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## Contracting Employment Disputes Out of the Jury System: An Analysis of the Implementation of Binding Arbitration in the Non-Union Workplace and Proposals to Reduce the Harsh Effects of a Non-Appealable Award

Michele M. Buse

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## I. INTRODUCTION

The scenario is not difficult to foresee: as a prospective employee signs her employment agreement with a new employer she notices a clause mentioning arbitration. Arbitration?<sup>1</sup> Some may have a vague idea of what arbitration is—an alternative dispute resolution (ADR)<sup>2</sup> method used to resolve disputes in lieu of going to trial. Others have no idea what it is. Either way, most prospective employees do not care. First and foremost, employees want a job and leave the concept of arbitration to be dealt with if and when it arises.<sup>3</sup> Whether individuals know a little about arbitration, know nothing about arbitration, or are fairly well-versed in the concept of arbitration, most probably do not know that signing an employment contract with an arbitration clause is not merely an agreement to forego litigation of job related disputes.<sup>4</sup> Rather, under such a clause, a person forfeits valuable rights, such as the ability to appeal the final decision in all but the most oppressive circumstances.<sup>5</sup>

This Comment discusses this concern, and others, regarding arbitration in the employment context. Part II focuses on the growing trend toward utilizing arbitration to settle employment related disputes.<sup>6</sup> Part III examines some of the concerns resulting from this expanding use of ADR and the resulting need for caution by employees, employers, and the legal system as a whole.<sup>7</sup> Part IV analyzes methods used to deter-

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1. Arbitration is defined as: "[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard," and "[a]n arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation." BLACK'S LAW DICTIONARY 105 (6th ed. 1990) (the latter quoting *Wauregan Mills, Inc. v. Textile Workers Union of Am., A.F.L.C.I.O.*, 146 A.2d 592, 595 (Conn. 1958)).

Those favoring arbitration classify the process as "a fast, effective means for resolving disputes without the delays and exorbitant costs of litigation." Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 LOY. CONSUMER L. REP. 112 (1993), available in WESTLAW, TP-ALL database, at WL 1, 3.

Although arbitration can be non-binding, the term "arbitration" in this Comment will refer to binding arbitration.

2. Alternative dispute resolution refers to processes other than traditional court adjudication used to settle claims. "[T]he overarching goal of alternative dispute resolution is to provide equal justice to all." Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 684 (1986).

3. See *infra* notes 260-65 and accompanying text.

4. See *infra* notes 233-37 and accompanying text.

5. See *infra* notes 238-58 and accompanying text.

6. See *infra* notes 14-98 and accompanying text.

7. See *infra* notes 99-188 and accompanying text.

mine whether the arbitration clauses are valid, given the inequality of bargaining power often present in the employment context.<sup>8</sup> To prevent dissatisfaction with the arbitration process after the fact, Part V proposes more effective procedures for ensuring that arbitration agreements are truly bargained for at the implementation stage.<sup>9</sup> In addition, since most courts are willing to uphold arbitration clauses even when an inequality of bargaining power is present between employees and employers,<sup>10</sup> Part VI proposes methods to reduce the bias and harsh effects of binding arbitration as currently practiced.<sup>11</sup> Recognizing that arbitration is fast becoming a necessary procedure for resolving employment related disputes,<sup>12</sup> Part VII concludes by acknowledging that this process is beneficial for all participants when properly implemented and regulated.<sup>13</sup>

## II. TREND TOWARD SELECTING ARBITRATION FOR EMPLOYMENT DISPUTES

### A. *Increased Use of ADR in General*

The employment sector is one of many groups joining the national trend toward using alternative dispute resolution processes to resolve disputes.<sup>14</sup> Following the re-enactment of the Federal Arbitration Act (FAA)<sup>15</sup> in 1947, the federal government advocated a public policy favoring arbitration.<sup>16</sup> The FAA applies to contracts that are both signed

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8. See *infra* notes 189-272 and accompanying text.

9. See *infra* notes 273-319 and accompanying text.

10. See *infra* notes 195-214 and accompanying text.

11. See *infra* notes 320-401 and accompanying text.

12. See *infra* notes 31-98 and accompanying text.

13. See *infra* notes 402-14 and accompanying text.

14. S. Gale Dick, *ADR at the Crossroads*, 49 DISP. RESOL. J., Mar. 1994, at 47, 52. Examples of other industries heavily utilizing ADR are securities, construction, health care, and banking. James R. Butler Jr., *Arbitration As a Means of Enhancing Consumer Relations*, 110 BANKING L.J. 527, 528 (1993).

15. 9 U.S.C. §§ 1-14 (1988). The FAA codified the general and permanent laws relating to arbitration. See *id.*

16. Jeffrey R. Knight, *Enforcing Arbitration Agreements Between Employers and Employees*, 61 DEF. COUNS. J. 251, 252 (1994) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); see also John A. Gray, *Have the Foxes Become the Guardians of the Chickens? The Post-Gilmer Legal Status of Predispute Mandatory Arbitration as a Condition of Employment*, 37 VILL. L. REV. 113, 121 (1992) (recognizing the federal policy favoring arbitration); Garry G. Mathiason & Pavneet Singh Uppal, *Evaluating and Using Employer-Initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-First Cen-*

by employees who do not fall within the contracts of employment exclusion<sup>17</sup> and relate to transactions in interstate or international commerce.<sup>18</sup>

Like the federal government, the states have enacted similar policies favoring arbitration by either adopting the Uniform Arbitration Act (UAA)<sup>19</sup> or drafting their own arbitration provisions.<sup>20</sup> While the state statutes generally have provisions suggesting guidelines for conducting arbitration proceedings, the federal statute does not.<sup>21</sup> As the federal arbitration statute preempts state law,<sup>22</sup> arbitration proceedings man-

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*tury*, in EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS (American Law Inst.—American Bar Ass'n 1994), 16.22 available in WESTLAW, ALI-ABA database, C902 ALI-ABA 875, 887 (recognizing the federal policy favoring arbitration). The FAA states in pertinent part:

A written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, . . . or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1988).

17. 9 U.S.C. § 1 (1988). For a discussion of the contracts of employment exclusion, see *infra* notes 121-29 and accompanying text.

18. 9 U.S.C. § 1 (1988). Most agreements containing arbitration clauses *will* be subject to the FAA as commerce is broadly construed. Green, *supra* note 1, at WL 9.

19. The states that have adopted the UAA are: Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and Wyoming. Uniform Arb. Act, 7 U.L.A. 1 (Supp. 1993).

The UAA states in pertinent part: "A written agreement to submit to arbitration any controversy existing or arising after the effective date of the agreement is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." Uniform Arbitration Act § 1, 7 U.L.A. 5 (1985).

20. R. Bales, *A New Direction For American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1863, 1910 (1994); *see, e.g.*, CAL. CIV. PROC. CODE §§ 1280-1288 (West 1982 & Supp. 1995); CONN. GEN. STAT. ANN. §§ 52-408-424 (West 1991 & Supp. 1994); GA. CODE ANN. §§ 9-9-1 to -83 (Michie 1982 & Supp. 1994); N.Y. CIV. PRAC. L. & R. 7501-7514 (McKinney 1980 & Supp. 1995).

21. Mathiason & Uppal, *supra* note 16, at 887.

22. *Id.* at 886; *see also* Marshall W. Grate, *Binding Arbitration of Statutory Employment Discrimination Claims*, 70 U. DET. MERCY L. REV. 699, 701 (1993) (recognizing preemptive authority of Supreme Court); Green, *supra* note 1, at WL 8; *see, e.g.*, *Perry v. Thomas*, 482 U.S. 483, 490, 491 (1987) (stating that federal statutes preempt state statutes under the Supremacy Clause); *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (state franchise law providing for court adjudication preempted by FAA); *Preston v. Kneuzer*, 641 F. Supp. 1163, 1171 (N.D. Ill. 1986) (all state claims must be arbitrated even if separate proceedings must be held in separate forums).

dated by the FAA will not be subject to any procedural guidelines. Therefore, when the FAA controls, one of the state's standardized procedures or the rules of an institutional provider of dispute resolution services should be consulted to provide structure while safeguarding the arbitration proceeding from abuse.<sup>23</sup>

Other events that have triggered the growing use of ADR to resolve disputes are the 1991 Executive Order on Civil Justice Reform<sup>24</sup> and the ADR Act of 1990.<sup>25</sup> Largely as a result of this government recognition of ADR, forty-six states and approximately 1200 courts currently have ADR programs in place.<sup>26</sup> The growing trend of using ADR in lieu of the courts cannot be disputed.<sup>27</sup>

### *B. Appeal of ADR to the Employment Sector*

The concept of ADR appeals to the employment sector for three main reasons. First, the increasing number of employment related disputes is burdening the court system.<sup>28</sup> Second, statutory rights relating to employment encourage the use of ADR.<sup>29</sup> Third, many advantages result from resolving disputes through arbitration rather than traditional litigation.<sup>30</sup>

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23. See Mathiason & Uppal, *supra* note 16, at 886. Institutional providers of dispute resolution services have their own procedural rules for conducting the arbitration process and panels of arbitrators from which disputants may select an arbitrator. These rules, however, are not set in stone. If the disputants do not wish to follow them, they can amend the rules so that they are mutually agreeable or adopt another institution's rules while still using the original service's arbitrators. Examples of institutional providers of dispute resolution services are the American Arbitration Association (AAA), Judicial Arbitration and Mediation Services (JAMS), Endispute, and the Center for Public Resources (CPR). Evan J. Spelfogel, *Legal and Practical Implications of ADR and Arbitration in Employment Disputes*, 11 HOFSTRA LAB. L.J. 247, 265 (1993).

24. Exec. Order No. 12, 778, 56 Fed. Reg. 55195 (1991). The 1991 executive order encourages federal agencies to use voluntary dispute resolution procedures in settling their cases. *See id.*

25. 5 U.S.C. § 571-583 (1988 & Supp. IV 1992). The ADR Act encourages the use of ADR in administrative proceedings. *See id.*

26. Dick, *supra* note 14, at 50.

27. *See supra* notes 14-27 and accompanying text.

28. *See infra* notes 31-53 and accompanying text.

29. *See infra* notes 54-57 and accompanying text.

30. *See infra* notes 58-98 and accompanying text.



## 1. Employment Related Disputes are Increasing in Number

The national trend toward the use of ADR, and arbitration in particular, is viewed as a positive development by the employment sector primarily because the number of employment related cases is growing so rapidly that the courts cannot accommodate them.<sup>31</sup> Employment disputes are on the rise due to three main forces: the erosion of the concept of at-will employment,<sup>32</sup> the creation of new statutory rights for employees,<sup>33</sup> and decreased participation in labor unions.<sup>34</sup>

### a. *Erosion of the concept of at-will employment*

The transformation of the traditional at-will employment scheme into one with a preference for a more stable job atmosphere has resulted in an increased number of employment related claims.<sup>35</sup> This trend toward promulgating employee stability is the result of three major forces.<sup>36</sup> First, courts are restricting an employer's right to terminate employees when the employee refuses to act against public policy.<sup>37</sup> Sec-

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31. Spelfogel, *supra* note 23, at 247. "Employment litigation has grown at a rate many times greater than litigation in general." *Id.* Furthermore, there are over 25,000 wrongful discharge cases requiring juries waiting to be heard in the state and federal courts. *Id.* at 249; see also Mark Berger, *Can Employment Law Arbitration Work?*, 61 UMKC L. REV. 693, 695 (1993) (as a result of approximately three million terminations each year, employees challenging such decisions will impose a huge burden on the courts); James A. King, Jr. et al., *Agreeing to Disagree on EEO Disputes*, 9 LAB. LAW. 97 (1993) (stating that there has been a 2166% increase in employment discrimination cases since the 1970s); Stephen W. Skrainka, *The Utility of Arbitration Agreements in Employment Manuals and Collective Bargaining Agreements for Resolving Civil Rights, Age and ADA Claims*, 37 ST. LOUIS U. L.J. 985, 992 (1993) (stating that the number of age discrimination cases tripled between 1980 and 1985, adding to already crowded court dockets); Even J. Spelfogel, *New Trends in the Arbitration of Employment Disputes*, 48 ARB. J., Mar. 1993, at 6 (stating that "[a]n increasing number of employment-related . . . cases . . . are causing lengthy delays for employees in obtaining their 'day in court'" [hereinafter *New Trends*]).

32. See *infra* notes 35-41 and accompanying text.

33. See *infra* notes 42-51 and accompanying text.

34. See *infra* notes 52-53 and accompanying text.

35. See *infra* notes 36-41 and accompanying text.

36. See *infra* notes 37-41 and accompanying text.

37. Berger, *supra* note 31, at 694; see also Warren Martin, *Employment at Will: Just Cause Protection Through Mandatory Arbitration*, 62 WASH. L. REV. 151, 154 (1987); see, e.g., *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 386, 389 (Conn. 1980) (quality control director for food company had a valid cause of action against employer who allegedly fired him in retaliation for the employee's insistence that the employer comply with the requirements of the Food, Drug & Cosmetic Act); *Adler v. American Standard Corp.*, 432 A.2d 464, 471 (Ct. App. Md. 1981) (recognizing that employees will have a cause of action when terminated for a reason violating public policy but finding that a prima facie case must first be met showing that the conduct

ond, courts are increasingly finding implied contracts of employment resulting from verbal guarantees of job security and the presence of employee handbooks detailing policies and benefits.<sup>38</sup> Third, the courts are, with growing frequency, recognizing an implied covenant of good faith and fair dealing, thereby limiting employee discharges for equity reasons.<sup>39</sup> As a result of these employee biased changes in employment law, employees have an increased incentive to bring suit for money damages and redress.<sup>40</sup> The desire to curb this tide of lawsuits has led employers to include arbitration clauses in their employment contracts.<sup>41</sup>

*b. Creation of new statutory rights for employees*

Recent congressional action vests employees with new statutory rights and provides for jury trials and punitive damages to redress violations.<sup>42</sup> Some of the statutory rights that relate to employment origi-

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would violate public policy); *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 871-78 (Mo. Ct. App. 1985) (employee could raise a cause of action against her employer who allegedly terminated her after she refused to disregard FDA policies and threatened to report her employer to the FDA); *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 802 (Va. 1985) (employees had cause of action against employer who allegedly terminated the employees in retaliation for the employees' exercise of their rights as shareholders).

38. *Berger, supra note 31*, at 694; *see also Martin, supra note 37*, at 155; *see, e.g., Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980) (finding that either an oral promise or a personnel policy handbook are sufficient to be construed as an implied contract). *But see Johnson v. McDonnell Douglas Co.*, 745 S.W.2d 661, 662 (Mo. 1988) (finding no implied contract from the existence of a unilaterally imposed employee handbook).

39. *Berger, supra note 31*, at 694; *see also Martin, supra note 37*, at 157; *see, e.g., Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 927 (Ct. App. 1981) (terminating long-term employee without good cause established a cause of action for wrongful termination based on implied covenant of good faith and fair dealing). *But see Gordon v. Matthew Bender & Co.*, 562 F. Supp. 1286, 1290 (N.D. Ill. 1983) (duty to act in good faith and fair dealing does not create an independent cause of action against an employer).

40. *Berger, supra note 31*, at 695.

41. *Mathiason & Uppal, supra note 16*, at 880; *see also Dick, supra note 14*, at 52.

42. *Berger, supra note 31*, at 693; *see also W. Terrence Kilroy & Adam P. Sachs, Arbitrating Employment Disputes; Greener Pastures for Employers?*, 62 APR J. KAN. B.A. 32 (1993) (noting that employment litigation is increasing due to the "passage of numerous federal and state statutes creating individual causes of action for employment disputes"). Formerly, damages were limited to equitable relief and could be tried by a judge. *Id.*

nate in the Worker Adjustment and Retraining Notification Act (WARN),<sup>43</sup> the Employee Polygraph Protection Act (EPPA)<sup>44</sup> and the Family and Medical Leave Act.<sup>45</sup>

Additionally, the Civil Rights Act of 1991<sup>46</sup> amends five statutes directly relating to employment matters: Title VII of the Civil Rights Act of 1964,<sup>47</sup> the Americans with Disabilities Act (ADA),<sup>48</sup> the Age Discrimination in Employment Act (ADEA),<sup>49</sup> the Civil Rights Act of 1866,<sup>50</sup> and the Civil Rights Attorney's Awards Act.<sup>51</sup> Common sense dictates that the more protection an employee has, the more likely employer actions will be challenged.

*c. Decreased union membership*

A final reason for the increase in employment disputes is the decline of unionization.<sup>52</sup> Disputants who, in the past, may have settled their claims through collective bargaining must now proceed individually.<sup>53</sup>

2. Statutory Provisions Encourage the Use of ADR

The Civil Rights Act of 1991 not only grants aggrieved parties the right to a jury trial, it also encourages the use of alternative dispute resolution mechanisms.<sup>54</sup> It is unclear whether the language of the Act

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43. 29 U.S.C. §§ 2101-2109 (1988) (requiring notice to qualified employees before plant closings and major layoffs).

44. 29 U.S.C. §§ 2001-2009 (1988) (prohibiting the use of lie detector tests and polygraphs in the workplace).

45. 29 U.S.C. §§ 2601-2654 (1985 & Supp. 1994) (providing employees receive up to 12 weeks yearly of unpaid leave for the birth or adoption of a child or to take care of a serious medical condition of the employee himself or his immediate family members).

46. Public L. No. 102-166, 105 Stat. 1071-1101 (codified as amended in various sections of 42 U.S.C. (Supp. IV 1992)).

47. 42 U.S.C. § 2000e (1988 & Supp. III 1991) (prohibiting discrimination in the workplace based on race, color, national origin, sex or religion).

48. 42 U.S.C. § 12101-12213 (1988 & Supp. III 1991) (prohibiting discrimination in the workplace based on disability).

49. 29 U.S.C. §§ 621-633a (1988 & Supp. IV 1992) (prohibiting discrimination in the workplace based on age).

50. 42 U.S.C. § 1981 (1988) (giving all persons the right to sue and to full benefit of the laws).

51. 42 U.S.C. § 1988 (1988 & Supp. IV 1992) (providing the judge with discretion to award attorney's fees to a party raising a statutory claim).

52. Jay W. Waks & Linda M. Gadsby, *Arbitration and ADR in the Employment Area*, in ARBITRATION, MEDIATION, AND OTHER ADR METHODS (American Law Inst.—American Bar Ass'n 1993), available in WESTLAW, ALI-ABA database, C879 ALI-ABA 439, 488.

53. See *id.*

54. Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23

reflects legislative intent that parties to an employment contract may provide that future disputes be arbitrated.<sup>55</sup> However, the Act went into effect after the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corporation*,<sup>56</sup> and therefore, "it certainly seems plausible that *Gilmer* changed Congressional understanding of the legal limits on arbitration . . . and that consequently, the legislative history . . . is of limited significance."<sup>57</sup>

### 3. Advantages of Arbitration Over Court Adjudication

The advantages of arbitration have led employers to write arbitration clauses into their non-union employment contracts.<sup>58</sup> Employers in particular want to adopt arbitration and avoid litigation for several reasons.<sup>59</sup> In addition, there are other reasons for adopting arbitration procedures that benefit both parties.<sup>60</sup>

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STETSON L. REV. 53, 54 (1993). Section 118 of the Civil Rights Act recognizes ADR procedures as a viable means for resolving disputes including such processes as "settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration." 42 U.S.C. 1981 (Supp. V 1993); see Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1081. See generally Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071-1101 (providing the modifications of the 1964 Civil Rights Act and areas affected by § 118).

55. Livingston, *supra* note 54, at 90-93.

56. 500 U.S. 20 (1991).

57. See Livingston, *supra* note 54, at 93. For a complete discussion of *Gilmer*, see *infra* notes 116-37 and accompanying text.

58. Mathiason & Uppal, *supra* note 16, at 880; see also Dick, *supra* note 14, at 52. Arbitration in labor law is not new, having been used in the past for collective bargaining agreements. Francis X. Dee, *Use of Alternative Dispute Resolution (ADR) in Resolving Employer-Employee Disputes*, in DISPUTE RESOLUTION ALTERNATIVES SUPERCOURSE at 377, (PLI Litig. & Admin. Practice Course Handbook Series No. 481, 1993); see also Loren K. Allison & Eric H. J. Stahlhut, *Arbitration and the ADA: Do the Two Make Strange Bedfellows?*, 37 RES GESTAE 168, 168 (1993). However, with the recent trend toward non-unionization, arbitration clauses have now started appearing in non-union workplace agreements as well. Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration From the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1188 (1993). Further, "[t]he decline of collective bargaining . . . has fostered debate over whether . . . arbitration can be imported from the unionized to the non unionized workplace." *Id.* at 1188.

59. See *infra* notes 61-75 and accompanying text.

60. See *infra* notes 76-98 and accompanying text.

a. *Employer advantages resulting from the arbitration of workplace disputes*

First and foremost, employers desire to avoid excessive damage awards.<sup>61</sup> The general perception is that juries tend to give large damage awards,<sup>62</sup> whereas judges and arbitrators typically exercise more restraint.<sup>63</sup> In addition, arbitrators are less likely than juries to impose punitive damages.<sup>64</sup>

Secondly, because judges and arbitrators generally defer to employer interests, employers are more likely to win if they arbitrate the dispute.<sup>65</sup> In contrast, “[j]uries are perceived to be notoriously biased against employers.”<sup>66</sup> Consequently, employers risk losing a case, even

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61. Kilroy & Sachs, *supra* note 42, at 33.

62. *Id.* At the high end, wrongful discharge cases have garnered \$32 million, \$43 million and \$124 million verdicts in some states. *Id.* Other common jury awards fall in the \$200,000-\$800,000 range. *Id.* One study of wrongful discharge claims found that the average jury verdict was approximately \$650,000 with another one-third of those cases also receiving punitive damages averaging \$523,170. King, et al., *supra* note 31, at 99-100. In California, when a plaintiff is successful in a wrongful termination suit, the average recovery is \$450,000. Cliff Palefsky, *Wrongful Termination Litigation: “Dagwood” & Goliath*, 62 MICH. BAR J. 776, 776 (1983); see Martin, *supra* note 37, at 168. However, this data is slightly misleading since only “high damage cases are likely to go to trial” and plaintiffs are likely to settle before trial if an employer has a strong defense. Palefsky, *supra*, at 776; see Martin, *supra* note 37, at 168 n.113; see also Dee, *supra* note 58, at 389-90 (stating that sympathetic juries wishing to impose large damage awards are not as prevalent as commonly believed).

63. John M. Husband & Brian M. Mumaugh, *Arbitration of Employment Disputes After Gilmer*, 20 COLO. LAW. 2277, 2279 (1991); cf. Kilroy & Sachs, *supra* note 42, at 33 (“[A]rbitrators [may be] less likely than juries to grant especially high damage awards.”).

64. Allison & Stahlhut, *supra* note 58, at 171. *But see* Dee, *supra* note 58, at 389-90 (stating that juries do not award punitive damages that often but, due to publicity of large verdicts, merely seem as if they do); Skrainka, *supra* note 31, at 990-91 (noting that while one particular arbitrator awarded punitive damage only once in 50 cases, other arbitrators award punitive damages more often in “appropriate cases”). This belief may in part be due to the fact that some courts hold that arbitrators do not have the authority to award punitive damages. Spelfogel, *supra* note 23, at 267.

65. Paul W. Cane, Jr. & Nancy L. Abell, *Binding Alternative Dispute Resolution in the Workplace 2-2* (May 1993) (unpublished manuscript, on file with the law office of Paul, Hastings, Janofsky & Walker). *But cf.* Allison & Stahlhut, *supra* note 58, at 172 (stating that many arbitrators actually have a pro-employee bias that may be detrimental to the employer; however, the employer may be prevented through careful arbitrator selection).

66. Allison & Stahlhut, *supra* note 58, at 172 (emphasis added). Indeed, a 1982 survey by a San Francisco law firm found that employees win 90% of wrongful termination cases where there is a jury trial. Palefsky, *supra* note 62, at 776; see Martin, *supra* note 37, at 168.

with a solid defense by choosing to litigate.<sup>67</sup> Many employers prefer to bypass this uncertainty through adopting arbitration.<sup>68</sup>

Furthermore, employers often view arbitrators as better overall decision-makers.<sup>69</sup> The arbitrators used in labor disputes generally have experience in the employment field and consequently are "better able to understand the dynamics of the workplace" and recognize when an employee has or has not been the subject of discrimination.<sup>70</sup> Additionally, arbitrators are less likely to succumb to "community pressures and attitudes" than juries.<sup>71</sup>

Lastly, employers often prefer arbitration because of the effects public trials may have on their companies.<sup>72</sup> Avoiding negative publicity is the primary concern, since no company wants to be labeled as being unfair to its employees.<sup>73</sup> Arbitration avoids such publicity as most arbitrations are held in private and the awards remain confidential.<sup>74</sup> Many employers also institute arbitration procedures as a means of communicating to their employees that they are open to resolving a dispute without litigation.<sup>75</sup>

*b. The mutual advantages of arbitration to employers and employees*

Arbitration benefits both employers and employees.<sup>76</sup> The speed with which arbitration can resolve disputes is one of the primary benefits.<sup>77</sup>

67. Allison & Stahlhut, *supra* note 58, at 172.

68. *See id.*

69. *Id.*

70. *Id.*

71. Mathiason & Uppal, *supra* note 16, at 879.

72. *See* Allison & Stahlhut, *supra* note 58, at 171-72; Knight, *supra* note 16, at 251.

73. Allison & Stahlhut, *supra* note 58, at 171-72; *see also* Knight, *supra* note 16, at 251.

74. Mathiason & Uppal, *supra* note 16, at 879; *see also* Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 84-85 (1992); Grate, *supra* note 22, at 701 (noting that "arbitration is usually less costly than litigation").

75. *See* Mathiason & Uppal, *supra* note 15, at 895.

76. *See infra* notes 77-98 and accompanying text.

77. Mathiason & Uppal, *supra* note 16, at 894. For example, litigated cases generally take three to eight years to reach final resolution while arbitration can generally resolve disputes in less than 10 months. *Id.*; *see also* Allison & Stahlhut, *supra* note 58, at 171 (finding that the average employment dispute was resolved through arbitration in 268 days, whereas a court adjudication would have taken a significantly longer time); Grate, *supra* note 22, at 701 (noting that arbitration is "usually faster" than

Studies have shown that while employment claims can take years to get to trial,<sup>78</sup> arbitration can resolve claims "within a matter of months."<sup>79</sup>

Another mutual benefit of arbitration is that it is less expensive than trial.<sup>80</sup> Because employment disputes are generally fact specific, "formalized discovery" is not needed.<sup>81</sup> This directly reduces the costs to the parties in resolving their dispute.<sup>82</sup> In addition, because there is no trial time involved, attorneys' fees generally are less.<sup>83</sup> The reduced cost of arbitration is valuable to employees because the expense of litigation may sometimes induce victims to relinquish meritorious claims.<sup>84</sup> It is also beneficial to employers as the average cost of defending a claim in court has been estimated at a staggering \$90,000.<sup>85</sup>

A third benefit commonly associated with arbitration is finality.<sup>86</sup> Since both employer and employee agree<sup>87</sup> to resolve a dispute through

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litigation); Knight, *supra* note 16, at 251. *But see* Dee, *supra* note 58, at 389 (noting that fewer evidentiary restraints and the inapplicability of summary judgment may cause arbitration to outlast a trial); Allison & Stahlhut, *supra* note 58, at 172 (lengthy trial process may be a benefit to employer to "wear down" an employee).

78. King et al., *supra* note 31, at 99.

79. Carol-Teigue J. Thomas, Gilmer v. Interstate/Johnson Lane Corporation: *When is an Employee's Right to a Judicial Forum Precluded by an Arbitration Agreement?*, 27 NEW ENG. L. REV. 791, 795 (1993) (citation omitted); *Perspective: ADR Techniques Gaining Favor in Non-Traditional Settings*, DAILY LAB. REP. (BNA) Mar. 15, 1993, available in WESTLAW, BNA-LB DATABASE, 48 DLR c-1, 1993 (noting the average arbitration resolves claims within "one or two days"); *see also* David G. Savage, *Justice Rules Arbitration Preempts Suits in Bias Cases*, L.A. TIMES, May 14, 1991, at A20.

80. Mathiason & Uppal, *supra* note 16, at 894. "It is undeniable that arbitration is a less costly method of resolving problems in the workplace than traditional litigation." *Id.* Arbitration of employment disputes may reduce costs by as much as 50%. *Id.*; *see also* Grate, *supra* note 22, at 701 (listing reduced costs as one of the advantages of arbitration); Knight, *supra* note 16, at 251. *But see* Dee, *supra* note 58, at 388-89 (noting that arbitration is not always cheaper than litigation); Waks & Gadsby, *supra* note 52, at 514 (expressing employer concerns that arbitration is "very costly" because it encourages employee claims).

81. King et al., *supra* note 31, at 101.

82. *Id.*; *see also* Thomas, *supra* note 79, at 795. However, while arbitration may limit discovery costs, this aspect of arbitration has its disadvantages. For example, an employee is "typically not given the *right* to engage in extensive discovery or compel production of documents." Thomas, *supra* note 79, at 795 (emphasis added).

83. Thomas, *supra* note 79, at 795.

84. King et al., *supra* note 31, at 99 (citation omitted).

85. King et al., *supra* note 31, at 100 (citation omitted).

86. Berger, *supra* note 31, at 701-02. However, finality is not a benefit to a party if the arbitration was not properly agreed to. For a discussion of the various methods of obtaining agreement, *see infra* notes 280-319 and accompanying text. It also is not a benefit if the process does not adequately protect a party's rights. For a discussion of how to safeguard rights during arbitration, *see infra* notes 320-401 and accompanying text.

87. For a discussion as to whether the parties are indeed agreeing to the arbitra-

arbitration, the controversy is taken out of the court system and its lengthy appeals process.<sup>88</sup> The "emerging standard" of arbitration provisions in employment contracts leads to their general enforcement.<sup>89</sup> Further, since an award can be vacated only under narrow circumstances dictated by statute,<sup>90</sup> finality of the arbitrator's decision is virtually certain.<sup>91</sup>

tion, see *infra* notes 280-319 and accompanying text.

88. See King, *supra* note 31, at 102-03; see Mathiason & Uppal, *supra* note 16, at 879-80.

89. Dick, *supra* note 14, at 52-53; see also *infra* notes 105-42 and accompanying text.

90. According to the FAA, an arbitral award will be vacated as follows:

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made.
- (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10 (1988 & Supp. V 1993).

The standards for vacating an arbitral award according to the Uniform Arbitration Act are substantially similar to the FAA provisions. See Uniform Arb. Act § 12, 7 ULA 140 (1985).

The standards for vacating an arbitral award under the California Arbitration Act are as follows:

The court shall vacate the award if the court determines any of the following:

- (a) The award was procured by corruption, fraud or other undue means;
- (b) There was corruption in any of the arbitrators;
- (c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator;
- (d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted;
- or
- (e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefore or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

CAL. CIV. PROC. CODE § 1286.2 (West 1982 & Supp. 1995).

91. See Brunet, *supra* note 74, at 86-87 (noting that the "chances of overturning an



Other benefits of arbitration are intangible.<sup>92</sup> Trial proceedings may have adverse psychological and social effects on some participants.<sup>93</sup> Generally, this result can be avoided through arbitration.<sup>94</sup> Further, ADR methods, such as arbitration, allow the parties to maintain more control over the process and proceed with less antagonism toward the opposing side.<sup>95</sup> Since an employee may retain her job after the dispute is resolved, it is often vital that the parties maintain a working relationship.<sup>96</sup> With ADR, there is a greater likelihood that the parties will have an amicable agreement thus preserving such a relationship.<sup>97</sup> Lastly, arbitration allows for a broad range of remedies not always available in a court adjudication.<sup>98</sup>

### III. THE NEED FOR CAUTION

From the above analysis, it is apparent that many employment disputes will be arbitrated in the future,<sup>99</sup> and that there are potential benefits for both parties.<sup>100</sup> However, there is need for caution by employees,<sup>101</sup> employers,<sup>102</sup> and the legal profession in general<sup>103</sup> concerning the current practice of binding arbitration. Parties must address these concerns before agreeing to arbitration.<sup>104</sup>

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arbitral award are slim").

92. See *infra* notes 93-98 and accompanying text.

93. King et al., *supra* note 31, at 99 (citation omitted).

94. See *id.* at 100. But see Allison & Stahlhut, *supra* note 58, at 172 (stating that "the emotional strain of combating an employer . . . [is] at play regardless if the judiciary or an arbitrator is to resolve the dispute").

95. King et al., *supra* note 31, at 100-01.

96. See *New Trends*, *supra* note 31, at 11.

97. See *id.*

98. Allison & Stahlhut, *supra* note 58, at 171; see also Skrainka, *supra* note 31, at 991 (noting that more "imaginative remedies will be crafted in the course of arbitration than in the context of a court decision."); Berger, *supra* note 31, at 720 ("[a]rbitration entails no inherent limitations on what remedies the arbitrator may order"); Waks & Gadsby, *supra* note 52, at 475-76 (observing that an "adjudicator may grant such relief as may be just and reasonable").

99. Waks & Gadsby, *supra* note 52, at 488; see *supra* notes 14-57 and accompanying text.

100. See *supra* notes 58-98 and accompanying text.

101. See *infra* notes 105-62 and accompanying text.

102. See *infra* notes 163-74 and accompanying text.

103. See *infra* notes 175-88 and accompanying text.

104. See *infra* notes 105-88 and accompanying text.

### A. *Employee Concerns*

#### 1. Arbitration Awards Cannot be Appealed Even When Based on Erroneous Fact or Law

The California Supreme Court held, in *Moncharsh v. Heily & Blase*,<sup>106</sup> that an award resulting from a binding arbitration is not appealable, even when the decision is based on erroneous fact or law.<sup>106</sup> One rationale behind this decision was that the parties knew what they were agreeing to when they signed the arbitration agreement and consequently traded their right to appeal for a more time efficient and less expensive resolution of the dispute.<sup>107</sup> The problem with this approach is that employees do not always know the consequences of signing the

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105. 832 P.2d 899 (Cal. 1992).

106. *Id.* at 916. In *Moncharsh*, Philip Moncharsh signed an arbitration agreement upon employment at the law firm of Heily & Blase. *Id.* at 901 & n.1. Mr. Moncharsh also signed a provision stating that the law firm would receive 80%, and he would receive 20%, of any fees gained from Heily & Blase clients, should Moncharsh continue to represent them after leaving Heily & Blase. *Id.* Upon leaving Heily & Blase, Moncharsh continued to represent six clients—five of whom Moncharsh brought to the firm upon his employment and one whom Moncharsh started working with after he began employment at Heily & Blase. *Id.* When attempts to settle the payment of fees failed, the parties utilized the arbitration agreement in the employment contract to settle the matter by arbitration. *Id.* One of Moncharsh's contentions at the arbitration hearing was that he had an oral agreement with Heily & Blase that the clients he brought to the firm were to be treated different from clients gained after arriving at the firm. *Id.* The arbitrator found in Heily & Blase's favor based on two points. *Id.* The first was the finding that any oral agreement the parties may have had was not documented, and consequently the written agreement controlled. *Id.* The second was that the 80/20 split as to all the clients Moncharsh brought with him was not unconscionable due to the fact that he was an intelligent man and did not have to sign the provision if he felt it was unfair. *Id.* at 901-02. Moncharsh petitioned the court to vacate the award and Heily & Blase petitioned for the award to be affirmed. *Id.* at 902. The court affirmed the award, ruling that "[t]he arbitrator's findings on questions of both law and fact are conclusive. A court cannot set aside an arbitrator's error of law no matter how egregious." *Id.*

See also Dick, *supra* note 14, at 53 (discussing the court's holding in *Moncharsh* and finding that the decision "bars judicial review of awards except under explicit statutory grounds, even where an award may result in 'substantial injustice'"); Mathiason & Uppal, *supra* note 16, at 896 (noting that when a jury makes a mistake, the appellate process can correct the error, but when an arbitrator makes a mistake, review of the decision is limited to very narrow statutory grounds for vacating the award).

107. *Moncharsh*, 832 P.2d at 904.

arbitration agreement.<sup>108</sup> Another rationale for the decision reached by the *Moncharsh* court was that the legislature already provided a remedy for the most egregious abuses of the arbitration award and process (vacation of an award) and, as such, the parties should already be sufficiently protected.<sup>109</sup> However, with the creation of so many new statutory rights, greater protection from erroneous findings of fact and law is needed because the limited grounds for vacation of an award are not sufficient.<sup>110</sup>

The holding of *Moncharsh* is in line with dicta first stated by the United States Supreme Court in *Wilko v. Swan*.<sup>111</sup> In *Wilko*, the majority noted that there would be no review of an arbitration award unless there was a "manifest disregard of the law."<sup>112</sup> Although the court did not define this standard, lower courts have found it to apply to situations in which the arbitrator knows the law but specifically disregards it in reaching his decision.<sup>113</sup> As the arbitrator in *Moncharsh* did not purposefully disregard the law, but rather resolved the dispute according to principles of fairness, his actions did not amount to manifest disregard for the law.<sup>114</sup> As the standard for vacating awards is high, it is rare that courts find a "manifest disregard for the law," thus limiting the circumstances under which an award will be vacated.<sup>115</sup>

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108. See *infra* notes 233-58 and accompanying text.

109. *Moncharsh*, 832 P.2d at 905; see CAL. CIV. PROC. CODE § 1286.2 (West 1982 & Supp. 1995).

110. For a discussion of expanding statutory rights, see *supra* notes 42-51 and accompanying text. For a discussion that statutory rights involve more complex issues than regular contractual disputes, see Malin & Ladenson, *supra* note 58, at 1189 (stating that since statutory rights are generally created for public policy reasons, public accountability is important). For a discussion of the grounds for vacating the arbitrators award, see *supra* note 90. One such ground exists where an arbitrator exceeds his powers. CAL. CIV. PROC. CODE § 1286.2(d) (West 1982 & Supp. 1995). In California, for example, erroneous reasoning is not considered excessive use of power. *O'Malley v. Petroleum Maintenance Co.*, 308 P.2d 9, 11 (Cal. 1957).

111. 346 U.S. 427 (1953), *overruled by* *Rodriguez De Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477 (1989).

112. *Id.* at 436-37.

113. See, e.g., *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992); *Robbins v. Day*, 954 F.2d 679, 683 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 201 (1992); *Advest Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2nd Cir. 1986).

114. See *Moncharsh v. Helly & Blase*, 832 P.2d 899, 916 (Cal. 1992).

115. Due to the lack of written arbitral decisions, it is difficult to know exactly why the arbitrator decided as he did. As a result, courts set a high standard for review. See *Wilko*, 346 U.S. at 436-37.

## 2. Arbitration of Statutory Claims Normally Accorded a Jury Trial Will be Compelled Even if They Are Not Specifically Included in the Scope of the Arbitration Contract

A second reason for caution on the part of employees results from the United States Supreme Court's holding in *Gilmer v. Interstate/Johnson Lane Corporation*.<sup>116</sup> Specifically, *Gilmer* held that the right to a judicial forum for resolution of a federal age discrimination claim may be waived by an employee.<sup>117</sup> The Court reasoned that a party who agrees to arbitration is not giving up any substantive rights to have a claim resolved, as provided by the ADEA, but is merely submitting the resolution of the dispute to a different forum.<sup>118</sup> The Court further reasoned that because the ADEA did not preclude arbitration of claims, this method of dispute resolution must have been contemplated.<sup>119</sup> In addition, the Court found adequate protection for an employee who claims an agreement is unenforceable due to the fact that agreements to arbitrate are not automatically upheld—the contract may still be voided according to basic contract principles.<sup>120</sup>

### a. *Compelling arbitration when it is included in a contract of employment*

The main issue of concern for employers and employees contemplating contracting for arbitration, left unresolved by *Gilmer*, is whether the FAA applies to contracts of employment.<sup>121</sup> If the FAA is found to

116. 500 U.S. 20 (1991).

117. *Id.* at 26-27.

118. *Id.* at 26.

119. *Id.* at 27-28.

120. *Id.* at 33; *see also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985). The FAA allows for the possibility that arbitration clause will not be upheld, but only if some "sort of fraud or overwhelming economic power" was involved. *Id.* As such, the *Gilmer* Court reasoned that if *Gilmer* could prove the contract was not valid based on more than a mere inequality of bargaining power, then he would not be held to the arbitration. *Gilmer*, 500 U.S. at 33. Absent such a finding, the arbitration was to be compelled. *See id.*

121. *Gilmer*, 500 U.S. at 25 n.2; *see also* *Husband & Mumaugh, supra* note 63, at 2279; *Knight, supra* note 16, at 253. This is an issue because *Gilmer's* contract was not signed *with his employer* but with *the NYSE as required by his employer*. *Gilmer*, 500 U.S. at 23 (emphasis added). The FAA states in pertinent part: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1988).

apply to employment contracts (as it was found to apply to registration contracts), then the *Gilmer* decision, and cases following its reasoning, will be binding precedent in the situation where an employee signs an employment contract containing an arbitration clause.<sup>122</sup> If the FAA is found not to apply to employment contracts, then *Gilmer* will not be binding precedent on employment related statutory disputes and employees will retain the right to litigate these claims.<sup>123</sup> Since *Gilmer* did not resolve this “contracts of employment” issue,<sup>124</sup> potential statutory claim litigants can only examine to how courts have applied *Gilmer* to employment contracts containing arbitration clauses thus far to gain insight into the applicability of the FAA to these contracts.<sup>125</sup>

Most courts have found that only contracts of employment relating specifically to those workers mentioned in the statute, and those workers in similar positions who *actually* transport goods interstate or internationally are excluded from the arbitration provisions of the FAA.<sup>126</sup>

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122. Gray, *supra* note 16, at 119-20. *Gilmer's* reasoning is “just as applicable to an individual employment agreement as it was to a registration agreement.” *Id.* With whom the employee signed the contract was not a major issue in *Gilmer*. The fact that the employee signed voluntarily was controlling. See *Gilmer*, 500 U.S. at 32-33. As such, it is unlikely that the Court would invalidate an arbitration contract signed with an employer when it would not invalidate one signed with an outside agency. See Gray, *supra* note 16, at 119-20.

123. Gray, *supra* note 16, at 131. For this to result, the Court would have to find that the cases are not analogous. This is unlikely because it would be inconsistent. Workers who signed agreements with third parties would be able to arbitrate whereas employers could not enforce similar provisions. Knight, *supra* note 16, at 253.

124. *Gilmer*, 500 U.S. at 25 n.2. The Court did not decide this issue because the arbitration agreement was part of the securities registration application, not part of *Gilmer's* contract with his employer. *Id.* The dissent, however, would have found that the FAA did not apply to employment contracts of any workers, thus providing no bias for compelling arbitration. *Id.* at 36 (Stevens, J., dissenting).

125. See Knight, *supra* note 16, at 251.

126. Mathlason & Uppal, *supra* note 16, at 884; see also Berger, *supra* note 31, at 708-09; King et al., *supra* note 31, at 110-11; Knight, *supra* note 16, at 252 (due to the liberal public policy favoring arbitration); see, e.g., *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) (FAA did not exclude contracts of employment of brewery workers because they are not involved in the transportation industry); *Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 523 F.2d 433, 436 (6th Cir. 1975); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (FAA did not exclude contract of professional basketball player); *Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971) (account executive's contract covered by the FAA); *Tenney Eng'g v. United Elec. Radio & Mach. Workers of Am. Local 437*, 207 F.2d 450, 451-53 (3d Cir. 1953) (FAA excludes only those workers actually involved in moving goods interstate); *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430, 1438-39 (N.D. Ill. 1993) (the FAA covered an attorney's partnership agreement); *Scott v. Farm Family Life Ins. Co.*, 827 F. Supp. 76, 78-79 (D. Mass. 1993) (the FAA covers insurance agent's employment contract); *Hull v. NCR Corp.*, 826 F. Supp. 303, 307 (E.D. Mo. 1993) (“FAA

The rationale behind these cases is that if Congress had intended to exclude *all* contracts of employment, it would have been unnecessary to have specifically named certain classes in the statute as examples; since such classes *were* enumerated, clearly *only* these types of workers were meant to be excluded.<sup>127</sup> Despite a limited number of decisions classifying employment contracts *outside* the securities industry, most courts have indicated that employment contracts will *not* fall within the contracts of employment exception of the FAA.<sup>128</sup> Therefore, the remainder of this Comment proceeds on the assumption that the FAA will be applicable to most non-union employment contracts.<sup>129</sup>

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is applicable to nonunion employment contracts involving workers who are not involved in the transportation industry"); *DiCrisci v. Lincoln Guar. Bank*, 807 F. Supp. 947, 952-53 (W.D.N.Y. 1992) (contract of bank operations manager covered by the FAA); *In re Management Recruiters Int'l, Inc. & Nebel*, 765 F. Supp. 419, 422 (N.D. Ohio 1991) (arbitration clauses in non union account executives employment contracts are enforceable under the FAA); *Dancu v. Coopers & Lybrand*, 778 F. Supp. 832, 833-34 (E.D. Pa. 1991), *aff'd*, 972 F.2d 1330 (3d Cir. 1992) (arbitration clause in accountant partnership agreement is enforceable under the FAA); *Hydrick v. Management Recruiters Int'l, Inc.*, 738 F. Supp. 1434, 1435 (N.D. Ga. 1990) (FAA did not exclude contract of employment of employee of personnel placement agency); *Malison v. Prudential-Bache Sec., Inc.*, 654 F. Supp. 101, 104 (W.D.N.C. 1987) (FAA did not exclude contract of stockbroker); *Engineers Ass'n v. Sperry Gyroscope Co.*, 148 F. Supp. 521, 523 (S.D.N.Y.), *aff'd*, 251 F.2d 133 (2d Cir. 1957), *cert. denied*, 356 U.S. 932 (1958) (contracts of plant worker are subject to the FAA).

However, an expansive reading of the FAA claiming that all employment affects commerce such that all employment contracts must be excluded from the FAA would invalidate most contract agreements. *Knight*, *supra* note 16, at 252. Some courts have adopted this view. *See, e.g., Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311 (6th Cir. 1991) (validating an employee's agreement with the securities industry to arbitrate because it was not a "contract of employment," but any contract *with his employer* would be subject to the FAA exclusion); *Bacashihua v. United States Postal Serv.*, 859 F.2d 402, 404-05 (6th Cir. 1988) (FAA not applicable to postal worker as she is part of a class of workers "engaged in interstate commerce" even though not personally transporting the goods interstate); *United Elec. Radio and Mach. Workers v. Miller Metal Prods., Inc.*, 215 F.2d 221, 224 (4th Cir. 1954) (FAA extends to those involved in the production of goods to be transported interstate); *cf. Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 934 (9th Cir. 1992) (while the contracts of employment issues was not raised, there was insufficient evidence to determine the effect of the FAA on broker's a employment contract).

127. *See Mathiason & Uppal*, *supra* note 16, at 884; *see also Berger*, *supra* note 31, at 708-09.

128. *See Berger*, *supra* note 31, at 708. Collective bargaining agreements have been found to be contracts of employment subject to exclusion by the FAA. *Lincoln Mills of Alabama v. Textile Workers Union of Am.*, 230 F.2d 81, 85 (5th Cir. 1956), *rev'd*, 353 U.S. 448 (1957).

129. *See Knight*, *supra* note 16, at 253; *see also supra* notes 121-28 and accompany-

b. *Which statutory claims can be compelled to be arbitrated?*

*Gilmer* did not conclusively decide *which* statutory rights can be contracted out of the jury system by opting for arbitration in an employment agreement.<sup>130</sup> When the coverage of statutory rights is at issue (usually because the contract states nothing about their inclusion or exclusion), the Supreme Court held that the burden is on the party opposing arbitration to show that Congress intended to preclude the waiver of judicial remedies for those rights at issue.<sup>131</sup> Therefore, if an employment contract says nothing as to the arbitration of statutory claims, arbitration of these claims will be allowed unless judicial intent not to have them arbitrated can be shown.<sup>132</sup>

c. *Expanding Gilmer's holding to mandate arbitration of statutory claims other than those covered by the ADEA*

Since the *Gilmer* decision, courts have expanded *Gilmer's* application of the FAA to include arbitration of statutory rights arising under Title VII,<sup>133</sup> ERISA<sup>134</sup> and the EPPA.<sup>135</sup> Future extensions of the

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ing text.

130. From *Gilmer*, it is only clear that securities industry employees must arbitrate ADEA claims if they have signed an agreement to arbitrate all claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

131. *Gilmer*, 500 U.S. at 26; *see also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1984) (holding that party must show Congress' intent). Such intent will be found in either the text of the statute, its legislative history or from conflict between arbitration and the "underlying purposes" of the statute. *Gilmer*, 500 U.S. at 26. In *Gilmer*, *Gilmer* did not meet this burden and thus was bound to arbitrate his ADEA claim. *Id.* at 35.

132. *Knight*, *supra* note 16, at 257; *see supra* notes 116-31 and accompanying text. Finding judicial intent not to arbitrate will be rare as many statutes say nothing as to arbitration (thus arbitration is not specifically excluded) and others, such as the ADA and the 1991 Civil Rights Act, explicitly encourage the use of ADR methods to resolve disputes. Section 513 of the ADA states: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act." 42 U.S.C. § 12212 (West Supp. 1991). The Civil Rights Act of 1991 states: "Where appropriate and to the extent authorized by law, the use of alternative dispute resolution including . . . arbitration, is encouraged to resolve disputes under the Act." Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1070, 1081 (codified as amended at 42 U.S.C. § 1981 (1994)).

133. *See, e.g.*, *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) (arbitration of Title VII claim compelled because petitioner failed to prove that Congress intended to exclude); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992) (FAA may compel the arbitration of Title VII cases); *Alford v. Dean Witter*, 939 F.2d 229 (5th Cir. 1991) (arbitration of Title VII claim compelled in light of *Gilmer*); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 312 (6th Cir.

*Gilmer* rule to other statutory rights is probable given the fact that scholars have noted that *Gilmer* will likely be expanded to mandate the arbitration of ADA claims, arising under similar factual circumstances as *Gilmer*,<sup>136</sup> and most other statutory claims regarding employment as well.<sup>137</sup>

*d. Compelling arbitration of statutory claims under state law*

While federal policy as to the arbitration of statutory claims is becoming more clear, the states have not *conclusively* established whether arbitration of statutory claims will be compelled under the states' arbitration statutes when the FAA is inapplicable.<sup>138</sup> However, one scholar has noted that arbitration clauses not covered by the FAA "will likely be enforceable under state law."<sup>139</sup> Additionally, as most state arbitration statutes do not contain the contracts of employment exception and instead "expressly appl[y] to 'agreements between employers and employees'"; compelling arbitration of statutory rights under the state statutes is likely.<sup>140</sup> In addition, several state courts have relied on

1991) (Title VII claims can be compelled under FAA).

134. See, e.g., *Fabian Fin. Servs. v. Kurt H. Volk, Inc. Profit Sharing Plan*, 768 F. Supp. 728, 733-34 (C.D. Cal. 1991) (ERISA claim compelled to arbitration under FAA).

135. See, e.g., *Saari v. Smith Barney, Harris, Upham & Co., Inc.*, 968 F.2d 877, 881 (9th Cir.), *cert. denied*, 113 S. Ct. 494 (1992) (statutory claim arising under EPPA was compelled to arbitration in light of clause in Civil Rights Act of 1991 encouraging ADR)

136. Allison & Stahlhut, *supra* note 58, at 171. This result is likely since § 513 of the ADA expressly discusses the use of alternative dispute resolution. *Id.*

137. *New Trends*, *supra* note 31, at 14. This extension is likely because the reasoning applied in *Gilmer* (that a person is merely having his claim heard in a different forum) is applicable to other statutory rights as well. *Id.*; see also, Bales, *supra* note 20, at 1899; William Howard, *The Evolution of Contractually Mandated Arbitration*, 48 ARB. J. 27, 33 ("[I]t is difficult to envision any type of statutory claim . . . that would not be subject to binding arbitration."); Husband & Mumaugh, *supra* note 63, at 2278-79; Knight, *supra* note 15, at 255-56 ("[I]f ADEA and Title VII claims are not exempt from arbitration agreements it is hard to imagine a statute that would be exempt."); Malin & Ladenson, *supra* note 58, at 1201.

138. Mathiason & Uppal, *supra* note 16, at 888. In making this assertion, Mathiason & Uppal refer specifically to the California Arbitration Act (CAA). *Id.* However, they previously noted that most state statutes are similar to California's; thus, the discussion has a broad application. *Id.* at 887. *But see* King et al., *supra* note 31, at 115 ("[S]tates have enacted arbitration statutes to enforce many of the agreements not subject to the FAA.")

139. King et al., *supra* note 31, at 116.

140. Mathiason & Uppal, *supra* note 16, at 888. This result is also likely due to the



*Gilmer* in upholding agreements to arbitrate.<sup>141</sup> Therefore, whether by federal statute or by state provision, most employment related contracts requiring arbitration of claims cover statutory claims normally guaranteed a jury trial.<sup>142</sup> Since an employee will forfeit the right to a jury trial by agreeing to arbitrate, employees should be fully informed of this result before signing.<sup>143</sup>

### 3. Arbitrator Bias

Bias in the arbitrator's decision may result from three primary forces: manifest bias,<sup>144</sup> superior knowledge of award patterns by one party<sup>145</sup> or repeat usage of an institutional arbitrator.<sup>146</sup> In multiple panel arbitrations, where each party chooses an arbitrator and then the two party arbitrators choose a neutral third arbitrator, it has been found that the party arbitrators are expected to be biased toward their side and any finding of bias on their part is not grounds to vacate an award unless corruption is present.<sup>147</sup> As a result, this Comment is only concerned with the possibility of bias on behalf of neutral arbitrators in the multi-party arbitration panel scenario. For single panel arbitrations, this Comment relates to all possible arbitrators.

#### a. *Manifest bias*

This species of bias is found when an arbitrator fails to disclose what is required and his failure results in grounds to vacate the award.<sup>148</sup> It has been found that failing to disclose relationships which create "an impression of possible bias" results in cause to vacate an arbitration award even if no actual fraud or bias is charged against the arbitrator.<sup>149</sup> Case law has established that personal relationships alone do

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fact that the CAA promotes a public policy favoring arbitration much as the FAA does. *Id.* at 887.

141. *See, e.g.,* *Spellman v. Securities, Annuities & Ins. Servs., Inc.*, 10 Cal. Rptr. 2d 427, 431-34 (Ct. App. 1992); *Skewes v. Shearson Lehman Bros.*, 829 P.2d 874, 877-78 (Kan. 1992); *Fletcher v. Kidder, Peabody & Co., Inc.*, 584 N.Y.S.2d 838, 839-40 (1992), *aff'd*, 81 N.Y.2d 623, *cert. denied*, 114 S. Ct. 554 (1993).

142. *See supra* notes 130-41 and accompanying text.

143. *See infra* notes 230-37 and accompanying text.

144. *See infra* notes 148-52 and accompanying text.

145. *See infra* notes 153-55 and accompanying text.

146. *See infra* notes 156-62 and accompanying text.

147. *Tate v. Sarasota Sav. and Loan*, 265 Cal. Rptr. 440, 448 (Ct. App. 1989).

148. *See id.*

149. *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 147-49 (1968). This standard was established to ensure that parties opting out of the jury system received the same protection they would have received had they not opted out. *Id.* at 148.

not create "an impression of possible bias" and do not have to be disclosed.<sup>150</sup> However, as to business relationships, which must be disclosed, numerous interpretations of "an impression of possible bias" have been voiced such that determining what must be disclosed by an arbitrator is difficult.<sup>151</sup> In California, for example, courts interpreting the *Commonwealth Coatings* standard have come up with five separate definitions of "an impression of possible bias."<sup>152</sup> As such, proving the existence of manifest bias in business relationships is a formidable task.

*b. Superior knowledge of arbitrator awards by one party*

Bias that warrants vacating of an award does not always result from an arbitrator favoring one particular party over another.<sup>153</sup> Instead, large employers who are frequent participants in the arbitration process may take to "tracking" arbitrators to find out information regarding the amount of the potential arbitrators' past awards.<sup>154</sup> Consequently, that employer may have an unfair advantage over an employee because the employer has the resources necessary to gain information pertinent to the selection of a favorable arbitrator, resulting in bias toward the employer's side.<sup>155</sup>

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150. *See, e.g.*, *Gonzales v. Interinsurance Exch. of Auto. Club of S. Cal.*, 148 Cal. Rptr. 282, 285 (Ct. App. 1978) (holding that personal relationships between attorneys do not create an "impression of possible bias" because it is reasonable that attorneys who work in the same area will know each other and thus do not need to be disclosed); *San Luis Obispo Bay Properties Inc. v. Pacific Gas & Elec. Co.*, 104 Cal. Rptr. 733, 741 (Ct. App. 1972) ("[M]embership in the same professional organization is in itself hardly a credible basis for inferring even an impression of bias."). Both cases rely on *Commonwealth Coatings* in finding that personal dealings alone do not need to be disclosed by arbitrators.

151. *See* Matthew David Disco, *The Impression of Possible Bias: What Neutral Arbitrators Must Disclose in California*, 45 HASTINGS L.J. 113, 136 (1993).

152. *Id.* Disco summarizes the five interpretations of "an impression of possible bias" as: (1) "[a] substantial business relationship," (2) "indication of favoritism or unusual preference," (3) "significant or substantial contacts," (4) "independent contractor-business relationship," and (5) "relationship that may lead arbitrator to place unusual trust or confidence in one side or the other." *Id.* at 136.

153. *See infra* notes 154-62 and accompanying text.

154. *See* Berger, *supra* note 31, at 697. Frequent participants in the arbitration process are referred to as "repeat players." *See id.* Although unintentional on the part of the arbitrator, such status still can be classified under "bias" because it may affect the award process.

155. For an employer who uses arbitration frequently, names and awards of arbitrators would likely be more easily accessible than to an employee who probably has

*c. Repeat usage of institutional arbitrators*

Bias among arbitrators may also result from repeat usage of a particular institutional arbitration company.<sup>156</sup> Many employers provide for the use of arbitrators selected from an institutional dispute resolution service in their employment contracts.<sup>157</sup> When an employer does so, the implication is that this dispute resolution service will get a substantial amount of business from the employer, thus leading to an inference of partiality.<sup>158</sup> The employee may realize that there is some sort of relationship between the two, however, she may not grasp the full extent of the financial consequences of such a union.<sup>159</sup>

While the employer may not outright expect the service to provide favorable resolutions, the service is reaping financial benefits from providing arbitrators to the employer and, for fear of jeopardizing this relationship, may err on the side of the employer when deciding disputes.<sup>160</sup> This is especially true since employers not satisfied with the results may very well switch from one service to a different service—there is nothing to keep a company from “arbitrator shopping.”<sup>161</sup> Thus, if employees keep winning, even though the arbitrators have proceeded in a neutral manner, there may be some incentive for an institutional arbitrator to sporadically, “throw in” a win for the employer to remain in the employer’s good graces.<sup>162</sup>

*B. Employer Concerns*

1. Potential for Defending More Claims

Employers also need to be aware of the consequences of including standard binding arbitration provisions in their employment con-

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not arbitrated before. *See id.*

156. *See Dick, supra* note 14, at 55.

157. *Cf. Disco, supra* note 151, at 138 (referring to institutional providers adopted by banks to settle disputes, but applicable in the employment context as well).

158. *Dick, supra* note 14, at 55.

159. *Cf. Disco, supra* note 151, at 143 (referring to the banking context, but equally applicable in the employment context).

160. *Thomas, supra* note 79, at 795-96; *see also Disco, supra* note 151, at 138. *But see Berger, supra* note 31, at 715 (noting that arbitrators wanting to increase their possibilities for selection for future arbitrations will not favor either side).

161. *See Berger, supra* note 31, at 715.

162. *Id.* However, if the employee is constantly losing, there is no such incentive for the arbitrator to give the employee a win because the employee has no power to switch the institutional arbitrator provided in the contract. And, while the employer is not necessarily encountering the same arbitrator every time, it is likely that the arbitrators working for the institution have knowledge of each of the employer’s cases. This knowledge may affect their decisions.

tracts.<sup>163</sup> The most prevalent concern for employers is that, by allowing employees to bypass the court system, employees who might have been hesitant to file a lawsuit<sup>164</sup> may be more likely to pursue claims against their employer in arbitration, thus increasing the ultimate number of claims to be defended.<sup>165</sup> This result, however, may be offset by the likelihood that the ultimate awards actually recovered by individual employees will be less than what would have been received at trial.<sup>166</sup> Thus, even with more claims being arbitrated, the total cost to the employer may still be decreased.<sup>167</sup>

## 2. Unionization

Another concern to be considered by employers contemplating the implementation of arbitration procedures is that unhappy employees may unionize.<sup>168</sup> The courts have not, and probably will not, extend the *Gilmer* decision to union situations.<sup>169</sup> As such, the Supreme Court's decision in *Alexander v. Gardner-Denver*<sup>170</sup> is still valid.<sup>171</sup> In

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163. See *infra* notes 164-74 and accompanying text.

164. The reasons an employee may be inhibited in bringing a lawsuit include cost and emotional strain. See *supra* notes 76-98 and accompanying text (listing the benefits of arbitration and the corresponding disadvantages of trial).

165. Waks & Gadsby, *supra* note 52, at 514; see also Husband & Mumaugh, *supra* note 63, at 2279; Mathiason & Uppal, *supra* note 16, at 896. Besides increasing the number of legitimate suits, easy access to arbitration may also increase the number of frivolous claims. Alfred G. Feliu, *Alternative Dispute Resolution: Pre-Dispute Arbitration Agreements As An Alternative to Employment Litigation*, in *HANDLING CORPORATE EMPLOYMENT PROBLEMS 1991*, at 525, 532 (PLI Litg. & Admin. Practice Handbook Series No. 410, 1991).

166. See *supra* notes 61-64 and accompanying text (discussing the differences in the amount of arbitration awards versus jury verdicts).

167. See *supra* notes 61-68, 77-79 (the combination of speed and lower cost should result in a lower overall cost for the employer who arbitrates).

168. Mathiason & Uppal, *supra* note 16, at 897.

169. Due to the special circumstances of collective bargaining, it is likely that non-union cases and union cases will remain distinct. See Gray, *supra* note 16, at 123; Knight, *supra* note 15, at 256 ("The interests of an individual employee may be subordinated to the collective interests of all employees . . . arbitration of statutory claims could thus be appropriate under an individual employment contract but inappropriate under a collective bargaining agreement.").

170. 415 U.S. 36 (1974).

171. See Kilroy & Sachs, *supra* note 42, at 34 ("Gilmer does not alter the rule that an arbitration ruling interpreting a collective bargaining agreement would not bar a later suit based on the civil rights laws."). But see Knight, *supra* note 16, at 255 (*Gilmer* "casts doubt" on *Alexander*).

*Alexander*, the Court held that unionized employees under labor contracts are free to pursue statutory claims in court following unsuccessful arbitrations.<sup>172</sup>

Consequently, forming a labor union may be the only viable option employees have to ensure their ability to pursue a court adjudication of statutory rights following an unsatisfactory arbitration.<sup>173</sup> If employees do organize, the advantages an employer anticipated from implementing arbitration procedures will be defeated.<sup>174</sup>

### C. Concerns of Those in the Legal Profession

#### 1. Retreat From the Common Law System

The legal profession in general should also be concerned with the impact of the current heavy reliance on arbitration for employment disputes.<sup>175</sup> The increased usage of binding arbitration to resolve employment disputes could result in "a detrimental impact on the development of substantive statutory law at the appellate level," since arbitrations do not have to follow precedent and carry no precedential value themselves.<sup>176</sup> The lack of judicial precedent leaves arbitrators free to decide cases as they please, without having to consider the applicable

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172. *Alexander*, 415 U.S. at 59. In *Alexander*, Gardner-Denver allegedly discharged Alexander for producing defective parts. 415 U.S. at 38. Pursuant to his union agreement, Alexander then filed a grievance claiming he was unjustly discharged. *Id.* at 39. He did not claim racial discrimination at this time. *Id.* The arbitration provision in effect for union grievances provided that the decision of the arbitrator was to be final and binding on all participants. *Id.* at 41-42. Before the arbitration began, Alexander claimed racial discrimination. *Id.* at 42. The arbitrator found that Alexander had been properly discharged without mentioning the racial discrimination claim. *Id.* at 42. Alexander then filed a civil action in civil court charging racial discrimination under Title VII of the Civil Rights Act of 1964. *Id.* at 43. In holding that Alexander was not precluded from pursuing his claim in court subsequent to the arbitration, the Court relied on the nature of the collective bargaining arrangement. *Id.* at 59-60.

In holding that *Alexander* was not binding in *Gilmer*, the Court relied on the special circumstances of the collective bargaining arrangement which were not present in *Gilmer*. *Gilmer*, 500 U.S. at 33-35.

173. Gray, *supra* note 16, at 115.

174. See *supra* notes 58-98 and accompanying text. If an employer wants to avoid this result, a provision could be included in the arbitration agreement specifically excluding arbitration of statutory claims. Parties are basically free to tailor their contracts to their individual needs. See Brunet, *supra* note 74, at 103 ("Specific, customized contracts to arbitrate permit the parties to chart their dispute resolution course.").

175. See *infra* notes 176-81 and accompanying text.

176. Gray, *supra* note 16, at 134; see also Thomas, *supra* note 79, at 795 ("The outcome [of an arbitration] affects only the individuals bringing the action.").

substantive law in making their decisions<sup>177</sup> or worry about the ramifications of their decisions.<sup>178</sup> In addition, for employment cases that do proceed to trial, there will be relatively little case law for the judges to consider as the numerous arbitrated cases carry no precedential value.<sup>179</sup> Similarly, the judge's resulting decisions will be of little value, as arbitrators presented with similar cases in the future will not be bound to abide by these decisions.<sup>180</sup> As such, without modification, binding arbitration as currently practiced may well serve to weaken the common law system as it has developed.<sup>181</sup>

## 2. Inadequacy of Procedures

Professionals are now beginning to realize that "[t]he question is no longer whether ADR should be used, but precisely how, under whose direction, and according to what checks and balances".<sup>182</sup> These professionals recognize that there is potential for inadequacy and abuse of the process, but remain optimistic that with procedures in place to ensure that the system is beneficial to all, binding arbitration can withstand challenge.<sup>183</sup> The courts also have recognized the need for procedural protection. For example, the Supreme Court, in *Gilmer*, upheld the agreement to arbitrate in part because the rules adopted by the NYSE provided adequate procedural safeguards.<sup>184</sup> Indeed, if these were not in place, the outcome of *Gilmer* would likely have been different.<sup>185</sup> It has been recognized that "the courts have expressed their confidence in the ability of arbitration to safeguard statutory rights, the task [now] is to guarantee that such confidence is well placed."<sup>186</sup> To

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177. Brunet, *supra* note 74, at 85.

178. Thomas, *supra* note 79, at 794.

179. *See id.*

180. *See* Gray, *supra* note 16, at 134

181. *See supra* notes 176-80 and accompanying text

182. Dick, *supra* note 14, at 47 (emphasis added).

183. *See* Spelfogel, *supra* note 23, at 270 ("Unless all of us work together in support of ADR and, particularly, final and binding arbitration, our adversarial system of dispute resolution will surely breakdown."); *see also* Berger, *supra* note 31, at 721; Green, *supra* note 1, at WL9; King, et al., *supra* note 31, at 102 (noting that any deficiencies resulting from informality can be dealt with by "designing an appropriate arbitral system").

184. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-35 (1991).

185. *See id.*

186. Dick, *supra* note 14, at 54.

fulfill this guarantee, both the method of implementation<sup>187</sup> and the arbitration process itself will need modification.<sup>188</sup>

#### IV. VALIDITY OF THE AGREEMENTS TO ARBITRATE IN LIGHT OF THE INEQUALITY OF BARGAINING POWER IN THE EMPLOYMENT CONTEXT

Under the FAA, "arbitration agreements shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>189</sup> Additionally, for statutory rights, arbitration agreements will generally be invalidated only when intended to be precluded by statute.<sup>190</sup> Given that employees often do not realize they are forfeiting valuable rights by opting out of the jury system,<sup>191</sup> the courts should recognize another less restrictive method to invalidate arbitration contracts signed by uninformed employees. Three such methods are detailed in this Comment. The first, contracts of adhesion, has attempted to invalidate arbitration agreements in the past, but has generally failed.<sup>192</sup> The second, preponderance of the evidence, is a broader mechanism for invalidating arbitration agreements, however it may prove to be too restrictive.<sup>193</sup> The last, totality of the circumstances, seems a fair method of determining whether an employer validly obtained informed consent to an arbitration agreement.<sup>194</sup>

##### A. *Contracts of Adhesion: A Failed Approach*

The courts have generally assumed that if an arbitration agreement has been signed, the clause was bargained for and consequently will be upheld under the FAA.<sup>195</sup> This is partly due to the fact that people are responsible for reading what they sign, whether they actually do so or not.<sup>196</sup> Further, it has been recognized that mere inequality of bargain-

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187. See *infra* notes 273-319 and accompanying text.

188. See *infra* notes 320-401 and accompanying text.

189. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (quoting 9 U.S.C. § 2 (1988)).

190. See *supra* notes 130-37 and accompanying text.

191. See *infra* notes 233-58 and accompanying text.

192. See *infra* notes 195-214 and accompanying text.

193. See *infra* notes 215-20 and accompanying text.

194. See *infra* notes 221-72 and accompanying text.

195. *Green*, *supra* note 1, at WL2; see, e.g., *Cohen v. Wedbush, Noble, Cooke Inc.*, 841 F.2d 282 (9th Cir. 1988); *N & D Fashions, Inc. v. DHJ Indus.*, 548 F.2d 722 (8th Cir. 1976).

196. *Green*, *supra* note 1, at WL13. "There is no unfairness in expecting parties to read contracts before they sign them." *Cohen*, 841 F.2d at 286-87.

ing power is not enough to make such a contract unenforceable—some sort of fraud or coercion must also be present.<sup>197</sup>

However, as an industry adopts arbitration as its favored method of resolving disputes, an employee may not have a “mere inequality of bargaining power,” but a lack of bargaining power altogether.<sup>198</sup> A person cannot always pass up one job to avoid an arbitration provision and accept employment with another company, as all potential employers may have similar provisions.<sup>199</sup> Such a situation has been recognized as a contract of adhesion: regardless of where one turns for a more favorable option, there is none.<sup>200</sup> Federal law, however, does not recognize state adhesion law principles; thus, this concept does not provide a defense to the enforcement of an arbitration clause under the FAA.<sup>201</sup> For the few instances when the FAA does not apply, state law adhesion principles are not preempted and do, presumably, bar the arbitration clause from taking effect if proven.<sup>202</sup>

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197. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). Since the FAA intended for arbitration contracts to be put on equal footing with other contracts, only such grounds as exist to invalidate contracts will invalidate an arbitration clause in a contract. *Id.* Since inequality of bargaining power may, in some circumstances, be reason to invalidate a contract, cases must be considered on a case-by-case basis. *Id.* In *Gilmer*, while Gilmer may have been unequal in bargaining power, there was “no indication . . . that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application.” *Id.*; see also *Husband & Mumaugh*, *supra* note 63, at 2279 (“[I]t appears that absent fraud or undue influence, the agreement will be given effect.”).

198. See *infra* notes 199-214 and accompanying text.

199. For example, it is now standard in the securities industry to require arbitration for all claims. See *Howard*, *supra* note 137, at 33 (noting that arbitration of claims is dominant over court adjudication in the resolution of securities disputes). Outside the employment context, it has been noted that as more and more banks impose arbitration provisions on their customers, there may come a point at which no bank will be without an arbitration provision. *Green*, *supra* note 1, at WL5.

200. *Henningson v. Bloomfield Motors*, 161 A.2d 69, 86 (N.J. 1960).

201. *Mathiason & Uppal*, *supra* note 16, at 885 (citing *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992)); see also *Husband & Mumaugh*, *supra* note 63, at 2279 (suggesting that agreements will be upheld even when given on a “take it or leave it” basis); see, e.g., *Perry v. Thomas*, 482 U.S. 483, 491 (holding that the FAA preempts the California Labor Code) (1987). But see *Knight*, *supra* note 16, at 258 (“[T]he words of the FAA itself do not require the exclusion of state contract law. In fact, the language of [FAA § 2] . . . arguably contemplates the use of state contract law to defeat some arbitration agreements.”).

202. See *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 934 (9th Cir. 1991).



For circumstances in which state law adhesion contract principles are applicable, recognition of the contract as one of adhesion does not automatically dictate that it is unenforceable.<sup>203</sup> The existence of a contract of adhesion results in its being reviewed more closely, and the provision becomes unenforceable only if some sort of unconscionability is found.<sup>204</sup> Consequently, employment contracts are treated no different than any other contract when adhesion concepts are raised.<sup>205</sup>

Due to inequality of bargaining power, distinctions between higher level employees and lower level employees may determine whether an adhesion contract is found.<sup>206</sup> An arbitration contract signed by a higher level employee is less likely to be considered unenforceable than one signed by a lower level employee.<sup>207</sup> As such, an employer should consider these distinctions when deciding whether to implement binding arbitration agreements for all employees.<sup>208</sup> Employers may prefer to avoid challenges to the arbitration clause by only implementing the provision as to higher level employees who are more likely to bring a suit and who are likely to be given larger awards.<sup>209</sup> Since lower level employees are less likely to bring suit in the first place, and less likely to draw significant damages,<sup>210</sup> the employer may prefer to allow these cases to go to court, while simultaneously arbitrating those cases that may prove more financially disastrous.<sup>211</sup>

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203. Factors to be considered when determining whether an arbitration agreement amounts to a contract of adhesion are:

the experience and competence of the contracting employee; the extent to which the employee negotiated other terms in the contract; whether the contract provision falls within the reasonable expectations of the employee; whether the contract designates an arbitrator who, by reason of status or identity, is presumptively biased; and the clarity of the agreement.

Knight, *supra* note 16, at 258.

204. See Gray, *supra* note 16, at 129.

205. *Id.*

206. See Allison & Stahlhut, *supra* note 58, at 172.

207. *Id.*

208. See Dee, *supra* note 58, at 406-07. See also Allison & Stahlhut, *supra* note 58, at 172 (discussing the manner in which to implement arbitration procedures for different level employees).

209. This conclusion is based on the assumption that higher level employees would be more knowledgeable as to their rights and would command higher salaries than lower level employees.

210. Generally, lower level employees will have lower salaries and therefore they will have less of an incentive to pursue a claim in court.

211. This would reduce the likelihood that an arbitration clause was forced upon an employee with unequal bargaining power while at the same time allowing the employer to reduce overall litigation costs. As such, employee and employer concerns are accommodated

A contract is also more likely to be found adhesive when the arbitration agreement is unclear as to which disputes will be arbitrated.<sup>212</sup> When an arbitration agreement is ambiguous as to which disputes will be covered, and the agreement is found to be adhesive, the ambiguities will be subject to stricter construction against the party with the stronger bargaining power.<sup>213</sup> However, this result is rare, as employees do not often prevail on claims of adhesion contracts.<sup>214</sup>

### *B. Preponderance of the Evidence: A Burdensome Approach*

The preponderance of the evidence approach to invalidating arbitration agreements, advocated by Jeffrey Stempel, begins with the premise that all written agreements should be enforced.<sup>215</sup> The subject matter and legal claims involved are not considered relevant.<sup>216</sup> The burden of production and persuasion will fall on the party opposing arbitration.<sup>217</sup> Only if that party can show, by the preponderance of the evidence, that consent to the arbitration clause was not obtained will the agreement to arbitrate be invalidated.<sup>218</sup> According to the proponent of

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212. If an arbitration clause is ambiguous, it makes good sense to review it more closely to see if any unconscionability is found by its inclusion. See note 204 and accompanying text.

213. *Victoria v. Superior Court*, 710 P.2d 833, 837 (Cal. 1985).

214. *Knight*, *supra* note 16, at 258.

215. Jeffrey Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1426 (1991).

216. *Id.*

217. *Id.* at 1427.

218. *Id.* Determining free consent will focus on the amount of disclosure as to the arbitration provision given to the employee and the level of the employee's knowledge as to the provision. Stempel states five theories under which a contract could be invalidated:

(1) *Blameless Ignorance*. The opponent was not adequately aware of the arbitration clause or the nature of arbitration as opposed to litigation, made reasonable efforts to acquire sufficient awareness, and would not have consented to a contract with the instant arbitration clause if he were aware of the differences between arbitration and litigation;

(2) *Dirty-Dealing*. The arbitration agreement or the contract as a whole was procured through fraud, misrepresentation, or coercion and the objecting party cannot be said to have constructively consented to arbitration.

(3) *Inescapable Adhesion*. The arbitration clause is part of a contract of adhesion and the subject matter of the contract is *vital* to contemporary human existence, similar to those things that the law of contracting by minors has traditionally labeled as "necessary," and the opponent had no reasonable means of obtaining the good or service or its substantial equivalent from

this system, such an approach would be consistent with the federal policy favoring arbitration while at the same time providing a mechanism by which employees can “avoid arbitration in unjust circumstances.”<sup>219</sup> While this approach may be feasible, the burden of persuasion may be too difficult to overcome, and thus a less restrictive approach may be more desirable when determining whether an arbitration agreement was truly bargained for.<sup>220</sup>

### C. *Totality of the Circumstances: A More Plausible Approach*

Due to the shortcomings and limited application of both the contracts of adhesion approach<sup>221</sup> and the preponderance of the evidence approach,<sup>222</sup> a more plausible means of determining whether an agreement to arbitrate was fully bargained for is to consider the totality of the circumstances.<sup>223</sup> This test was first introduced in *Coventry v. United States Steel*,<sup>224</sup> in which the Third Circuit listed several factors to be considered in determining whether knowing and voluntary consent was obtained.<sup>225</sup> This test is valuable because it takes into account four factors when determining whether true consent was obtained in procuring the arbitration agreement: (1) that the legislative history of the FAA intended bargaining between parties of equal power,<sup>226</sup> (2) that many people do not know they are giving up valuable

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another source;

(4) *Substantive Unconscionability*. The arbitration forum, system, or chosen process decreed by the clause is so unreasonably favorable to the drafter as to be substantively unconscionable that the courts will not enforce the agreement;

(5) *Defective Agency*. The opponent did not sign the arbitration agreement and the signer was not an agent of the opponent authorized to commit the subject matter of the instant dispute to arbitration or, if authorized, breached its fiduciary duty to the opponent in signing an arbitration agreement of such breadth.

*Id.* at 1434-35 (citations omitted).

219. *Id.* at 1427.

220. See *infra* notes 221-319 and accompanying text.

221. See *supra* notes 195-214.

222. See *supra* notes 215-20.

223. See *infra* notes 224-72 and accompanying text.

224. 856 F.2d 514 (3d Cir. 1988).

225. *Id.* at 522-23 (citations omitted). In determining whether the arbitration was bargained for, the Coventry Court listed the following factors to be considered: (1) the employee's education and experience; (2) the employee's role in deciding the terms of the release provisions; (3) the clarity of the release provisions; (4) whether the employee had legal representation; and (5) “whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.” *Id.* at 523 (citations omitted).

226. See *infra* notes 230-32 and accompanying text.

rights by agreeing to arbitration;<sup>227</sup> (3) that the realities of unemployment may prevent true consent;<sup>228</sup> and (4) that employers should be held accountable for obtaining a knowing and voluntary consent to the arbitration contract.<sup>229</sup>

### 1. Legislative History of the Federal Arbitration Act

The need for a totality of the circumstances test is evident by looking at the procedural history of the FAA. As Justice Stevens noted in his dissent in *Gilmer*, the FAA was originally intended to encourage arbitration between merchants of *equal* bargaining power.<sup>230</sup> As such, applying the FAA to employment contracts between *unequal* parties was not anticipated.<sup>231</sup> Therefore, applying the same standard to invalidate contracts resulting from equal bargaining power, to invalidate arbitration agreements in the employment context is inappropriate.<sup>232</sup>

### 2. Knowledge of Rights

The need for a totality of the circumstances test to determine whether the contract containing the arbitration provision was bargained for becomes particularly evident when considering that employees often do not know what rights they are giving up when they first sign the contract.<sup>233</sup> The rights given up may include a jury trial,<sup>234</sup> opportunity to

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227. See *infra* notes 233-58 and accompanying text.

228. See *infra* notes 259-65 and accompanying text.

229. See *infra* notes 266-72 and accompanying text.

230. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 38-39 (1991) (Stevens, J., dissenting).

231. See *id.* at 40 (Stevens, J., dissenting).

232. See Green, *supra* note 1, at WL6.

233. Brunet, *supra* note 74, at 106 ("[W]e can speculate confidently that only a few customers realize that signing the arbitration clause specifically waives constitutional rights during arbitration.") (referring to a broker-customer relationship, but applying equally to an employer-employee relationship); see also Andrew Kielkopf, *Gilmer v. Interstate/Johnson Lane Corp.: An Employee Perspective*, 22 CAP. U. L. REV. 803, 830 (1993) (noting that "[i]n America, everyone feels entitled to have his or her case heard by a judge and, where appropriate, a jury of peers. In fact, very few people realize that by signing such an agreement, violations will be sent to an arbitration panel.").

234. See *infra* notes 238-41 and accompanying text.

appeal,<sup>235</sup> discovery,<sup>236</sup> and compliance with the rules of evidence.<sup>237</sup>

a. *Jury Trial*

The employee may not be aware that she is giving up her right to a jury trial, or may know this fact but may not realize the ramifications of this action.<sup>238</sup> It is unlikely that an employee will know that his chances of recovery and the possibility for a high award are usually greater in a jury trial than in arbitration.<sup>239</sup> The employee probably will also not realize that, by giving up their right to a trial, the employer has less to fear in terms of negative publicity and accordingly may have less of an incentive to act fairly toward the employee.<sup>240</sup> This decreased incentive may result in employers being less concerned with their actions, thereby putting the employees at more of a risk of having a dispute arise in the first place.<sup>241</sup>

b. *Appeal*

The employee also may not realize that an arbitrator's award is a final decision which cannot be appealed.<sup>242</sup> A stranger to arbitration is likely to perceive an arbitration award to be as appealable as a court judgment.<sup>243</sup> Even if the contract contains the term "binding," it cannot

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235. See *infra* notes 242-47 and accompanying text.

236. See *infra* notes 248-53 and accompanying text.

237. See *infra* notes 254-56 and accompanying text.

238. See *infra* notes 239-41 and accompanying text.

239. See *supra* notes 62-68 and accompanying text (discussing the differences in jury awards versus arbitrator awards); see also Husband & Mumaugh, *supra* note 63, at 2279 (stating that employees should be aware of this result).

240. Thomas, *supra* note 79, at 795 ("[A]rbitration may shield unfair employers from public accountability."). But see Spelfogel, *supra* note 23, at 269 (noting that ADR "forc[es] supervisors to act more reasonably, consistently and in accordance with established company policies and practices").

241. See Thomas, *supra* note 79, at 795 (an employer is not as likely to change its unfair practices if not many people are aware of them). But see Spelfogel, *supra* note 23, at 269 (arguing that implementation of arbitration makes employers more accountable for their actions and more fair to employees).

242. Brunet, *supra* note 74, at 87 ("[T]here is no true appeal from an arbitral award."); see also Feliu, *supra* note 165, at 533 ("appeal rights are limited"); *supra* notes 105-15 and accompanying text (discussing the *Moncharsh* holding that an arbitral award cannot be appealed even when based on erroneous fact or law).

243. As arbitration is not yet a familiar process to many people, employees cannot be assumed to know the procedural dynamics associated with this method of dispute resolution. Indeed, it has been noted that "[t]he ultimate [arbitral] decision, however, is at least as final as that reached by a court of law." Berger, *supra* note 31, at 696 (citations omitted). As most know that a final decision from a court of law can be appealed even though it is also "binding," there is no reason to suppose participants

be assumed that the average employee has knowledge of legal terms.<sup>244</sup> It is also highly improbable that an employee would assume that an arbitrator could apply the wrong law or ignore legal precedent altogether when resolving an employment dispute.<sup>245</sup> However, given the *Moncharsh* decision that arbitration awards cannot be appealed even when there are errors of fact or law, this is an entirely plausible scenario.<sup>246</sup> Since there is no recourse for errors in an arbitration which would normally result in sufficient cause for an appeal in the court system, the circumstances of the individual should certainly be considered when determining whether arbitration agreements involved bargaining.<sup>247</sup>

### c. *Discovery*

Another right that employees are probably not aware they may lose when they sign an arbitration agreement is discovery.<sup>248</sup> The concept of discovery in arbitration is generally limited,<sup>249</sup> which has significant consequences for the employee.<sup>250</sup> An employer will generally have a personnel file and will retain access to this information in the event of an arbitration.<sup>251</sup> The employee is not likely to keep records of employment related matters and may consequently be hindered by discovery rules in arbitration which may prevent her access to her own personnel file.<sup>252</sup> By contrast, if the dispute had gone to court, it is virtually cer-

would not expect the same from a "binding" arbitration.

244. An employee would likely believe that a court ruling is "binding" as well. Since most laymen believe that appeals are an inevitable part of the legal process, there is no reason to expect someone to think any different of the arbitration process.

245. As the most often cited advantages of arbitration are speed and reduced cost, a more probable assumption on the part of the employee is that arbitration is the same as court—just less expensive and time-consuming because participants do not have to "wait in line" for a courtroom. *See supra* notes 58-98 and accompanying text.

246. *See supra* notes 105-15 and accompanying text.

247. *See supra* notes 105-15 and accompanying text.

248. *See infra* notes 249-53 and accompanying text.

249. *Dee, supra* note 58, at 390 ("Typically there is no discovery in arbitration."). *But see Berger, supra* note 31, at 720 (arguing that "discovery limitations . . . are in fact more imagined than real" because arbitrators can be given the power to compel the production of relevant documents); Husband & Mumaugh, *supra* note 63, at 2279 (arguing that both parties benefit from "the relaxed procedures").

250. *See infra* notes 251-53 and accompanying text.

251. In the event that an employer does not keep personnel files, this discussion may not be applicable. However, common sense dictates that most companies, even small businesses, will have some sort of file on the employee.

252. *See Thomas, supra* note 79, at 795 (The complainant in an arbitration "is typi-

tain that this same information would have to be produced through court-mandated discovery procedures.<sup>253</sup>

*d. Compliance with the rules of evidence*

As with discovery, evidence rules are also relaxed in arbitration proceedings.<sup>254</sup> Television has inundated people with visions of lawyers raising grandiose objections to the presentation of evidence and witness testimony during trial. However, most people probably do not realize that these same comments or items of evidence that would be excluded in court at the objection of the opposing lawyer will generally be admissible in arbitration, provided they are the least bit relevant.<sup>255</sup> As a consequence, an employee cannot be assured that prejudicial evidence will be excluded from an arbitration.<sup>256</sup>

Therefore, some of the procedural protections built into the legal system are not available for arbitrations, leaving an unknowledgable participant vulnerable.<sup>257</sup> As a result of many uninformed parties signing arbitration clauses in their employment contracts, courts should be reluctant to enforce such provisions "without examining carefully the factual background and prior dispute resolution experience of the parties."<sup>258</sup>

### 3. Reality of Unemployment

Another compelling argument in favor of considering the totality of the circumstances arises from the typically dismal employment

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cally not given the right to engage in extensive discovery or compel production of documents.") (citations omitted).

253. Such documents would be required to be produced as discovery under Federal Rules of Civil Procedure. Some believe discovery is not that great of a problem in arbitration because it can be written into the arbitration agreement that employer files be turned over prior to any arbitration hearing. King et al., *supra* note 31, at 102. But, while this protection is possible, it is not available if the employee does not know what to look for in the agreement and the employer has not included this provision. Thus, until it becomes more common to include such discovery provisions in arbitration agreements, employees may suffer a handicap.

254. *See infra* notes 255-56 and accompanying text.

255. *New Trends, supra* note 31, at 13. *See also* Sapp v. Barenfield, 212 P.2d 233, 237 (Cal. 1949) (noting that any relevant evidence may be admitted as long as the arbitration hearing is fairly conducted).

256. *See New Trends, supra* note 31, at 13. *But see* Husband & Mumaugh, *supra* note 63, at 2279 (stating that both parties benefit from "less restrictive evidentiary issues").

257. *See supra* notes 233-56 and accompanying text.

258. Brunet, *supra* note 74, at 104.

rates.<sup>259</sup> It has been noted that "where job markets are competitive, employees should have the economic ability and leverage either to bargain with employers about the terms of an acceptable arbitration agreement or to choose an employer who does not require arbitration."<sup>260</sup> A major assumption made by this assertion, however, is that employees have choices among employers.<sup>261</sup>

The assumption regarding job choice is neutralized by the fact that, "[f]or individual employees, consent to arbitration may be more formal than real for all but the most financially secure and sought-after workers."<sup>262</sup> Consequently, an employee will likely release her right to court adjudication by agreeing to the mandatory arbitration provision in order to find a job or retain her current position.<sup>263</sup> Unfortunately, in a job market characterized by high unemployment, people will often do anything to secure a job and are not really negotiating at arm's length when faced with arbitration provisions in their employment contracts.<sup>264</sup> Further, employees generally do not anticipate the possibility of a dispute with their employer when they first obtain a job, making it unlikely that they would pay significant attention to any arbitration clause included in their contract.<sup>265</sup>

#### 4. Employer Accountability for Obtaining True Consent

Some scholars believe that the totality of circumstances test should not be used because it reduces the finality of disputes going to arbitration for solution.<sup>266</sup> On the other hand, one scholar has noted, "[b]y

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259. See *infra* notes 260-65 and accompanying text.

260. King et al., *supra* note 31, at 103.

261. Common sense dictates that when unemployment is high such options are unrealistic.

262. Stempel, *supra* note 215, at 1387. Because "people want to eat first and consider legal and philosophical implications later[,] . . . [t]he average worker in need of a job is unlikely, at the outset, to balk at an arbitration clause." *Id.*

263. See Kielkopf, *supra* note 233, at 830.

264. *Id.*

265. Berger, *supra* note 31, at 713.

266. King et al., *supra* note 31, at 119. These scholars anticipate that employers will not be willing to encourage the use of arbitration because of the fear that the agreement will easily be ruled invalid through this test if the employee so chooses. *Id.* This should not be a concern for employers if they have taken the proper steps to ensure that the process of implementing arbitration for their employment disputes is fair; it is only a concern when the employer has done something unfair. See *supra* notes 195-214 and accompanying text.



looking at the totality of the circumstances, the court can determine effectively whether the individual knowingly and voluntarily agreed to waive his substantive rights.<sup>267</sup> If the court is satisfied that the arbitration agreement has been implemented in a fair manner, arbitration will be compelled, ensuring finality of the ultimate decision.<sup>268</sup> If the court finds that the totality of the circumstances do not indicate that the arbitration agreement has been justly implemented, then it will not be upheld.<sup>269</sup> In this situation since the employer did not explain the procedure in enough detail to obtain a knowing and voluntary waiver of rights from the employee, the employer should lose the benefit of finality.<sup>270</sup> This method still recognizes that a mere inequality of bargaining power is not enough, *in itself*, to render an arbitration agreement unenforceable.<sup>271</sup> However, when an unequal bargaining situation exists, the totality of the circumstances approach determines on a case by case basis whether any other dynamics were at play which would merit invalidating the arbitration clause.<sup>272</sup>

#### V. PROPOSALS FOR TRUE BARGAINING IN A BINDING ARBITRATION AGREEMENT

Taking into consideration the case law and commentary on binding arbitration agreements in employment contracts, the following proposals detail how an employer should implement an arbitration procedure for disputes so that the employee is provided with a better understanding of the transaction.<sup>273</sup> The proposals consider four separate situations: (1) pre-dispute binding arbitration for new hires;<sup>274</sup> (2) pre-dispute binding arbitration for existing employees;<sup>275</sup> (3)

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267. Green, *supra* note 1, at WL10. In determining the totality of the circumstances, the factors Green believes should be considered include: "the individual's education and experience, his role in deciding the inclusion or exclusion of the arbitration clause, the clarity of the terms in the arbitration clause, whether the individual used legal representation in negotiating the agreement, and whether there was valid consideration given for the release of the right to seek a judicial forum." *Id.* at WL10.

268. *See id.*

269. *See id.*

270. This should only encourage fair practice in the implementation of arbitration agreements, resulting in greater finality because no reasons would exist to invalidate the contract.

271. While the *Gilmer* Court did not explicitly name the totality of the circumstances approach in its decision, this view is nevertheless consistent with the Court's holding. *See* Kielkopf, *supra* note 233, at 824

272. *Id.*

273. *See infra* notes 280-319 and accompanying text.

274. *See infra* notes 280-90 and accompanying text.

275. *See infra* notes 291-314 and accompanying text.

pre-dispute tiered dispute resolution procedures for all employees;<sup>276</sup> and (4) post-dispute binding arbitration for all employees.<sup>277</sup> Following this section are proposals to ensure fairness in the arbitration procedure itself.<sup>278</sup> With the combination of true bargaining for arbitration and fairness in the arbitration process, implementing arbitration as a method of resolving employment disputes will be a feasible, fair, and final alternative to court adjudication.<sup>279</sup>

#### A. *Pre-Dispute Binding Arbitration for New Hires*

Implementation of an arbitration agreement for employment disputes is easiest for new employees.<sup>280</sup> According to one scholar, "a standardized arbitration agreement must not exceed the reasonable expectations of the employee, as the weaker or adhering party."<sup>281</sup> Accordingly, "adequate and reasonable notice" should be given to the employee as to the "meaning and exact scope of the arbitration agreement and its consequences."<sup>282</sup> This should be written in understandable language and explained to the employee.<sup>283</sup> Necessarily, this explanation should include a breakdown of the rights being given up and an explanation about the non-appealability of the arbitrator's award absent the limited circumstances dictated by statute.<sup>284</sup>

This information should be provided when the potential employee applies for a job so that the person has plenty of time to analyze the information and understand what to expect as a result of gaining employment with a particular employer.<sup>285</sup> The agreement should also clearly state which disputes will be settled by arbitration and which, if any, will not.<sup>286</sup> To ensure that the employee reads and comprehends

276. See *infra* note 315 and accompanying text.

277. See *infra* notes 316-19 and accompanying text.

278. See *infra* notes 280-319 and accompanying text.

279. See Knight, *supra* note 16, at 259; see also Allison & Stahlhut, *supra* note 58, at 173.

280. Allison & Stahlhut, *supra* note 58, at 172; see also Spelfogel, *supra* note 23, at 263 (stating that *Gilmer* recognized that an arbitration clause is as enforceable as any other condition of employment such as amount of wages or sick leave).

281. Mathiason & Uppal, *supra* note 16, at 890.

282. *Id.*

283. Allison & Stahlhut, *supra* note 58, at 172.

284. These are the problem areas that are not likely to be known. See *supra* notes 233-58 and accompanying text.

285. Mathiason & Uppal, *supra* note 16, at 890; see also Dee, *supra* note 58, at 407; Kilroy & Sachs, *supra* note 42, at 36.

286. Dee, *supra* note 58, at 408-09; see also Allison & Stahlhut, *supra* note 58,

the arbitration agreement, the employer should have her separately sign an acknowledgment clause.<sup>287</sup> Finally, the employee should be notified that she can, and should, seek counsel regarding the arbitration agreement before signing.<sup>288</sup> As a result, both employee and employer will be protected should one side subsequently claim a lack of knowledge.<sup>289</sup> As an alternative, employers could offer the arbitration contract to employees after they have been hired and provide them with the same consideration given to existing employees in exchange for the agreement to arbitrate.<sup>290</sup>

### *B. Pre-Dispute Binding Arbitration for Existing Employees*

A more difficult process of establishing true bargaining for an agreement to arbitrate is encountered when the agreement of an existing employee must be obtained.<sup>291</sup> Unlike the new employee, the existing employee was hired without the expectation that disputes would be subject to arbitration.<sup>292</sup> There are four methods an employer can utilize to implement binding arbitration for existing employees: (1) individually contract with employees;<sup>293</sup> (2) include the arbitration provision in an employee handbook;<sup>294</sup> (3) encourage consent to the agreement based on the "change of forum" argument;<sup>295</sup> and (4) full disclosure and honesty.<sup>296</sup>

#### 1. Individually Contracting with Employees

Employers may opt to make individual contracts with their employees, asking them to acknowledge the new arbitration policy and agree to be bound by its terms.<sup>297</sup> This, however, must be supported by independent consideration to make the contract valid.<sup>298</sup> Some courts have

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at 173.

287. Allison & Stahlhut, *supra* note 58, at 172.

288. Dee, *supra* note 58, at 407. Putting this provision in boldface type is even more preferable. Kilroy & Sachs, *supra* note 42, at 36

289. King et al., *supra* note 31, at 121.

290. Gray, *supra* note 16, at 118; see also Spelfogel, *supra* note 23, at 268. For a discussion on adequate consideration, see *infra* notes 297-301.

291. See Knight, *supra* note 16, at 259.

292. Mathiason & Uppal, *supra* note 16, at 890.

293. See *infra* notes 297-302 and accompanying text.

294. See *infra* notes 303-07 and accompanying text.

295. See *infra* notes 308-10 and accompanying text.

296. See *infra* notes 311-14 and accompanying text.

297. Mathiason & Uppal, *supra* note 16, at 890; see also Allison & Stahlhut, *supra* note 58, at 172.

298. Mathiason & Uppal, *supra* note 16, at 890; see also Allison & Stahlhut, *supra* note 58, at 172.

found that continued employment is sufficient consideration since the employee could have taken a job elsewhere if she disapproved of the arbitration provision.<sup>299</sup> Other courts have indicated that continued employment *alone* is not enough to support a finding of consideration—some increase in benefits must be presented.<sup>300</sup> This increase in benefits must be in the form of a promotion or raise that was not already earned by the employee.<sup>301</sup> Employers should also provide notice to the employees that the advice of a lawyer can and should be obtained before proceeding and that they have a reasonable period of time to accept or reject the provision.<sup>302</sup>

## 2. Employee Handbook Method

In lieu of individually contracting with each employee for an arbitration agreement, the employer may choose to impose unilaterally the arbitration agreement on its employees by adding the policy to employee handbooks, announcing that the policy is effective for all employees, providing the employees with a written summary of the policy in explicit language and asking employees to sign an acknowledgment of receipt of the written policy.<sup>303</sup> This method, however, is not as desirable as the previous method,<sup>304</sup> and courts will be less likely to consider this a binding agreement.<sup>305</sup> It is recognized that “mutual agreement to the method of resolving disputes is not present” when arbitration is mandated in an employer handbook.<sup>306</sup> Furthermore, this unilateral ap-

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299. See, e.g., *Medtronic, Inc. v. Benda*, 689 F.2d 645 (7th Cir. 1982); *ISC-Bunker Ramo Corp. v. Altech, Inc.*, 765 F. Supp. 1340 (N.D. Ill. 1990); *Lang v. Burlington N. R.R.*, 835 F. Supp. 1104 (D. Minn. 1993).

300. Spelfogel, *supra* note 23, at 268; see e.g., *Hollingsworth Smolderless Terminal Co. v. Turley*, 622 F.2d 1324 (9th Cir. 1980); *Hull v. Norcom*, 750 F.2d 1547 (11th Cir. 1985).

301. Allison & Stahlhut, *supra* note 58, at 172.

302. Kilroy & Sachs, *supra* note 42, at 36.

303. Mathiason & Uppal, *supra* note 16, at 891.

304. Kilroy & Sachs, *supra* note 42, at 36 (stating that “employers should include such arbitration clauses within an employment contract and not in a personnel manual”).

305. Allison & Stahlhut, *supra* note 58, at 172-73. This is because it is an opt out method rather than an opt in method, and people may, for any number of reasons, fail to opt out and accordingly become bound by the agreement. *Id.* But see Knight, *supra* note 16, at 259 (continued employment after the policy is adopted may provide the employer with an estoppel argument even if the employee has not specifically signed the provision).

306. Berger, *supra* note 31, at 710.

proach demonstrates only receipt of the policy, not acceptance of its terms.<sup>307</sup>

### 3. Change of Forum Argument

Employers have encouraged employees to sign an arbitration agreement by informing them that they are merely changing the forum to hear their dispute and that they are not giving up any substantive rights.<sup>308</sup> However, this is not entirely true. There are situations where a person has a substantive right to appeal, but forfeits this right by choosing to arbitrate disputes.<sup>309</sup> In addition, people have the right to have a jury hear their disputes in certain situations—this is also eliminated when an agreement to arbitrate has been put in place.<sup>310</sup>

### 4. Full Disclosure and Honesty

The best way for an employer to implement an arbitration procedure is to acknowledge to the employees that they will be forfeiting some rights by opting out of the jury system.<sup>311</sup> The employer should explain these rights and note the procedural safeguards enacted to ensure that the process is fair and reliable.<sup>312</sup> Further, the employer should impress upon the employees that any large damage award gained at trial may be lost to attorney's fees anyway, so that they may potentially benefit monetarily by arbitrating their disputes.<sup>313</sup> Full disclosure and honesty prior to obtaining consent will ensure that the process is fair

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307. Allison & Stahlhut, *supra* note 58, at 173. However, some scholars argue that this is a reasonable method of implementation based on the same analysis used above to find consideration by an employee's continued employment in the individual contract situation. Mathiason & Uppal, *supra* note 16, at 891 ("[T]he longer the policy has been in effect, the stronger the employer's argument that the employee, by continuing the employment, has implicitly consented to the arbitration provision."). While continued employment after notice of the arbitration procedure is implemented is not the most feasible method of attaining the consent of existing employees, it may, nevertheless, lead to an estoppel argument for the employer to raise should the provision be protested. Knight, *supra* note 16, at 259.

308. Mathiason & Uppal, *supra* note 16, at 891. Courts have upheld this rationale in validating arbitration agreements. See, e.g., Pierson v. Dean Witter Reynolds, 742 F.2d 334, 340 (7th Cir. 1984); ISC—Bunker Ramo Corp. v. Altech, Inc., 765 F. Supp. 1310 (N.D. Ill. 1990); Lang v. Burlington N. R.R., 835 F. Supp. 1104 (D. Minn. 1993).

309. Green, *supra* note 1, at WL10; see also *supra* notes 242-47 and accompanying text (discussing the non-appealability of arbitration awards).

310. See *supra* notes 238-41 and accompanying text (discussing the jury trial rights given up by choosing to arbitrate).

311. See *supra* notes 233-58 and accompanying text.

312. See *infra* notes 320-401 and accompanying text.

313. See King et al., *supra* note 31, at 99.

and agreeable for all involved, thus eliminating the need to determine subsequently whether consent was properly obtained and thereby risking the finality of the process.<sup>314</sup>

*C. Pre-Dispute Tiered Approach to Dispute Resolution for All Employees*

Employers could also design a dispute resolution system that includes binding arbitration but that also includes other methods of dispute resolution, such as mediation or med-arb, so that the employee has a choice of procedures.<sup>315</sup>

*D. Post Dispute Binding Arbitration for All Employees*

In lieu of the above procedures, which address pre-dispute agreements to arbitrate, there are other ways by which employers could encourage the use of arbitration and ultimately reduce their court time, while also ensuring that the employees have bargained for the process.<sup>316</sup> Employers could give their employees the option to arbitrate after the dispute arises so that the employee has a better idea of what to expect from taking her case to court, yet can still choose to arbitrate if she so wishes.<sup>317</sup> By doing so, the employer may still avoid trial by bringing the option of arbitration to the attention of an employee who might not otherwise have considered it, while simultaneously indicating the employer's desire to engage in the process of arbitration to resolve the matter expediently.<sup>318</sup> In addition, the agreement is more likely to be found knowing and voluntary, since the employee had a clear choice, thus providing more certainty that the arbitration will be final and binding.<sup>319</sup>

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314. Bales, *supra* note 20, at 1898; *see also* Knight, *supra* note 16, at 259.

315. Dick, *supra* note 14, at 54; *see also* Spelfogel, *supra* note 23, at 264 (advocating a three step procedure starting with communication of the problem to a superior and peer review, next providing for mediation and, lastly arbitration).

316. *See infra* notes 317-19 and accompanying text.

317. Berger, *supra* note 31, at 713. *But see* Dee, *supra* note 58, at 408 (noting that post-dispute agreements to arbitrate are more difficult to obtain).

318. By showing that the employer is open to resolving the dispute without having to go to trial, the employer indicates his willingness to work together which may result in greater likelihood that the employee will also agree to the arbitration. *See supra* note 75 and accompanying text.

319. Berger, *supra* note 31, at 713; *see also* Dee, *supra* note 58, at 409-10.

VI. PROCEDURAL SAFEGUARDS TO PROTECT AGAINST THE HARSH EFFECTS  
OF FORFEITING BOTH THE RIGHT TO A JURY TRIAL AND  
THE RIGHT TO APPEAL THE ARBITRATION AWARD

Due to the Supreme Court's willingness to uphold the arbitration of employment related disputes, including those involving statutory rights, an opposing party may seek to avoid the arbitration by attacking the process itself.<sup>320</sup> By enacting safeguards within the arbitration contract, a process fair to all can be achieved, thus, eliminating need or cause to subsequently invalidate the procedure.<sup>321</sup>

Currently, there remains a need for improvement in choosing unbiased, experienced arbitrators,<sup>322</sup> defining the scope of discovery,<sup>323</sup> establishing standards for receiving evidence,<sup>324</sup> requiring written opinions<sup>325</sup> and allowing for review of arbitration decisions involving statutory claims.<sup>326</sup>

A. *Selecting Unbiased, Experienced Arbitrators*

1. Preventing Bias

To ensure that the participants have a fair opportunity to be heard and to reduce the possibility that one side will be favored over another, bias on the part of arbitrators must be protected against.<sup>327</sup> Indeed, the Supreme Court noted in *Commonwealth Coatings Corporation v. Continental Casualty Company*,<sup>328</sup> "we should . . . be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free reign to decide the law as well as the facts and are not subject to appellate review."<sup>329</sup>

a. *Erring toward full disclosure of conflicting relationships*

In light of the confusion in the area of disclosure concerning what constitutes "an impression of possible bias,"<sup>330</sup> the best policy for the

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320. Howard, *supra* note 137, at 34-35.

321. See *infra* notes 322-401 and accompanying text.

322. See *infra* notes 327-57 and accompanying text.

323. See *infra* notes 358-71 and accompanying text.

324. See *infra* notes 372-83 and accompanying text.

325. See *infra* notes 384-92 and accompanying text.

326. See *infra* notes 393-401 and accompanying text.

327. *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 148-49 (1968).

328. 393 U.S. 145 (1968).

329. *Id.* at 149.

330. See *supra* notes 148-52 and accompanying text.

arbitrator is to err on the side of disclosure and to inform the parties about *any* business or personal relationship with either party.<sup>331</sup> This way, the parties can choose to disqualify the arbitrator before the arbitration begins if they see a possible problem.<sup>332</sup> In the event that the parties choose to keep the arbitrator, they will have been fully informed of any potential conflict and will not have cause to challenge the arbitrator's decision based on bias after the fact.<sup>333</sup> The disclosure should be liberal so that no information is hidden and the parties can proceed without having to fear that the award will be vacated subsequent to the arbitration, forcing the parties to start over.<sup>334</sup> The best way to ensure that arbitrators disclose what is required is for employers to write these broad disclosure provisions into the arbitration contract.<sup>335</sup> The arbitrator will thus avoid having to rely on the confusing case law in this area and will be clear as to what she must disclose.<sup>336</sup>

*b. Avoiding exclusive use of one institutional arbitration service*

Although the effect of institution-employer relationships has not yet been tested in the courts, such challenges can be expected in the near

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331. This gives more control to the parties to decide for themselves which arbitrators may be biased. See *infra* notes 332-36 and accompanying text. But see George L. Blum, *Disclosing Conflict of Interest in the California Arbitration System: Banwait v. Hernandez and the Erosion of Duty*, 5 OHIO ST. J. ON DISP. RESOL., 97, 108-09 (1989) ("impermissible relationships" based upon fiduciary grounds should be disclosed; "permissible relationships" based on professional or social connections should not).

332. The purpose is to create a procedure that all will perceive as fair so that there will be no grounds for dissatisfaction after the fact. Whether a personal relationship will actually affect an arbitrator's decision is really irrelevant because if the party perceived it as such then there will be dissatisfaction. By disclosing all relationships, the parties are in control to decide for themselves, before the process begins, whether the arbitrator is acceptable.

333. See Disco, *supra* note 151, at 116 ("If the standard is unclear then parties will be tempted to seek vacation of unfavorable arbitration awards in every instance by attempting to capitalize on a vague and inherently manipulable standard."). This proposal will help increase finality (a benefit of arbitration) without jeopardizing the fairness of the procedure.

334. See Blum, *supra* note 331, at 112-13 (noting the undesirability of having a conflict of interest arise after the parties have already invested time and money in the arbitration process).

335. See Kilroy & Sachs, *supra* note 42, at 36.

336. See *supra* notes 150-52 and accompanying text.



future.<sup>337</sup> Employers can, however, avoid the implications which arise from such relationships and bypass potential court scrutiny.<sup>338</sup> First, employers should avoid using an institutional arbitration service that is for-profit.<sup>339</sup> In the alternative, employers should eliminate the inclusion of any *one* arbitration service as the provider of the arbitrators.<sup>340</sup> There are many private arbitrators practicing; allowing the parties to choose independently from the whole spectrum of arbitrators is preferable.<sup>341</sup> Second, both sides should participate in the selection process with information helpful in this process being made equally available to both sides.<sup>342</sup> An employee should never be compelled to arbitrate if the arbitrator is chosen solely by the employer.<sup>343</sup> Lastly, each side should be able to have one peremptory challenge and unlimited challenges for cause to reduce any hint of bias.<sup>344</sup>

## 2. Experience

### a. *In employment law*

Experience should also be considered when selecting an arbitrator.<sup>345</sup> For employment disputes, arbitrators should be experienced in employment law.<sup>346</sup> The American Arbitration Association requires that

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337. See *Disco*, *supra* note 151, at 142.

338. See *infra* notes 339-44 and accompanying text.

339. The American Arbitration Association (AAA) is one such non profit provider, formed to "encourage the use of arbitration and other techniques of voluntary dispute resolution." *Disco*, *supra* note 151, at 138. Since they are non-profit, the desire for repeat business may not be as great as with a for-profit provider. *But see id.* at 139 (even nonprofit organizations have interests in repeat business because their mere existence depends on it).

340. Taking away the dependence on one particular provider also takes away the provider's dependence on the employer as a constant source of business, lessening the need to favor the employer.

341. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (inferring that arbitration clauses may not be enforced if the arbitrator selection provisions are too restrictive). This will not only help prevent repeat bias but will open up the number of qualified arbitrators, and the employee will view the process as more fair. *Waks & Gadsby*, *supra* note 52, at 482.

342. *Berger*, *supra* note 31, at 716. For example, if an employee has no idea how to go about finding an arbitrator, the employer should provide the names of a few different sources so that the employee may choose someone.

343. *Id.*

344. *Kilroy & Sachs*, *supra* note 42, at 36.

345. *Dee*, *supra* note 58, at 415-16. *But see* Robert C. Barrett, *SPIDR Commission on Qualifications: An Update on Its Current Work*, in *DISPUTE RESOLUTION ALTERNATIVES 1994*, at 331 (PLI Litig. & Admin. Handbook Series No. 504, 1994), available in TP-ALL database, at WL 1, 19. (Many neutrals who do not have a law degree or experience in a given field make "excellent dispute resolvers.")

346. See *Allison & Stahlhut*, *supra* note 58, at 173.

its arbitrators have "familiarity" in the employment field if they are to arbitrate such disputes.<sup>347</sup> This does not seem appropriate given that courts are now allowing arbitrators to arbitrate important statutory claims in addition to normal contractual disputes.<sup>348</sup> This is especially a concern due to the fact that many arbitrators either do not want to decide statutory rights or feel they are currently unqualified to do so.<sup>349</sup> As such, there should be some additional training so that arbitrators are able to handle the complexities of civil rights statutes.<sup>350</sup>

To accommodate the needs of the parties, the following proposal should be implemented to ensure that the arbitrators have the requisite experience in the employment field.<sup>351</sup> First, the arbitrator should have a minimum of seven years of practice in labor/employment law.<sup>352</sup> Second, it would be preferable if the arbitrator is either in an employment law society, so that she is keeping up on current trends and issues in the field, or participates in continuing education for employment disputes.<sup>353</sup> Finally, claims involving large amounts of damages should be heard by an arbitrator who is also a retired judge so that the decisions do not stray too far from the prevailing law.<sup>354</sup>

*b. In arbitration*

In addition, general arbitration training of some sort should be required.<sup>355</sup> Lawyers may know the law, but additional skills are needed

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347. Howard, *supra* note 137, at 36.

348. Since statutory rights are designed to "promote public ends," if it is found that they can be arbitrated, the decision-maker should be someone fairly well-versed in the law so that the goals of the statute are carried out. *But see* King et al., *supra* note 31, at 102 (since the parties choose their arbitrator, they have the power to select someone knowledgeable about all the claims at hand).

349. Spelfogel, *supra* note 23, at 265.

350. *New Trends*, *supra* note 31, at 12.

351. *See infra* notes 352-56 and accompanying text.

352. This will ensure that the arbitrator has a solid foundation in this area of law and is not just relying on knowledge gained from a law school course.

353. Barrett, *supra*, note 345, at WL 11. This is needed due to the constantly changing state of the law. *Id.*

354. Many arbitrators are retired judges. The need to have judges decide large disputes is evident in that generally a substantial wrong has occurred to merit such a claim and as much protection as possible should be afforded to ensure a just result.

355. For example, the securities industry requires all arbitrators to go through specialized training prior to sitting on their arbitration panels. Howard, *supra* note 137, at 33. Also, the state of Florida requires general dispute resolution training in addition to an academic degree. Barrett, *supra* note 345, at WL 15.

for a lawyer to be an effective arbitrator.<sup>366</sup>

If such procedures are followed, both parties will be ensured of a competent, unbiased arbitrator so as to both reduce the possibility of disapproval after the award has been made, and eliminate the need for the currently non-existent appeals process.<sup>367</sup>

## B. Discovery Procedures

A second proposal to protect the integrity of the arbitration process and to preserve the rights of the parties concerns the standards for discovery.<sup>368</sup> Generally, production of documents for discovery is allowed during the arbitration hearing, but not before.<sup>369</sup> As such, some scholars believe that parties should authorize the arbitrator to allow discovery to whatever extent she desires.<sup>360</sup> Neither of these procedures is adequate to put the parties on an equal footing, however, because in employment disputes, the employer may have the benefit of important documents which the employee may not get to see until the beginning of the hearing, if at all.<sup>361</sup>

As such, standard discovery procedures need to be in place and outlined in the arbitration agreement so that both parties know from the beginning which documents will be exchanged.<sup>362</sup> Exchange of documents where there is a "substantial, demonstrable need" is an appropriate solution that some commentators propose.<sup>363</sup> In addition, the contract should provide that the employer produce all relevant employee files prior to any arbitration hearing.<sup>364</sup> Furthermore, the employee should have the opportunity to depose at least one of the employer's representatives.<sup>365</sup>

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356. See Barrett, *supra* note 345, at WL 20. Barrett lists necessary arbitrator skills as the "(a) ability to make decisions; (b) ability to run a hearing; (c) ability to distinguish facts from opinions; and (d) ability to write reasoned opinions." *Id.* at WL 21.

357. Blum, *supra* note 331, at 97. "Unless all parties involved perceive that the arbitration has been conducted by an essentially impartial observer, much of the power of this dispute resolution mechanism will be lost." *Id.*; see also Disco, *supra* note 151, at 116.

358. See *infra* notes 359-71 and accompanying text.

359. *New Trends*, *supra* note 31, at 13.

360. Kilroy & Sachs, *supra* note 42, at 36.

361. See *supra* notes 248-53 and accompanying text.

362. See King et al., *supra* note 31, at 102.

363. Waks & Gadsby, *supra* note 52, at 464.

364. See King et al., *supra* note 31, at 102; see also Waks & Gadsby, *supra* note 52, at 464. The New York Stock Exchange procedural rules providing for document production, information requests, depositions, and subpoenas are a good example to follow when implementing discovery provisions. Kilroy & Sachs, *supra* note 42, at 36. These rules were accepted by the *Gilmer* Court as providing adequate procedural safeguards in the arbitral forum. *Id.*

365. Waks & Gadsby, *supra* note 52, at 464. This requirement is based on the

Some scholars reject this approach, pointing out that if standard discovery is built back into arbitration procedures, the benefits commonly associated with arbitration will be jeopardized.<sup>366</sup> However, the goal of arbitration is not to have the dispute resolved in a few days, or even a few weeks, but to resolve it expeditiously while maintaining a better relationship among the parties.<sup>367</sup> These objectives can be maintained concurrently with the implementation of more even-handed procedures for discovery.<sup>368</sup> Furthermore, employees will be more satisfied with the proposed procedure because they will not have to forfeit the rights they would have under binding arbitration as currently practiced.<sup>369</sup>

With the goals of arbitration in mind, it should be evident that whatever can be done to make the procedure more conducive to the parties' needs will help to promote usage of arbitration in the first place.<sup>370</sup> Likewise, such an open-minded approach will lessen the likelihood that the parties will be displeased after the fact.<sup>371</sup>

### C. Admission of Evidence

The manner in which parties present evidence in arbitration also needs to be reformed in order to promote arbitration as a favorable alternative to both employer and employee.<sup>372</sup> Currently, evidence is

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premise that the employer will have greater knowledge of the reasons for termination than will the employee. *Id.*

366. Butler, *supra* note 14, at 539-40.

367. See *supra* note 1 (listing the benefits of arbitration); see also Spelfogel, *supra* note 23, at 263:

The goals and advantages of any ADR or arbitration mechanism are to reduce the risks, costs and often lengthy delays associated with an over-burdened legal stem that in the opinion of many is out of control; to preserve workplace unity; to foster and improve internal communication and employee morale; to provide employees with an outside option where they do not believe internal processes are fair; and to diminish legal expenses.

*Id.*

368. Even with discovery, an arbitration will likely result in a speedier resolution of the dispute because other delays associated with trial, such as finding an available courtroom and impaneling a jury, are not present.

369. See Waks & Gadsby, *supra* note 52, at 464.

370. Spelfogel, *supra* note 23, at 265.

371. If the employee has been adequately protected, there will be no cause for dissatisfaction.

372. See *infra* notes 373-83 and accompanying text.

freely admitted if it is the least bit relevant.<sup>373</sup> This process allows the admission of certain prejudicial evidence that normally would be excluded in court.<sup>374</sup> Such liberal evidence rules are meant to streamline the arbitration procedure so that it is not subject to all the rigidities of a trial.<sup>375</sup> Having such a flexible standard, however, creates room for abuse.<sup>376</sup>

To ensure that the parties do not “sneak in” evidence that they know should not be admitted, there are two possible solutions.<sup>377</sup> First, the parties can attempt to find arbitrators who are lawyers known to follow the rules of evidence, rather than relying on non-lawyers or lawyers who take a liberal approach to the admission of evidence.<sup>378</sup>

Second, an honor system could be enacted so that the parties do not attempt to introduce evidence that they know is not admissible under formal rules of evidence.<sup>379</sup> Sanctions could be imposed to ensure compliance with this procedure.<sup>380</sup> Since the tendency to admit evidence improperly may already be somewhat reduced (as there is no jury to potentially sway),<sup>381</sup> this, combined with the threat of sanctions, may encourage attorneys to “play by the rules” so that the arbitration will proceed smoothly and quickly.<sup>382</sup> As such, evidentiary problems can be precluded before they become an issue, ensuring that the arbitrator will not be privy to any prejudicial evidence and that the parties receive a fair and just proceeding.<sup>383</sup>

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373. *New Trends*, *supra* note 31, at 13; *see also supra* notes 254-58 and accompanying text.

374. *See supra* notes 254-58 and accompanying text.

375. *See supra* notes 254-58 and accompanying text.

376. *See New Trends*, *supra* note 31, at 13 (noting that such loose evidence rules “can be troublesome”).

377. *See infra* notes 378-83 and accompanying text.

378. Spelfogel, *supra* note 23, at 247.

379. This would allow the parties more control over the procedure and hold them accountable for any errors which may disturb the award.

380. Currently, sanctions are available for bringing frivolous claims to the arbitration. Waks & Gadsby, *supra* note 52, at 476. Sanctions are also used to ensure arbitration participants comply with the discovery provisions. *Id.* at 483. Sanctions could be used in the same manner to prevent admission of evidence which the lawyers know would not be admissible in court. Without sanctions, such a system would have no enforcement mechanism and would probably not be effective.

381. At trial, lawyers often will attempt to admit evidence which they know is not admissible in hopes of swaying the jury to their side.

382. For the employer then, the arbitration will still proceed faster than trial, yet the employee will still be protected as she would in a court adjudication.

383. This will eliminate the harsh effect of a non-appealable award because there will not be cause for dissatisfaction as the parties were treated fairly.

#### D. *Written Opinions*

Generally, arbitrators "are not required to find facts, give reasons for awards, or describe the processes by which they arrived at their decisions."<sup>384</sup> While the trend toward requiring written decisions is growing,<sup>385</sup> this practice is still not standard.<sup>386</sup> To maintain some semblance of uniformity of decisions, written opinions should be issued by the arbitrators in all employment disputes.<sup>387</sup> "Express requirements that the arbitrator include findings of fact and a discussion of applicable law" are also preferred so that the likelihood of the decision being accepted is improved.<sup>388</sup> This is especially important in the employment field, given the high number of disputes arising and the similarly high number of claims which are being resolved outside the courts.<sup>389</sup> Requiring written decisions would make the arbitrators more accountable for their decisions,<sup>390</sup> would help to ensure conformity with legal precedent and the current developments in employment law,<sup>391</sup> and would reduce the need or desire for rehearings.<sup>392</sup>

#### E. *Standard of Review for Statutory Claims*

The final manner in which the arbitration contract can be fortified to protect the rights of all parties involved is to include a provision for reviewability of statutory claims.<sup>393</sup> It has been shown that courts cannot be indifferent to legal errors in these cases because the unreviewability of the "arbitrator's construction of the statute does not adequately protect the public interest."<sup>394</sup> Allowing court review of

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384. *Stein v. Drake*, 254 P.2d 613, 617 (1953) (citing *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.*, 174 P.2d 441 (Cal. 1946), *overruled on other grounds by Brink v. Alegro Bldrs., Inc.*, 375 P.2d 435, 438 (1962)). *But see Brunet*, *supra* note 74, at 89 (stating that it is the common practice of labor arbitrators to write opinions).

385. The California Arbitration Act and the NYSE are two systems that require written decisions.

386. Because arbitration claims do not usually result in written opinions there is nothing to use as precedent. *Thomas*, *supra* note 79, at 795.

387. *Waks & Gadsby*, *supra* note 52, at 464; *see also Allison & Stahlhut*, *supra* note 58, at 173.

388. *Kilroy & Sachs*, *supra* note 42, at 36.

389. *See supra* notes 31-53 and accompanying text.

390. *Waks & Gadsby*, *supra* note 52, at 465.

391. *Id.*

392. *Id.*

393. *See infra* notes 394-401 and accompanying text.

394. *Berger*, *supra* note 31, at 718-19. This is because "private forums, such as

such arbitration decisions would, of course, remove some of the finality of the arbitrator's decision; however, with implementation of the proper procedural safeguards, the law should have already been adequately followed making review unnecessary.<sup>395</sup> Only when a breakdown in this process occurs does a safety net become necessary.<sup>396</sup>

In such situations, to expedite the process and prevent unnecessary delay, a reviewing court should defer to the factual findings of the arbitrator, much as deference would be given to a trial court.<sup>397</sup> As such, efficiency over trial may still be maintained in that the parties do not have to re-arbitrate the whole case.<sup>398</sup> Accordingly, the goals of the arbitration will have been carried out.<sup>399</sup>

By implementing the above procedural protections and including them in the contract to arbitrate, arbitration of employment disputes will be more fair during the proceedings.<sup>400</sup> As a result, there will be less chance that the parties will be disgruntled after the process, thereby leading to greater finality and satisfaction with the process overall.<sup>401</sup>

## VII. CONCLUSION

Alternative dispute resolution is being implemented in many arenas.<sup>402</sup> This has been especially true in the area of employment law, largely due to the high number of disputes arising each year as a result of Congress granting numerous statutory rights to employees<sup>403</sup> and to the changing dynamics of the workplace, resulting in the downturn of at-will employment.<sup>404</sup> With the implementation of arbitration, the favored method of alternatively resolving employment disputes, comes

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arbitration, may resolve disputes on the basis of nonlegal social mores" whereas "public forums . . . protect basic legal values." Malin & Ladenson, *supra* note 58, at 1189. Since statutory rights are generally enacted for public policy reasons, and not as a means for individual redress, public accountability is important. *See id.*

395. The goal is to increase finality by improving the procedure overall. However, despite this safeguarding, it will sometimes be necessary for a limited review to ensure fairness overall.

396. If the arbitrator's decision adequately reflects the law, and fairness has prevailed throughout the proceeding, the losing party would have no cause and no incentive to appeal.

397. Malin & Ladenson, *supra* note 58, at 1238.

398. *See id.*

399. *See supra* notes 58-98 and accompanying text.

400. *See supra* notes 320-99 and accompanying text.

401. *See supra* notes 320-26 and accompanying text.

402. *See supra* notes 14-27 and accompanying text.

403. *See supra* notes 42-51 and accompanying text.

404. *See supra* notes 35-41 and accompanying text.

apprehension as to the legal rights being placed in jeopardy by opting out of the jury system.<sup>405</sup> This is of great concern primarily because this opting-out is not always bargained for by an employee, but is generally found to be binding nonetheless.<sup>406</sup>

Therefore, to ensure that both sides are truly knowledgeable about the arbitration process, and to preserve important rights, certain procedures should be detailed in any arbitration agreement before being presented to an employee for a signature.<sup>407</sup> By implementing the above procedures with respect to arbitrator selection,<sup>408</sup> discovery,<sup>409</sup> rules of evidence,<sup>410</sup> written decisions,<sup>411</sup> and reviewability of statutory claims,<sup>412</sup> arbitration proceedings for employment disputes should proceed in a fair manner for all involved. In addition, arbitration proceedings will be completed more quickly and in a less hostile environment than the courtroom.<sup>413</sup> As such, the goals of arbitration will be upheld, as will the rights traditionally afforded by trial, and both parties will benefit from the process.<sup>414</sup>

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405. See *supra* notes 233-58 and accompanying text.

406. See *supra* notes 189-214 and accompanying text.

407. See *supra* notes 320-401 and accompanying text.

408. See *supra* notes 327-57 and accompanying text.

409. See *supra* notes 358-71 and accompanying text.

410. See *supra* notes 372-83 and accompanying text.

411. See *supra* notes 384-92 and accompanying text.

412. See *supra* notes 393-401 and accompanying text.

413. See Knight, *supra* note 16, at 251.

414. See *supra* notes 273-401 and accompanying text.



