring employees to sign statements of acknowledgement would sustain the

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148. See *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

149. See, e.g., *Morrison*, 317 F.3d at 667-69.

150. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

151. See *Bales*, *supra* note 37, at 435-41.

152. See *Bales*, *supra* note 37, at 438 (citing *Caley v. Gulfstream Aerospace Corp.*, 333 F. Supp. 2d 1367, 1371, 1375 (N.D. Ga. 2004) (noting that in addition to posting notice on company bulletin boards, Gulfstream mailed copies of the Dispute Resolution Policy to all employees’ home addresses)).

153. See *id.* at 436-37; see also *Skirchak v. Dynamic Research Corp.*, 432 F. Supp. 2d 175, 180 (D. Mass. 2006).

employer's burden of showing that employees were apprised of the change.<sup>154</sup>

A notice requirement is consistent with well-established principles governing at-will employment relationships.<sup>155</sup> Some jurisdictions require "reasonable notice" and other jurisdictions require a "meeting of the minds."<sup>156</sup> While employees' express consent may not be required to implement a change governing the employment relationship, in order for a change to be binding, the employer must demonstrate that the employee had knowledge of the change.<sup>157</sup> In the at-will context, following notification, consent to a change is achieved when the employee returns to work after the effective date.<sup>158</sup> Without notice there cannot be a meeting of the minds and courts need not look any further into the agreement, because whatever the terms are, they are unknown to the employee, and he or she should not be bound by them.

### B. CONSIDERATION

Next, courts should look to whether arbitration agreements are supported by adequate consideration. Unrestricted unilateral-modification provisions create the problem of illusory promises.<sup>159</sup> When an employer retains the right to modify, or even terminate, an arbitration agreement at any time or without notice to the employee, the return promise to arbitrate is at the whim of the employer and, thus, illusory.<sup>160</sup> In jurisdictions that require mutuality, an employer can retain the right to unilaterally modify an agreement and still provide a reciprocal promise by requiring notice and a short period of time before

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154. See Bales, *supra* note 37, at 436.

155. See, e.g., *Oakwood Mobile Homes, Inc. v. Sprowls*, 82 S.W.3d 193, 199 (Ky. 2002).

156. *Id.* at 195 n.3 (stating the employer's ability to unilaterally alter the conditions of employment in an at-will relationship as requiring "reasonable notice" in Michigan or a "meeting of the minds" in Kentucky (citing *Harlan Pub. Serv. Co. v. E. Constr. Co.*, 71 S.W.2d 24, 29 (Ky. 1934))).

157. See, e.g., Bales, *supra* note 37, at 436 (discussing a case where an employer posted an arbitration agreement on the company's internal website, but since they could not demonstrate that employees were notified of the website and posting, the United States District Court for the District of Massachusetts held the arbitration agreement unenforceable for lack of notice (citing *Acher v. Fujitsu Network Commc'ns, Inc.*, 354 F. Supp. 2d 26, 37 (D. Mass. 2005))).

158. See *May v. Higbee Co.*, 372 F.3d 757, 764 (5th Cir. 2004) (citing *Edwards v. Wurster Oil Co.*, 688 So. 2d 772, 775 (Miss. 1997); *Misso v. Nat'l Bank of Commerce Memphis Tenn.*, 95 So. 2d 124, 127 (Miss. 1957)).

159. See, e.g., *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir. 2002); *Salazar v. Citadel Commc'ns Corp.*, 90 P.3d 466, 469 (N.M. 2004) (citing *Bd. of Educ. Gadesen, Ind. Sch. Dist. No. 16 v. James Hamilton Constr. Co.*, 891 P.2d 556 (N.M. Ct. App. 1994)).

160. See, e.g., *Dumais*, 299 F.3d at 1218-19; *Salazar*, 90 P.3d at 469-70.

the change becomes effective.<sup>161</sup> For example, an employer might place notice of changes in an employee's paycheck envelope, with an explanation that the changes will become effective and deemed accepted upon the employee's return to work after ten working days. Since the right to change the arbitration agreement is not entirely discretionary, the reciprocal promise to arbitrate is not illusory.<sup>162</sup>

Additionally, unilateral changes should only apply to claims filed after the effective date.<sup>163</sup> Employee claims under an arbitration policy should not be affected by modifications made after the filing of a claim.<sup>164</sup> A clearly drafted unilateral-modification clause should include language that specifies the prospective nature of any changes. For example, a modification clause could include a phrase which states that any modifications to an arbitration agreement by the employer will apply only to future claims, and not to claims filed prior to the effective date of the modification. This effect should be given whether or not it is explicitly contained in the unilateral-modification clause. The contrary effect, retroactive application, would create the same contract formation defects discussed in Part III of this article.<sup>165</sup>

Most courts upholding unilateral-modification provisions in employment relationships have done so in the context of at-will employment, where longstanding unilateral-modification rights have existed.<sup>166</sup> Some courts have held that consideration beyond continued at-will employment is not required in exchange for the employee promise to arbitrate.<sup>167</sup> Other courts have held that a promise of at-will employment cannot supply the requisite consideration for a promise to arbitrate because continued employment is entirely discretionary.<sup>168</sup> When an employee agrees to an arbitration agreement, and thereby gives up the right to pursue statutory claims in court, an employer, even in the at-will context, should not be permitted to retain the unrestricted unilateral right to modify its obligations under the arbitration agreement. Although the at-will employer may retain its unilateral rights to modify

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161. See, e.g., *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 667-68 (6th Cir. 2003); *In re Halliburton Co.*, 80 S.W.3d 566, 569-70 (Tex. 2002).

162. See, e.g., *Morrison*, 317 F.3d at 668.

163. See *In re Halliburton*, 80 S.W.3d at 569-70 ("No amendment shall apply to a Dispute of which the Sponsor [Halliburton] had actual notice on the date of the amendment.").

164. See *id.*

165. See *supra* Part III.

166. See, e.g., *Kelly v. UHC Mgmt. Co.*, 967 F. Supp. 1240, 1260 (N.D. Ala. 1997).

167. E.g., *id.*

168. E.g., *Piano v. Premier Distrib. Co.*, 107 P.3d 11, 14 (N.M. Ct. App. 2004) (citing *Bd. of Educ., Gadsden Ind. Sch. Dist. No. 16 v. James Hamilton Constr. Co.*, 891 P.2d 556, 561 (N.M. Ct. App. 1994)).

other employment policies, the arbitration agreement is a contractual term that requires adequate consideration.<sup>169</sup>

The nature of the at-will employment relationship is that it can be terminated at any time, without prior notice, and for any or no reason.<sup>170</sup> An arbitration agreement generally incorporates any claim arising from the employment and does not cease when the employee no longer works for her or his employer.<sup>171</sup> At any time, the employer may decide not to perform on the promise to continue employment. When this happens the employee receives nothing for the promise to arbitrate and, yet, is still bound by the promise. The promise of continued employment is illusory and not co-extensive with the agreement to arbitrate. Courts that find continued employment adequate consideration for an employee's promise to arbitrate open the door for employers, who are under no obligation to provide further consideration, to draft unrestricted unilateral-modification provisions that raise issues of fairness and unconscionability.

### C. CONSCIONABLE TERMS

Lastly, courts should look at arbitration agreements and procedures to determine conscionability and procedural fairness. Courts that find arbitration agreements lack consideration are more likely to find that the agreements are also unconscionable.<sup>172</sup> When turning to the issue of unconscionability, courts should consider the fairness of the agreement, the relative bargaining power of the parties, and whether there are meaningful alternatives to the employee.<sup>173</sup> Courts that find continued employment inadequate as consideration require an additional benefit or forbearance to supply the employer's consideration.<sup>174</sup> The forbearance of unrestricted modification rights, or additional benefits to the employee, may bring the necessary fairness into the arbitration agreement; so too might a reciprocal promise to arbitrate.<sup>175</sup> While a

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169. See *supra* text accompanying notes 43-46.

170. *Corcoran v. Chi. Park Dist.*, 875 F.2d 609, 612 (7th Cir. 1989) (citing *Martin v. Fed. Life Ins. Co.*, 440 N.E.2d 998, 1002 (Ill. App. Ct. 1982)).

171. See *Ameriquest Mortgage Co. v. Bentley*, 851 So.2d 458, 464 (Ala. 2002).

172. See *State ex rel. Saylor v. Wilkes*, 613 S.E.2d 914, 924 (W.Va. 2005).

173. *Id.* at 922 (citing *Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co.*, 413 S.E.2d 670, 671 (W. Va. 1991)).

174. See *Piano v. Premier Distrib. Co.*, 107 P.3d 11, 14-16 (N.M. Ct. App. 2004).

175. See, e.g., *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 667-68 (6th Cir. 2003) (finding that an arbitration agreement was supported by adequate consideration where the employer could only modify the agreement on one day out of every year and had to give the employee at least 30 days notice); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002) ("[employer's]

reciprocal promise to arbitrate under specified procedures sometimes provides consideration for an agreement, an unrestricted right to change the procedures unreasonably favors the employer. The illusory nature of the promise fails to supply the agreement with consideration and also extinguishes conscionability because of the employer's unfettered discretion to change the terms.

Although contracts of adhesion are common and generally enforceable,<sup>176</sup> courts should recognize that in order to further the federal policy favoring arbitration, the employer-drafted arbitration agreements and procedures must adequately preserve the substantive rights of employees.<sup>177</sup> Unconscionability may be more difficult to determine because an arbitration proceeding, by design, lacks the procedural formalities of the courtroom. However, lines must be drawn between the informality of arbitration and the procedural requirements of a trial so that arbitration acts as an alternative to litigation, rather than a waiver of statutory rights. Courts must determine that the arbitration agreements provide the minimum amount of procedural guidelines necessary for the employee to support a claim in the arbitral forum.<sup>178</sup>

## V. CONCLUSION

State and federal courts are divided on the issue of whether an arbitration agreement subject to an employer's unilateral-modification clause is enforceable; courts holding that the arbitration agreements are unenforceable are divided on which of several contract law doctrines apply.<sup>179</sup> The majority of courts refuse to compel arbitration when the employer's unilateral-modification rights create a lack of consideration, a non mutual obligation, an illusory promise to arbitrate, or an unconscionable agreement.<sup>180</sup> A minority of courts hold that the promise

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promise to arbitrate its own claims is *a fortiori* adequate consideration for this agreement.”).

176. See *Saylor*, 613 S.E.2d at 922 (citing *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002)) (“[I]t is likely that the bulk of the contracts signed in this country are contracts of adhesion and are generally enforceable.”).

177. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25-26 (1991).

178. See, e.g., *id.* at 30-33. *Gilmer* raised numerous arguments citing the inadequacy of an arbitration proceeding to address his ADEA claim: limited discovery, no written opinions, no appellate review, no provisions for broad equitable relief, etc. The Court addressed each of these arguments and ultimately decided the arbitral forum provided the necessary procedural guidelines to address the statutory claim. *Id.*

179. Compare *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315 (6th Cir. 2000) (finding that because there is a lack of mutual obligation, the arbitration lacked consideration and was unenforceable), with *Piano*, 107 P.3d at 16 (finding that the promise to arbitrate was an illusory promise and, therefore, lacked consideration and was unenforceable).

180. See, e.g., *Floss*, 211 F.3d at 316; *State ex rel. Saylor*, 613 S.E.2d at 924.

of continued employment is adequate consideration, and that arbitration agreements containing unilateral-modification clauses are enforceable.<sup>181</sup>

This article argues that an employer's promise of continued at-will employment is illusory and, therefore, by itself does not supply consideration for an employee's promise to arbitrate. This article also argues that under existing contract law doctrines, arbitration agreements subject to *unrestricted* unilateral-modification provisions should not be enforceable. However, courts should permit employers to retain the ability to unilaterally modify arbitration agreements so long as the agreements provide employees with (1) adequate notice of changes, (2) sufficient consideration for the promise to arbitrate, and (3) conscionable arbitration terms. Courts can overlay this three-step framework onto existing contract doctrines to fairly and consistently analyze the enforceability of unilateral-modification clauses in employment arbitration agreements.

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181. See *Kelly v. UHC Mgmt. Co.*, 967 F. Supp. 1240, 1260 (N.D. Ala. 1997).

