ENSURING ENFORCEABILITY & FAIRNESS IN THE ARBITRATION OF EMPLOYMENT DISPUTES
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ABSTRACT

Private arbitration of employment law claims has become common in recent years. The Supreme Court has shown a strong preference for requiring that an employee pursue an employment claim through an arbitration program rather than seeking to enforce his or her rights in court. At the same time, legislation has been introduced to try to protect the rights of employees who, without an arbitration program in place, would have the opportunity to assert their statutory rights in court. This article explores what safeguards should be in place to assure that employers can rely on the enforceability of an arbitration program because that program provides employees with a fair process in which to assert their claims. The article reviews numerous court decisions as well as guidelines and requirements developed by several arbitration services to advise what an enforceable arbitration program would look like.
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Employers continue to turn to arbitration as a means to resolve issues arising in the employment relationship. At the same time, concerns have been expressed about the fairness of requiring employees to rely on arbitrators to enforce their statutory rights. This concern has resulted in the introduction of the Arbitration Fairness Act of 2009 in the U.S. House to limit the enforceability of "pre-dispute" arbitration agreements in the employment setting.1 The bill states that no predispute arbitration agreement would be enforceable if it requires arbitration of an employment dispute or a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.2

The Arbitration Fairness Act has support based on concerns about the current use of arbitration to resolve both employment and consumer disputes. The sponsor of the similar 2008 Senate Bill, Russ Feingold, expressed concern that the use of mandatory arbitration in employment and consumer disputes has been “slowly eroding the constitutional rights of Americans.”3

The findings underlying the bills support some regulation of arbitration:

1) Mandatory arbitration undermines the development of public law for civil rights because there is no meaningful review of arbitrators' decisions.

2) Mandatory arbitration is a poor system for protecting civil rights because it is not transparent.

3) Private arbitration companies are sometimes under great pressure to devise systems that favor corporate repeat players.

4) Arbitration clauses often include unfair provisions that deliberately tilt the systems against individuals.4

The sponsor of both the 2008 and 2009 versions of the bill, Rep. Hank Johnson, has stated that big business has “warped and corrupted the arbitration process.”5 A representative of the National Employment Lawyers Association (NELA) characterized the current system of arbitration as “separate and very unequal.”6 Rep. Linda Sanchez, as chair of the House Commercial and Administrative Law Subcommittee of the Judiciary Committee, stated in 2007 that “To be a respected and reasonable alternative to the courts, arbitration must provide a level and fair playing field.”7

At the same time, proponents of arbitration have spoken out against the bills. The executive director of the Council for Employment Law Equity (CELE), an attorney who represents management, called mandatory 

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4. H.R. 1020.
employment arbitration “a useful, fair and productive fixture on our American employment landscape.” He believes that the bills would have “far-reaching and disastrous impacts on American jurisprudence and American society.”

Academic studies presented at hearings on the 2008 bills showed that parties with an inferior bargaining position achieve better or at least comparable results through arbitration. At the Senate hearing, the CELE representative claimed that employees participating in arbitration have a 63% chance of prevailing, whereas employees only prevail 43% of the time in court. Similarly, the American Arbitration Association (AAA) found in a 2006 study that employees had a favorable outcome in 77% of cases going to arbitration. Regarding the process, a professor suggested at the Senate hearing that with passage of the bill, employees would find it more difficult to find a lawyer, and would have less satisfactory resolution of their claims over a longer period of time. The loss of arbitration of employment disputes was projected to quadruple the costs of dispute resolution by approximately $88 million.

A representative of Public Justice testified at the Senate hearing against “palliative” approaches that would allow mandatory arbitration under

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9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
some restrictions to make it more equitable.\textsuperscript{15} He called arbitration “largely a system above and beyond the law.”\textsuperscript{16} Yet the AAA suggested at the House hearing on Bill 3010 that Congress should enact “due process safeguards”\textsuperscript{17} to apply to mandatory arbitration. The AAA has adopted procedures intended to protect the due process rights of participants in the arbitration of employment disputes.\textsuperscript{18} These include the right to have counsel present and the right to participate with only reasonable costs, as well barring limitations on remedies.\textsuperscript{19} An AAA representative suggested at the Senate hearing that its standards were required by law, then fairness in employment arbitration would be mandatory.\textsuperscript{20}

I. OVERVIEW

Concerns about the fairness of some arbitration programs are supported by the court decisions which have refused to enforce certain mandates to arbitrate rather than litigate statutory claims. Typically these decisions result from an employee’s pursuit of a statutory claim despite the existence of an arbitration agreement with his or her employer. This article

\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{18} AAA Employment Arbitration Rules and Mediation, available at http://www.adr.org/sp.asp?id=32904#1
\textsuperscript{19} Id.
explores what safeguards should be required, rather than suggested, based on guidance from the AAA and other organizations or arbitrators and on the decisions of the federal courts which have reviewed arbitration agreements and decisions.

The U.S. Supreme Court has shown significant support for arbitration as an alternative to litigation of employment law disputes. In applying the Federal Arbitration Act (FAA), the Court has held that its purpose is “‘to reverse the longstanding judicial hostility to arbitration agreements … and to place them on the same footing as other contracts.’”21 To achieve this purpose, the Court has supported “rigorous enforcement” of agreements to arbitrate to give effect to the contractual rights and expectations of the parties.22

The Supreme Court’s generally favorable view toward the use of arbitration has been applied to employment disputes. Employment discrimination claims of all kinds, as well as other statutory claims, are arbitrable.23 In ordering the arbitration of a claim arising under the Age Discrimination in Employment Act, the Supreme Court found no reason to treat civil rights statutes any differently than other important statutes that may

be enforced under arbitration agreements. The Court stressed that pre-dispute arbitration clauses should be enforced unless the employee shows that Congress specifically intended to preclude arbitration. Since that decision, courts have followed its guidance and typically supported the arbitration of discrimination claims.

Perhaps because of this favorable view of arbitration, it is estimated that at least 500 employers and five million employees were covered by its employment arbitration programs in 2000. Under collectively bargained agreements, arbitration has always been a mainstay. One study compared the use of arbitration in those settings to arbitration of disputes in non-unionized settings. The highest disciplinary appeal proportion was for union procedures at 55%, with the lowest appeal proportion for other nonunion procedures at 11%, and with nonunion procedures that include mandatory arbitration occupying a middle position at 34%

Despite this preference for arbitration, arbitration agreements are not always valid. In assessing whether an arbitration agreement or clause is

29. Id.
enforceable, courts “apply ordinary state-law principles that govern the formation of contracts.”\textsuperscript{30} A contractual clause is unenforceable if it is both procedurally and substantively unconscionable.\textsuperscript{31} Courts must also determine whether the arbitration process affords the employee sufficient opportunity to assert the statutory rights that could otherwise pursue in court, based on the fairness of the process.\textsuperscript{32}

Section 4 of the Federal Arbitration Act (FAA) allows a party to an arbitration agreement to petition a district court to compel arbitration in accordance with the parties’ preexisting agreement.\textsuperscript{33} Under Section 3, an employer may seek a stay of court proceedings to allow the dispute to go to arbitration.\textsuperscript{34} A party seeking to stay proceedings under section 3 or to compel arbitration under section 4 must demonstrate “that a valid agreement to arbitrate exists, that the moving party is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes within the clause's scope.”\textsuperscript{35} This proof is required because “a party seeking to substitute an arbitral forum for a judicial forum must show, at a bare minimum, that the protagonists have agreed to arbitrate some claims.”\textsuperscript{36}

\textsuperscript{30} Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 (9th Cir. 2002).
\textsuperscript{32} Id. See also, Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997).
\textsuperscript{34} Id.
\textsuperscript{35} Intergen v. Grina, 344 F.3d 134, 142 (1st Cir. 2003).
\textsuperscript{36} McCarthy v. Azure, 22 F.3d 351, 354-55 (1st Cir. 1994).
The FAA does not, however, includes standards to ensure the conscionability and fairness of the arbitration proceedings. Federal courts have considered issues of fairness in addition to issues of unconscionability. After the *Gilmer* Court gave its general approval of arbitration of employment disputes, the District of Columbia Circuit Court set up guidelines for creating an arbitration agreement that would be fair, and therefore enforceable.37 According to that court, an agreement to arbitrate employment-related statutory claims would be fair if it provides the following:

1) adequate discovery
2) a written award is required
3) employees have access to all types of relief that they could recover in court
4) employees should not be required, as a condition of going to arbitration, to pay unreasonable costs, or any arbitrator fees or expenses.38

Commentators have recognized that “infusing arbitration with due process protections undeniably will influence the public's perception of the process.”39 Drafters of a protocol on arbitration of employment disputes hoped that by "specifying clear and stringent quality standards for arbitration," the protocol would help "overcome[] the high level of skepticism and

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38 Id.
criticism” attributed to some arbitration arrangements. Adherence to certain standards of fairness might allow employees to see “the benefits [arbitration] provides to the claimant, the most important of which may be that it is an accessible process in which to seek redress for an employer's violation of the anti- discrimination laws.” This includes providing employees with an opportunity to "tell their side of the story."

Some hope that employment arbitration can develop into a “vehicle that provides an efficient, cost-effective method for resolving employees' statutory claims.” These proponents of arbitration hope that employers would benefit from decreased costs of litigation as well as avoiding potential significant liability from jury awards. Employees could also benefit from a less costly arbitration procedure if it that forum is more accessible them and can be used to resolve claims that might not have been brought in court, given the greater expense of litigation. The goal of an arbitration system would be to provide quicker and that are more effective for employees. In addition, the relative simplicity of arbitration may mean that the employee's claim is

40. Id. at 397.
41. Id.
42. Id.
43. Martin H. Malin, Ethical Concerns in Drafting Employment Arbitration Agreements after Circuit City and Green Tree, 41 Brandeis L. J. 779, 786-87 (2003).
44. Id. at 786-87.
45. Id. at 787.
46. Id.
decided on its legal merits, instead of being dismissed prior to trial on a motion. 47

Even though the Supreme Court limited the avoidance of arbitration based on the costs of the process, sponsors of the Arbitration Fairness bills and various commentators have taken the position that an employee should not be required to arbitrate statutory claims if that process does not allow that employee to “effectively vindicate her statutory rights.” 48 In other words, even in arbitration, an employee should still be able to enforce her rights under the applicable statutory law. 49 Because of the Supreme Court’s bias in favor of arbitration, however, the employee seeking to avoid arbitration bears a burden of persuasion that is difficult to meet. 50 That review generally looks at the circumstances surrounding an individual employee’s entrance into an arbitration agreement, rather than systemically reviewing the fairness of the arbitration process. 51 Under such an approach, the employee seeking her day in court will be likely to lose. 52

Even so, an arbitration plan that is not drafted carefully can subject the employer to needless litigation to decide whether the employee has separate statutory rights to be enforced in court. An employer could still try to

47. Id.
48. Id. at 792.
49. Id.
50. Id. at 793.
51. Id.
52. Id.
use arbitration as a process to force claims by employees into a process that will be more favorable to the employer's position and potentially negative for employees. Commentators have noted that such an approach may lead to an arbitration agreement that “undermines the overall legal framework by stacking the deck in the employer's favor.”

Instead, some commentators have suggested that employers can think of arbitration as a procedure that will be less formal, less expensive and less time consuming compared to litigation, that still preserves the ability of employees to assert their rights under the applicable statutes. Employees may bring more claims with an arbitration system in place, because arbitration may be more accessible than litigation for many employees. However, if litigation expenses are reduced and the employer is less likely to become liable under high jury awards, the employer may be better off. In addition, arbitration can protect the employer from negative publicity if it is set up as a private forum. Under this approach, the employer adopts a process that still protects employees' rights and produces a just result. This article will demonstrate how that result can be achieved without totally abandoning arbitration as a means of resolving employment disputes.

II. FORMATION OF THE AGREEMENT

53. Malin, supra note 37, at 814.
54. Id.
55. Id. at 815.
56. Id.
An employer may not be able to compel arbitration of an employment dispute without valid assent to an arbitration program by its employees. Since the Supreme Court’s decision in \textit{Gilmer}, numerous federal district courts have addressed the legitimacy of an agreement to arbitrate employment disputes.\footnote{Michael H. LeRoy & Peter Feuille, Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future, 18 Ohio St. J. Dis. Res. 249, 304-05 (2001)} Employees may argue that no agreement existed to arbitrate a dispute, based on the circumstances surrounding their hiring or the implementation of the arbitration program.\footnote{See, e.g., \textit{Tinder v. Pinkerton Security}, 305 F.3d 728 (7th Cir. 2002); \textit{Oblix Inc. v. Winiecki}, 374 F.3d 488 (7th Cir. 2004)} Enforcement may be more difficult when the employer implements an arbitration program after the employee with a dispute has been hired.\footnote{See, e.g., \textit{Tinder v. Pinkerton Security}, 305 F.3d 728 (7th Cir. 2002).} However, as described below, employers can implement an enforceable program anytime if employees are given adequate notice and an explanation of how the program will still allow them to pursue claims.

Researchers have found that since \textit{Gilmer}, the argument that the employee never agreed to arbitration was effective for employees in 32.1 percent of the district court cases surveyed.\footnote{LeRoy and Feuille, supra note 56, at 304-5.} This study found that employees were particularly successful at the appellate level on the issue of whether an agreement existed, showing that a valid agreement to arbitrate did not exist in
nine of fifteen cases post- *Gilmer*. Some courts reviewed in this study concluded that an arbitration agreement could not be enforced against employees who were intended to be covered by it because the arbitration procedures were “too indefinite—and therefore, illusory.”

**Assent by current employees**

A reviewing court must determine an agreement to arbitrate disputes has in fact been reached between the employer and employee. *Nguyen v. City of Cleveland*, 312 F.3d 243 (6th Cir. 2002). Section 3 of the Federal Arbitration Act, requires arbitration agreements to be written, but does not require them to be signed. Therefore, written acceptance of employer's policies is not a statutory prerequisite to enforceability.

An employee may agree to the arbitration of employment disputes by continuing his or her employment after the implementation of the arbitration program. Such an agreement was found where an at-will employee continued in her job past the effective date of her employer's arbitration program. This arbitration program brochure provided expressly that employees agreed to submit claims to arbitration by remaining employed after

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61. Id.
62. Id.
63. *Nguyen v. City of Cleveland*, 312 F.3d 243 (6th Cir. 2002).
64. 9 U.S.C. §3.
effective date of program. The validity of the agreement to arbitrate was supported by state law holding that at-will employees give adequate consideration for employer promises that modify or supplant an at-will employment relationship by remaining on job.

An arbitration agreement has been enforced despite the lack of an employee's signature on the arbitration agreement, which waived her right to bring discrimination claims in court. The agreement was enforced because it provided that her continued employment constituted assent. In support of its enforcement of the agreement, the court noted the employee's education and experience as a manager. The court also noted that she had sufficient time before signing the agreement to consult an attorney, and she could have decided not to waive her rights. Under the FAA, agreements to arbitrate need only be written, not signed. The court relied in part on state law, under which continued employment can constitute acceptance.

In enforcing the agreement to arbitrate, it was important that the agreement included a provision that stipulated that continued employment
would constitute acceptance. Thus, the agreement could not be accepted by unilateral action. In addition, unlike other cases, this employee did not tell her supervisor that she did not assent to the agreement.

An employee’s recollection about the arbitration program is not considered essential to its enforcement. One employee was compelled to arbitrate her Title VII claim, even though she claimed that she did not see or review the terms in the brochure describing the program, which was provided with her paycheck. Enforcement was justified by the program’s feature in an internal monthly magazine, and because it was referenced in a poster that was displayed in all of the employer’s work sites, and was described in a payroll stuffer. These types of publication efforts satisfy an employer’s obligation to inform its employees that an arbitration program is being implemented, regardless of whether an employee chooses to avail herself of that knowledge.

Most courts will still require some evidence of an employee’s agreement to arbitrate employment disputes. An employer may not be able to enforce an agreement to arbitrate without evidence of an enforceable agreement. One agreement was not enforced where the employer could not

74. Id. See also Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005)(lack of employee’s signature on written dispute resolution policy did not preclude it from being “agreement in writing”).
75. Id.
76. Id.
77. 305 F.3d at 730-31. See also, Trogden v. Pinkerton’s Inc., No. 4:02-cv-90494, 92 FEP Cases 298 (S.D. Iowa May 8, 2003)(employee bound to arbitrate by continuing employment after she received arbitration provision in employee handbook).
78. Id.
produce authenticated documents regarding the creation of such an agreement, and the employment application which the employee signed included only her promise to arbitrate employment disputes, without any similar promise on the employer's part. A promise to employ her at will was not sufficient consideration for the arbitration agreement, and an acknowledgment that she agreed to the terms of the dispute-resolution handbook does not show that she agreed to terms of the dispute-resolution program.

Effective communication with employees about an arbitration program can help to show that an agreement has been created. An employer's failure to show that the material terms of its dispute resolution plan were communicated to its employees could show that the employer had created an enforceable agreement to arbitrate under state law. The employer must establish that it provided the plan to its employees, and that the employee trying to avoid the plan actually received it. Even though a plan may be described on the employer's website, the employer must establish that the employees knew that the description was available there and had the necessary equipment to access the information. In the alternative, the employer could

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80. Id.
82. Id.
83. Id.
show that employee received a hard copy of at least a summary of the plan.\textsuperscript{84}

Without such communication to employees, an employee’s continued employment after the adoption of the plan typically cannot constitute assent to the plan.\textsuperscript{85}

A training session at the time an arbitration plan is introduced also can help establish an agreement to arbitrate. Such training should document the distribution of the written plan, or at least a summary of it.\textsuperscript{86} In addition, the official who conducts the training session should explain the working of the plan and employees’ rights.\textsuperscript{87} The trainer should also cover other material terms, such as the fact that the employer deems continued employment to constitute acceptance of the plan.\textsuperscript{88}

An employee may argue that he or she is not be bound by an agreement to arbitrate if he or she did not actually agree to have employment disputes go first to arbitration.\textsuperscript{89} Yet assent can be based on an employees’ acknowledgement of the employer’s use of the arbitration process.\textsuperscript{90} For example, an employee assented to be bound by the terms of her employer’s arbitration agreement by signing an “Acknowledgement of Receipt of Rules

\textsuperscript{84}Id.
\textsuperscript{85}Id.
\textsuperscript{86}Id.
\textsuperscript{87}Id.
\textsuperscript{88}Id.
\textsuperscript{89}See May v. Higbee Co., 372 F3d 757 (5th Cir. 2004); Circuit City Stores Inc. v. Najd, 294 F.3d 1104 (9th Cir. 2002).
\textsuperscript{90}May v. Higbee Co., 372 F3d 757 (5th Cir. 2004).
for Arbitration.” \(^91\) That acknowledgement, stating that employee agreed to provisions of the arbitration process by accepting and continuing employment with company, notified the employee that she would be bound to arbitrate through her continuation of her employment. \(^92\)

An employee may assent to an employer's requirement of arbitration of employment disputes, based on his failure to opt out of program. \(^93\) One employee was bound to arbitrate claims even though he did not affirmatively opt in, because he had signed an acknowledgment form which explained the effects of his declining to opt out, and also gave the steps he could use to express his disagreement. \(^94\) The parties had come to an agreement to arbitrate employment disputes since his inaction was indistinguishable from overt acceptance. \(^95\)

Employees were bound by arbitration provisions where they were given sufficient notice that their continued employment, as clearly stated in agreements, constituted acceptance of arbitration under state law. \(^96\)

\(^91\) Id.
\(^92\) Id. See also Tinder v. Pinkerton Security, 305 F.3d 728, 730-34 (7th Cir. 2002)(employee bound after signing acknowledgment form indicating receipt of an employee handbook and remaining employed following her receipt of a payroll stuffer that instituted a mandatory arbitration program).
\(^93\) Circuit City Stores Inc. v. Najd, 294 F.3d 1104 (9th Cir. 2002).
\(^94\) Id.
\(^95\) Id.
Employees who denied knowing about the agreement before its implementation or contended that they were unqualified to assess its legal effect and were not given time to consult an attorney were still bound, where the agreements were mailed to employees' home addresses about two weeks before the effective date, notices concerning implementation were posted on workplace bulletin boards, and the agreements and accompanying documents were posted on company's intranet and distributed via e-mail.97

**Ability to Opt Out**

An agreement to arbitrate will more likely be binding on a current employee, if he or she had a meaningful opportunity to opt out of the arbitration provision when signing the agreement, and still preserve his or her job.98 Yet even with that ability, unequal bargaining power after the time of hire excused an employee from the restrictions of an agreement to arbitrate disputes.99 This arbitration plan was effective three months after it was announced, independent of employees' appreciation of it.100 Of course, an employee did have the option of leaving his or her employment if he or she did not like the program.101 The court refused to bind the employee where the employer has “overwhelming bargaining power.”102

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97 Id.
98. See, e.g., *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002) (upholding agreement).
99. *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007).
100 Id.
101 Id.
102 Id.
Similarly, a manager for a multi-store, multi-state home improvement supply store chain established that an arbitration clause in his employment agreement was procedurally unconscionable and therefore unenforceable.\textsuperscript{103} Given the manager's relative lack of bargaining power, subject to very different financial pressures than the employer, the agreement was unenforceable where the employee was told to agree to participation in the arbitration program or be replaced.\textsuperscript{104} The employer failed to establish that the employee should have been familiar with the terms of an arbitration program because arbitration clauses were so common in employment agreements generally or in that industry.\textsuperscript{105}

This reasoning suggests that as arbitration programs do become more common, an employer may be able to enforce an arbitration agreement without providing extensive information to its employees. However, given that a current employee can argue that he or she did not agree to participate in the program, employers should err on the side of educating current employees about their rights under a new arbitration program.

\textit{Binding new employees}

For new employees, the agreement to arbitrate may be easier to establish. At least one federal appellate court has concluded that an employer

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{103} Faber v. Menard Inc., 267 F.Supp.2d 961 (N.D. Iowa 2003).
\item \textsuperscript{104} \textit{Id.}
\item \textsuperscript{105} \textit{Id.}
\end{enumerate}
\end{footnotesize}
does not engage in illegal retaliation by refusing to hire an applicant who refuses to sign such an agreement to arbitrate arbitration disputes.\textsuperscript{106} The applicant could not reasonably have believed that employer's arbitration policy was an unlawful employment practice, and, therefore his refusal to sign agreement was not protected opposition conduct.\textsuperscript{107} When hearing the issue a second time, the court noted that if the employer were to require that all employment claims be submitted to arbitration, "no retaliation would be involved in an employer's exercise of such a right, because an employee opposing such a practice would not be engaged in any protected activity."\textsuperscript{108}

An employee who was "a highly educated managerial employee was capable of understanding the terms of the agreement."\textsuperscript{109} However, this reliance on the ability of the employee to comprehend the agreement does not necessarily mean that employees with less education or experience can void an arbitration agreement on that basis alone.\textsuperscript{110} One district court recognized that most applicants will not reject an offer of employment because they are being asked to agree that future disputes be arbitrated, regardless of their level of education or experience.\textsuperscript{111} Even so, to avoid the arbitration agreement, the

\textsuperscript{106} \textit{EEOC v. Luce, et al}, 345 F.3d 742 (9th Cir. 2003).

\textsuperscript{107} \textit{Id}.

\textsuperscript{108} \textit{Id}.

\textsuperscript{109} \textit{Morrison v. Circuit City Stores, Inc}, 317 F.3d 646, 668 (6th Cir. 2003).


\textsuperscript{111} 334 F. Supp. 2d at 941.
employee must come forward with specific evidence that the agreement to arbitrate was not voluntary.\textsuperscript{112}

Even for new hires, however, employers need to be sure that an enforceable agreement has been created. An agreement may not be enforceable if it is with a company that provided arbitration services, and the employer was only a third-party beneficiary of that agreement.\textsuperscript{113} The employer's promise of employment to induce the applicant to sign the agreement did not create an enforceable contract between the employee and the employer where the only consideration for the agreement from the arbitration company was to provide the arbitration forum.\textsuperscript{114} In addition, the agreement did not provide information about the forum or the standards by which the arbitration company should abide.\textsuperscript{115} The court concluded that the agreement too vague regarding the employer's company's obligation, and the agreement did not limit the company's ability to amend the arbitration procedures.\textsuperscript{116}

As with current employees, these cases suggest that employers need to ensure that applicants are well-informed regarding their obligation to submit any future claims to arbitration. Even if the information is not enough to

\textsuperscript{112} Id.

\textsuperscript{113} Penn v. Ryan's Family Steak Houses Inc., 269 F.3d 753 (7th Cir. 2001).

\textsuperscript{114} Id.

\textsuperscript{115} Id.

\textsuperscript{116} Id.
discourage an applicant from rejecting an offer, it may be sufficient to bind that employee to the requirement to arbitrate later in their employment.

**Agreement via Handbook**

Employers may introduce an arbitration program by describing it in an employee handbook or manual. Generally, if the arbitration program described in a handbook applies to both the employer and the employee, courts have found that an agreement to arbitrate has been created.\(^{117}\) As with other methods of introducing an arbitration program if promises in the handbook promises are vague, or can be changed at the employer’s discretion, courts have found that these agreements to arbitrate are illusory and unenforceable.\(^{118}\)

For example, a program developed by General Dynamics was unenforceable even though it was included in a personnel handbook.\(^{119}\) The reviewing court indicated that it might have enforced the agreement “if a reasonable employee … would have known, given prior dealings between the company and its work force, that personnel handbooks operated as the functional equivalents of contracts.”\(^{120}\) Under those circumstances, the inclusion of a new policy in a revised handbook might have let employees

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\(^{117}\) LeRoy, supra note 52, at 304-05.

\(^{118}\) Id.

\(^{119}\) Campbell v. General Dynamics Gov’t Systems Corp., 407 F.3d 546 (1st Cir. 2005).

\(^{120}\) Id.
know that the new policy was binding on them. The court concluded that without such a past practice, the company’s issuance of a new handbook alone did not give employees adequate notice that the arbitration was binding on them.

An employee handbook may not be sufficient to show that continued employment creates an agreement to arbitrate employment disputes, without an express agreement to arbitrate. One federal court refused to enforce an arbitration program included in an employer’s “employee solution program booklet,” which required employees to arbitrate claims against the employer. Continued employment by current employees after the booklet was distributed was insufficient to establish an agreement to arbitrate, since the employer made no similar promise to arbitrate its claims against employees.

The wording of the booklet also made it unenforceable. No mutual agreement could be found where the booklet specifically stated that it “did not affect any other terms or nature of the employee’s performance,” that it was “not an employee agreement,” and that the “employer reserved the right to modify or discontinue the program at any time.” This disclaimer suggested to the court that the employer made nothing more than an illusory promise, and an illusory promise cannot constitute consideration for an agreement to

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121 Id.
122 Id.
124 Id.
arbitrate. The court also expressed doubts about basing an individual contract on the employee’s continuing to work for his employer, where no agreement was negotiated or signed by the employee, and was set up to prevent employees from bringing their statutory claims in a judicial forum.

As with an express arbitration agreement, the employer must ensure that the employee has received and read the handbook so as to bind that employee to its contents. For example, an employer’s e-mail announcement and a reference to a booklet explaining its new mandatory arbitration policy did not provide adequate notice of the policy so as to create an enforceable contract. The e-mail was distributed company-wide and contained a link to an online version of the booklet setting forth the details of the policy, but the reviewing court found that nothing in the e-mail heading would have compelled an employee to open it. In addition, the employee seeking to avoid arbitration of his dispute denied receiving the e-mail or the booklet, which the employer could not disprove.

125. Id. See also Phox v. Atriums Management Co. Inc., 230 F. Supp. 2d 1279 (D. Kan. 2002)(arbitration clause in employee handbook is not enforceable because employee handbook and employee acknowledgement form expressly provide that handbook is not contract).

126. Id.


129. Id.

130. Id. See also Phox, 230 F. Supp. 2d at 1282 (No meeting of minds where employee did not sign or initial page of employee handbook containing arbitration clause and signed form acknowledging receipt of handbook without knowing it contained arbitration clause).
Even if the employee had received the e-mail and the booklet, he would not be compelled to arbitrate his discrimination claims, where the e-mail did not clearly advise him that arbitration was mandatory, and it failed to state directly that under the arbitration program, he was giving up his right to a jury trial, and that he was accepting the program requirements by continuing his employment there. Because the booklet was ambiguous and inconsistent, he could have read the arbitration language as offering only a permissive alternative to litigation.

These courts have established communication requirements for an arbitration agreement to be enforceable. Although an employee or applicant may only be able to choose between the program and seeking employment elsewhere, providing employees with information about the program should help to ensure that their rights are protected. To do so, however, courts need to be consistent in requiring such communication when reviewing arbitration agreements, rather than allowing employers to implement arbitration programs without fully informing their employees.

Employer Discretion May Undermine Agreement

The enforceability of an arbitration also depends in part on whether it represents a true agreement between an employer and its employees, rather than a policy dictated by the employer alone. An agreement to arbitrate must
bind both the employer and the employee to be enforceable. Arbitration plans may lose their enforceability if they provide too much discretion to the employer or the arbitrator. For example, employees whose arbitration agreement required that all employment claims be arbitrated but gave their employer unilateral power to modify its terms and states that it is not a contract were not required to arbitrate their claims. Even though the agreement may have recited included consideration in exchange for the employees' promise to arbitrate, the fact that employees were irretrievably bound to its terms while the employer was bound to nothing rendered the agreement illusory and thus non-existent.

Discretion for the arbitrator may also undermine the agreement. One agreement gave too much discretion to the arbitrating agency under the Arbitration Agreement used by the employer. The employer had commissioned an agency “to arbitrate and resolve any and all employment-related disputes between the Company's employees (and job applicants) and the Company.” Even after the agency amended its rules, the agency could still modify or amend the rules even after the employee signed the Arbitration Agreement. The agreement was unenforceable because the agency had the

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135 Id.
137 Id.
138 Id.
right to eliminate the rule that was supposed to give employees the right to enforce the rules and procedures that were in effect when he or she signed the arbitration agreement.\textsuperscript{139}

In contrast to that unenforceable agreement, an employer's written dispute resolution policy that it could unilaterally modify was enforceable, despite the employee's contention that employer's modification power renders its promise illusory.\textsuperscript{140} The agreement was enforceable in part because the employer could only modify the policy after giving notice to its employees.\textsuperscript{141} Moreover, the employee was assured that the rights included in the policy that was in effect at the time he or she made a claim would be applied to that claim.\textsuperscript{142}

As with an express agreement to arbitrate, an arbitration program contained in a handbook may only be enforceable if the employer is also bound to it. An agreement was not enforceable against an employee where the employer reserved the right to “modify or cancel provisions of employee handbook at its sole discretion,” which included the terms of the arbitration program\textsuperscript{143} Even if an employer did not exercise its right to revise or cancel the arbitration agreement before its employee filed suit, the program was

\textsuperscript{139} Id.

\textsuperscript{140} Caley, 428 F.3d at 1364-66.

\textsuperscript{141} Id.

\textsuperscript{142} Id.

\textsuperscript{143} Phox, 230 F. Supp. 2d at 1282.
unenforceable since the employer had the unilateral right to change the program when or after the employee signed the employee acknowledgment form. The employer's “promise of employment” was not sufficient consideration to bind its former employee to the arbitration program, since such a promise was illusory.

Knowing agreement

In addition to showing that an agreement was reached, an employer must show that the employee entered into the agreement to arbitrate knowingly to enforce that agreement. For example, an employee was not bound to arbitrate a sexual discrimination claim because those employees had not “knowingly entered into the agreement to arbitrate employment disputes.” As applicants for sales representative position, they were required to sign forms that include an agreement to “arbitrate any dispute, claim or controversy required to be arbitrated under the rules of any organization with which the employees registered.” The employees were not bound to that agreement where arbitration was not discussed when they signed the forms,
and they were not provided with the manual including the actual terms of the arbitration agreement.\footnote{Lai, 42 F.3d at 1301.}

Like the inability to opt out, the inability of an employee to reject an arbitration program shows a lack of agreement. Where an employee never said anything to his employer or signed anything to indicate acceptance of his employer’s newly imposed dispute-resolution policy, which required employees to arbitrate all job-related claims, the employee did not enter into an “agreement” with the employer to arbitrate his employment discrimination claims.\footnote{Bailey v. FNMA, 209 F.3d 740 (D.C. Cir. 2000).}

An employee’s failure to reject a proposal to arbitrate, without more, does not necessarily evidence the employee’s assent to be bound to arbitration. Where the employer presented the policy as a “condition of employment,” but there was some question as to whether a current employee could be terminated for refusing to accept a new arbitration policy.\footnote{Id.} Therefore, the employee had reason to assume that his job was not in jeopardy under existing law, and he signaled nothing when he remained in employer’s employ.\footnote{Id.}

Like the decision in Bailey, employees who were discharged for refusing to sign a new employee handbook that included a compulsory-arbitration provision regarding employment-discrimination claims did not
have an objectively reasonable belief that such a provision was an unlawful employment practice.\(^\text{153}\) The employees’ refusal to sign that handbook did not was not considered to be protected activity that would provide the basis for a claim of retaliation. The fact that the agreement may have been unenforceable or even illegal does mean that an employer is retaliating by requiring that employees sign such agreements as a condition of employment.\(^\text{154}\)

To ensure that employees have entered into an enforceable agreement to arbitrate, the employer should ask employees to sign an affirmation stating that he or she had read the notice regarding the implementation of the arbitration program.\(^\text{155}\) One court held that an arbitration agreement could not be enforced where the employee stated that he did not read the notices about the program, and did not discover that he had waived his right to bring a claim in court until the employer asserted that his claims should go to arbitration.\(^\text{156}\) Considering the totality of the circumstances, the employer must show that its communication to employees “would have provided a reasonably prudent employee notice of the waiver,” based on the communication method used, the circumstances in that workplace, and the content of the notice.\(^\text{157}\)

\(^{153}\) Weeks v. Harden Manufacturing Corp., 291 F.3d 1307 (11th Cir. 2002).

\(^{154}\) Id.

\(^{155}\) Campbell, 407 F.3d at 554-55.

\(^{156}\) Id.

\(^{157}\) 16 AD Cases at 1368.
A mass e-mail to employees could be an effective way to communicate about a new arbitration program, if the e-mail was clear, and included a detailed explanation of the arbitration agreement. The content of the notice to employees should inform them that continuing to work for that employer can result in a waiver of their right to bring a claim in court. Moreover, an e-mail announcement may not produce an enforceable arbitration agreement if it downplays the obligations set forth in the Arbitration Policy. Such notice should include the important fact that the arbitration program would be an employee's exclusive remedy for employment-related claims.

E-mail notice may be more appropriate where e-mails are a preferred method of communication to handle personnel matters. To rely on this method of communication, the employer would need to identify other instances where the employer has used e-mail or an intranet posting to change or add a term of employment. In addition, to ensure that the information was received, the employer should mandate that employees respond to the e-mail.

State courts have enforced arbitration agreements where the employer fully informed employees about the terms of the agreement. For example,

158. Id. at 1369.
159. Id.
160. Id.
161. Id.
162. Id.
Anheuser-Busch was able to enforce its arbitration agreement where the policy explained that “by continuing or accepting an offer of employment” with Anheuser-Busch, all covered employees “agree[d] as a condition of employment to submit all covered claims to the dispute resolution program.”¹⁶³ A letter, handbook, and explanatory materials explaining the terms of the agreement, posters explaining the program, along with a brief presentation of the new program for employees, helped make the agreement enforceable.¹⁶⁴ After receiving this information, employees became bound by signing an “Employee Acknowledgment and Understanding” form showing their understanding of the terms of the program.¹⁶⁵

To summarize, an employer can ensure that an agreement to arbitrate is created by ensuring that employees have adequate information and understanding regarding the terms and conditions of the arbitration program. For both continuing and new employees, the employer must make it clear that agreement to the terms is indicated by continuation or acceptance of employment. Without such communication and understanding, an employee may not be bound by the terms of the arbitration agreement and may be free to litigate his or her claims against the employer.

III. CONSCIONABILITY OF THE AGREEMENT

¹⁶⁴ Id.
¹⁶⁵ Id.
Even if an agreement to arbitrate has been created, that agreement may not always be enforceable. Agreements which are unconscionable may not be enforced by a reviewing court, leaving the employee free to pursue a claim in court rather than in the arbitration forum chosen by the employer.\textsuperscript{166}

The doctrine of unconscionability involves both “procedural” and “substantive” elements. “Procedural unconscionability” pertains to the process by which an agreement is reached and the form of an agreement.\textsuperscript{167} Procedural unconscionability may be shown if the agreement constitutes a contract of adhesion.\textsuperscript{168} Contracts of adhesion typically are prepared by a party with excessive bargaining power, who then presents the agreement to the other party for signature on a “take-it-or-leave-it” basis.\textsuperscript{169}

Generally, a contract \textit{is not unconscionable based only on the fact that the parties to it are unequal in bargaining power}\textsuperscript{170} The party challenging an agreement to arbitrate must also establish “substantive unconscionability.” Such an agreement includes terms that unreasonably favor one party, and to which the disfavored party does not truly assent.\textsuperscript{171}

General rules of contract law establish that gross inequality of bargaining power, combined with terms that are unreasonably favorable to the
party with greater bargaining power, may establish that the contract involved elements of deception or compulsion, or may show that the party with less bargaining power had “no meaningful choice, no real alternative, or did not in fact assent to the unfair terms.”\textsuperscript{172} Therefore, a finding of unconscionability requires two things: contractual terms that are unreasonably favorable to the drafter and a lack of a meaningful choice for the party who is expected to accept the provisions.\textsuperscript{173}

One examination of cases challenging arbitration agreements has shown that in 2002-2003, employees asserted unconscionability as a reason against enforcement of an arbitration agreement in 235 cases, and those agreements were found to be unconscionable in 100 of those cases, or 42.5\%\textsuperscript{174} \textsuperscript{174} 68.5\% of those 235 cases involved agreements to arbitrate various types of disputes.\textsuperscript{175} Significantly, courts found that 50.3\% of the arbitration agreements are unconscionable, whereas only 25.6\% of other types of contracts were found to be unconscionable.\textsuperscript{176}

\textit{Agreement to Arbitrate by Applicants}

Applicants who agree to arbitration will often be bound by that agreement later on. Often courts will find that such an agreement is not a

\begin{itemize}
\item \textsuperscript{172} Restatement §208; see also Plaskett v. Bechtel Int'l, Inc., 243 F.Supp.2d 334, 340 (D.V.I. 2003) (quoting section 208).
\item \textsuperscript{173} Bensalem Township v. Int'l Surplus Lines Ins. Co., 38 F.3d 1303, 1312 (3d Cir. 1994)); see also, e.g., Sears, 146 F.3d at 184.
\item \textsuperscript{174} Susan Randall, Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability, 52 Buffalo L. Rev. 185, 194-95 (2004).
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Id.
\end{itemize}
contract of adhesion, even though the agreement was a “take-it-or-leave-it” standardized form prepared by employer, and employee had to sign it to get job. An employee seeking to void the agreement would need to present evidence that she was unable to find suitable employment if she refused to sign agreement, or that the parties’ relative bargaining positions were otherwise significantly uneven.

Bargaining positions may be sufficiently equal where the employer had same duty to arbitrate as employee, and both the applicant and employer knew that the parties would submit disputes to an arbitrator instead of a judge or jury. It is important that the employer did not rush the applicant or deceive her as to agreement’s consequences. Equality of bargaining power is also shown by the inability of the employer to change the agreement unilaterally. The agreement’s clarity and presence in a separate, short document, rather than being buried in lengthy handbook, helps support its enforceability.

Unequal Bargaining Power

An employee may not always be bound by an arbitration agreement presented during the application process. For example, an arbitration

177. Cooper v. MRM Investment Co., 367 F.3d 493 (6th Cir. 2004).
178. Id.
179. Id.
180. Id.
181. Id.
agreement that was part of a 12-page application packet was not enforced, even though it notified the applicant that to be considered for hire, he or she was required to complete and sign the "Job Application Agreement to Arbitration of Employment-Related Disputes."\(^{182}\)

An agreement may be unenforceable if applicants are only given a short amount of time to consider an arbitration agreement.\(^{183}\) Misleading information about the agreement from a manager can also be problematic, especially if the applicants lack much education and are desperate for the jobs being offered.\(^{184}\) The agreements were also problematic because they allowed the private arbitration company to modify or amend the rules as they chose, without providing employees with the benefit of the procedural rules that were in effect when they executed agreements to arbitrate.\(^{185}\)

Similarly, an arbitration agreement was not enforced, even though it was signed by two long-time heavy-equipment operators, in part because they only had middle school educations.\(^{186}\) Those employees had very narrow options for other employment and the international corporation which employed them clearly possessed more bargaining power than those

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183. Id.
184. Id.
185. Id. See also Circuit City Stores Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002) (agreement was contract of adhesion as a standard-form contract drafted by employer with which had superior bargaining power).
operators.\textsuperscript{187} Since they \underline{no ability to negotiate}, the employees could avoid the arbitration agreement.\textsuperscript{188}

Despite these situations where an agreement was unenforceable, a bald allegation of unequal bargaining power alone does not necessarily demonstrate unconscionability.\textsuperscript{189} One arbitration agreement was enforced because the employee failed to show that she would be unable to find suitable employment elsewhere, given her “age, education, intelligence, business acumen and experience, and relative bargaining power.”\textsuperscript{190} That employee’s sophistication and experience with the company made it unlikely that she could establish unequal bargaining power.\textsuperscript{191}

An award may be enforced even if an employer failed to provide the employee with the rules that list claims that would be arbitrated, where the employee failed to fully read and question the form containing the agreement to arbitrate before signing it.\textsuperscript{192} The burden is on the employee to have his concerns addressed before signing, particularly where the form stated \underline{in bold capital letters} that signators should read it \underline{carefully}.\textsuperscript{193} Since this employee did not claim that he could not understand the form, as he held an MBA, mere

\begin{itemize}
\item \textsuperscript{187}Id.
\item \textsuperscript{188}Id.
\item \textsuperscript{189}Seawright, 101 FEP at 1823.
\item \textsuperscript{190}Id.
\item \textsuperscript{191}Cooper, 367 F.3d at 504.
\item \textsuperscript{192}Gold v. Deutsche Aktiengesellschaft, 365 F. 3d 144 (2d Cir. 2004).
\item \textsuperscript{193}Id.
\end{itemize}
inequality in bargaining power was not alone sufficient to hold the clause unenforceable.\footnote{\textsuperscript{194} Id., \textit{See also} Caley, 428 F.3d at 1371-72 (no disparity in bargaining power, where terms of policy were clear and were presented to employees with cover letter reflecting importance of policy, and its terms were not oppressive).}

One agreement was enforced where the employee seeking to avoid arbitration was a “sophisticated, educated, and experienced businesswoman.”\footnote{\textsuperscript{195} Deluca v. Bear Stearns & Co., Inc. 175 F. Supp. 2d 102 (D. Mass. 2001).} Her characteristics undermined her contention that she did not understand its contents, even though she had written on the agreement that she did not understand one clause.\footnote{\textsuperscript{196} Id. at 115.} Allegations that she only signed it to keep her job, that no one for the employer went over the handbook with her, that she was not told about her right to negotiate terms or consult an attorney, and that she was did not understand the term “at-will employee” did not make the agreement unenforceable.\footnote{\textsuperscript{197} Id.}

As shown by these cases, courts vary in their reliance on the attributes of an employee or applicant when reviewing the enforceability of an arbitration agreement. This variance in outcomes could be due to the difference in facts among the cases. However, the outcomes do suggest that the enforceability of an agreement could depend on the particular attributes of employees that enable them to understand the arbitration agreement. To ensure enforceability of an agreement, as well as protection of employees’
rights, employers should provide as much clear and detailed information about their arbitration program as possible.

Inequality of benefit

An arbitration agreement may also be invalidated because it benefits the employer more than its employees. This is similar to the mutuality requirement for finding an enforceable agreement to arbitrate. An arbitration agreement was substantively unconscionable because it compelled the arbitration of claims that employees were most likely to bring against the employer, but exempted from arbitration claims that an employer was most likely to bring against employees.\(^{198}\)

Not all claims of unequal benefit are successful. One agreement to arbitrate was enforced where it was binding on both the employer and employee, even though the employer retained the right to terminate the agreement with 90 days notice.\(^{199}\) Similarly, a court enforced an employer's dispute resolution plan despite its reservation in employer of the power to amend or discontinue the plan.\(^ {200}\)

Arbitration agreements signed at the time of hire are not necessarily unfair or the product of overreaching. Courts may be reluctant to find that an agreement is unconscionable since “employees fare well in arbitration with

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198. Ferguson v. Countrywide Credit Industries Inc., 298 F.3d 778 (9th Cir. 2002).

199. Seawright, 101 FEP at 1823.

their employers—better by some standards than employees who litigate, as the lower total expenses of arbitration make it feasible to pursue smaller grievances and leave more available for compensatory awards.” 201

Employees may attempt to avoid an arbitration agreement if it was not imposed on all employees in a fair way. One agreement to arbitrate was enforced despite the claim of the employee that she signed the agreement under duress.202 The employer required that the employee sign the agreement a few days before a co-worker's arbitration case in which she was to testify.203 The requirement was not unfair, however, since this employee was not singled out, as the employee handbook including the description of the arbitration program was to all of the employer's offices nationwide, and that distribution was not related to that one employee's upcoming testimony in her co-worker's case.204 In addition, the employee was provided two days to review the handbook and consult an attorney.205

Issues of conscionability will vary by state. However, as the above-referenced cases demonstrate, certain factors remain constant:

1) Clarity and brevity of the agreement will improve its enforceability.

2) Acknowledgement of receipt of the agreement after an opportunity to consider and ask questions will improve enforceability.

201. Oblix, Inc. v. Winiecki, 374 F.3d 488, 491 (7th Cir. 2004). See also Sens, 146 F.3d at 184 (rejecting argument that agreement was a contract of adhesion due to disparity in bargaining power); Raenmetal, 170 F.3d at 17 (same).

3) Employers must agree to be bound by the terms of the agreement in order to bind the employee.

4) Better informed employees are easier held to the terms of the arbitration agreement.

IV. FAIRNESS OF ARBITRATION

Second only to unconscionability, employees rely on the alleged unfairness of the arbitration process in seeking to avoid unfavorable results of that process. Two main reasons to challenge the fairness of the arbitration program have been the fairness of the process itself and the alleged bias of the arbitrators. Issues of fairness have not been addressed by recent Supreme Court decisions upholding employees’ obligations to arbitrate employment disputes. For example, the Court’s decision in ___ requiring that employees arbitrate an age discrimination claim relied solely on the fact that the collective bargaining agreement included discrimination claims as an arbitrable issue. The Court did not concern itself with the aspects of that arbitration process which may or may not have protected those employees’ statutory rights. This lack of attention to issues of fairness may be one reason that the Arbitration Fairness has been introduced.

One indication of dissatisfaction with the fairness of the arbitration process is the rate of appeal to the courts. In one study, union grievance procedures had the highest percentage of decisions successfully appealed at
17.3% (successful appeals as percentage of disciplinary decisions).\textsuperscript{206} Other nonunion procedures have the lowest percentage at 2.7%. In the middle are nonunion procedures involving mandatory arbitration at 11.1% and peer review at 9.9%.\textsuperscript{207}

Since the creation of the Employment Protocol, its principles and standards have been adopted by major arbitration service providers.\textsuperscript{208} One study compared the American Arbitration Association’s results in employment arbitration cases both before and after the AAAs adopted its Employment Protocol governing employment arbitration.\textsuperscript{209} These researchers found that “employers arbitrating pursuant to an adhesive arbitration clause in a personnel manual after the Due Process Protocol have less success than before the Due Process Protocol.”\textsuperscript{210} By adopting this Employment Protocol, this “self-regulation” of arbitration procedures has been seen as “making a difference in employment arbitration.”\textsuperscript{211}

Despite the adoption of these principles by major arbitration service providers, individual neutrals have failed to commit to the protocols, perhaps due to what has been termed the “assurance problem.”\textsuperscript{212}

\begin{thebibliography}{99}
\bibitem{206} Colvin, supra note 24, at 592.
\bibitem{207} Id.
\bibitem{208} Harding, supra note 33, at 402.
\bibitem{209} Id.
\bibitem{210} Id. at 415-16.
\bibitem{211} Id. at 423.
\end{thebibliography}
arbitration services may not want to adopt a set of standards "because [they are] unable to obtain the necessary assurance that other firms will contribute their fair share."\textsuperscript{213}

The protocols as they are may be inadequate because nothing in them provides reassurance that individual arbitrators and arbitration services follow through on what they have promised.\textsuperscript{214} There is no procedure in place to compel or even monitor arbitrators’ compliance, even among arbitrators or agencies who have agreed to abide by the protocols.\textsuperscript{215} This lack of a review process may lessen the likelihood that an arbitration service will comply, particularly if they see that they will be disadvantaged compared to other service providers.\textsuperscript{216} One commentator noted that "individuals frequently are willing to forgo immediate returns in order to gain larger joint benefits when they observe many others following the same strategy."\textsuperscript{217} Without such monitoring, neither courts nor legislators have anyway of knowing if individual arbitrators are following the protocols.\textsuperscript{218}

Despite this lack of oversight, some court decisions reviewing arbitration agreements have relied on the standards found in the protocol. For example, an arbitration program used by Hooters did not follow the standards

\textsuperscript{213} Id. at 423.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
articulated in the Employment Protocol. The court found that the program was unconscionable and a violation of public policy. The employee argued that the rules of the arbitration did not measure up to the standards in the Employment Protocol or the rules of some arbitration service providers.

In the Hooters' case, the employee's experts refused to arbitrate the employee's discrimination claim given the procedural rules in that arbitration agreement. The court agreed that the program was unenforceable. The Hooters' arbitration program was not void simply because it did not include the standards from Employment Protocol, but because the Employment Protocol allowed the court to determine the appropriate procedures under which employers should conduct arbitrations.

These cases show that in general, fairness for employees can be enhanced by looking to the standards established by the agencies which specialize in providing arbitrators for employment disputes. Courts must keep in mind, however, that these agencies cannot enforce these standards, and it is up to the courts to ensure that the rights of employees are protected.

Bias of Arbitrators

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220. Id.
221. Id.
222. Id.
223. Id.
224. Harding, supra note 33, at 410.
Critics of the arbitration process are concerned that an arbitrator of an employment dispute may favor the employer. The *Gilmer* Court disagreed, and based its preference for arbitration in part on its refusal to presume that the employer and employee, and/or the agency being used to conduct the arbitration proceeding, would be “unable or unwilling to retain impartial arbitrators.” Bias was not a concern for the employee in the *Gilmer* case since the New York Stock Exchange arbitration rules included procedures to avoid having biased panels. The Court also relied on the Federal Arbitration Act provision that courts may overturn arbitration decisions if there is “evidence of partiality or corruption in arbitrators.”

Since *Gilmer*, some circuit courts have expressed concern about an arbitrator’s neutrality, recognizing that the specific arbitral forum must allow for the effective vindication of that claim. The court reviewing the arbitration process used by Hooters, for example, found that it ensured a biased decision maker. In this process, one arbitrator was selected by the employee and another by Hooters, and then those arbitrators chose the third member of the panel. Bias was inherent in the selection process because the employee’s arbitrator and the third arbitrator were selected only from a list.

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226 *Id.*
227 *Id.*
230 *Id.*
of arbitrators developed by Hooters alone, giving the employer control over the majority of the panel. In fact there were no standards for whom Hooters could include on the list, including its own managers.

The bias of arbitrators was also a concern in a more recent court decision reviewing the Ryan’s arbitration procedure. The arbitration program was found to be unenforceable because the forum was not neutral. The “adjudicators” were chosen from three different lists, including two lists of both employees and supervisors and managers from another employer that used the arbitration provider and a third list of attorneys, retired judges, and other “competent legal professional persons not associated with either party.” The arbitration provider, EDSI was a private business, benefitting significantly from Ryan’s annual fee paid to it which made up over 42% of EDSI’s gross income in 2002. Given these findings, the court concluded that EDSI was biased in favor of Ryan’s and other employers because it had a financial interest in maintaining its arbitration service contracts with employers, including Ryan’s. Because EDSI had such a prominent role in

231 Id.
232 Id. at 938-39.
233 Id. at 938-39.
234 Id.
235 Id.
236 Id.
determining the lists of potential arbitrators, the bias inherent in the program made it “fundamentally unfair.”

This same court found that bias against employees and applicants is enhanced by a lack of criteria to govern adjudicators who are employed by the employers using the arbitration program. The selection procedure lacked minimum educational requirements, any requirement that arbitrators have relevant experience, or any explicit requirement of neutrality. The court was also concerned that the arbitration procedures did not require that the neutral legal “experts” professionals involved have experience or education that would provide them with substantive or procedural knowledge of either dispute resolution or the potential employment law issues that might arise.

Beyond this lack of requirement for qualifications, the bias in this program was exacerbated by the lack of a protocol governing the selection of potential arbitrators from the three pools. Members of the supervisor and employee pools were chosen by employers who had entered into alternative dispute resolution agreements with EDSI, rather than being randomly selected. The arbitration procedures also allowed the inclusion of both a supervisor and a non-supervisory employee from the same company on one

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237. Id. at 314 (citing Cole, 105 F.3d at 1482 (statutory rights include access to a neutral forum) and McMullen, supra, 355 F.3d at 493-94 (striking down arbitration scheme where employer had exclusive control over selection of arbitrator pool).
238, Id.
239, Id.
240, Id.
241, Id.
242, Id.
panel, opening the door for inappropriate assertion of influence. Also, an employer could also discuss the arbitration process or specific claims with the adjudicator who were their employees, and failed to prohibit employers from trying to improperly influence those adjudicators.

Like the Ryan’s process, an arbitration agreement drafted by a union-employer and entered into by employee as condition of employment was unconscionable because it placed control over selection of arbitrator in the hands of the union. The program required that the employee and the union engage in the alternate-strike method of choosing an arbitrator from a list of prospective arbitrators provided by union, with no specified constraints. The program also denied the arbitrator any authority to alter, change, or diminish any power granted to the union president by the union’s bylaws. The court refused to salvage the agreement by construing it to require that the union president provide a neutral list of arbitrators, where the agreement made no reference to any selection rules.

These decisions show that at least in extreme situations, where the employer has an inordinate amount of control over the arbitrator(s), a court

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243. Id.
244. Id.
245. Murray v. United Food and Commercial Workers Local 400, 289 F. 3d 297 (4th Cir. 2002).
246. Id.
247. Id.
248. Id.
will step in to invalidate the process. With such court intervention, the neutrality of the process should be protected.

**Less Control of Bias**

Despite the intervention shown in the cases outlined above, the tide may be turning against invalidating arbitration programs based on alleged bias of the arbitrator. The Supreme Court’s decision in *Green Tree* has made it clear that lower courts should not presume, absent concrete proof to the contrary, that arbitration systems will be unfair or biased.\(^{249}\) In this case involving the costs of arbitration in a consumer claim, the Court concluded that the mere possibility of a party to the arbitration agreement incurring prohibitive costs is too speculative to invalidate an arbitration agreement where the agreement was silent on the subject of arbitration costs.\(^{250}\)

In line with the reasoning in *Green Tree*, but in contrast to the decisions invalidating the biased selection procedures outlined above, one selection process used was not unconscionable, against public policy, discriminatory on basis of national origin or race, or a blatant attempt to rig the pool.\(^{251}\) The process was fair since each side played an equal role in that process and many potential arbitrators met that provision.\(^{252}\) The court refused to presume that the employer and employee would not be able or

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\(^{249}\) *Green Tree*, 531 U.S. at 84.

\(^{250}\) *Id.*

\(^{251}\) Parilla v. IAP Worldwide Servs. V1 Inc, 368 F.3d 269 (3d Cir. 2004).

\(^{252}\) *Id.*
willing to find “competent, conscientious, and impartial arbitrators.”

Similarly, two courts have enforced the Ryan's arbitration system since the Supreme Court's decision in Green Tree.

Like these appellate courts, a district court in Kentucky upheld a program even though it expressed concern that under the agreement to arbitrate, arbitrators may not have had the “appearance of fairness and impartiality.” That employer had created the arbitration program and had chosen the administrators of it. Given that this was a mandatory arbitration program, the court considered that the arbitrators might be biased in favor of the employer, since it had the ability to discontinue their employment. The court even noted that under this program, an employee could have some legitimate issues about fairness, even though the program included some procedural protections. In upholding this arbitration program, the court relied on other courts’ conclusions that such agreements are generally permissible in such circumstances.

At least one commentator has noted the advantage enjoyed by employers which comes not from the selection procedure, but their status as “repeat

253. Id.
254. Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943 (8th Cir. 2001); Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753 (7th Cir. 2001).
256. Id.
257. Id.
258. Id.
259. Id.
Employers who participate in arbitration more than once do better in arbitration than single use employers. Employers may also have an advantage from being able to compile information about potential arbitrators and their prior rulings. Some of this effect may also help employers to succeed in litigation as well.

Bias of arbitrators may be avoidable by following the process used by the major arbitrator agencies. For example, JAMS submits a list of five neutral arbitrators to each party, with a description of their background and experience. Then each party can strike up to two names off the list. The arbitrator selected then has the burden of making any required disclosures.

Similarly, the National Academy of Arbitrators (NAA) suggests that arbitrators disclose “any past or present involvement or relationship with the parties, counsel or potential witnesses.” The NAA also states in its policy that an arbitrator should decline to hear a case absent clear evidence that the selection

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261 Id.

262 Cole, 105 F.3d at 476-79.


265 Id.

266 Id.

process was “fundamentally fair.” The policy statement does not define what processes would be considered fair.

Bias of the Process

The Supreme Court warned against the waiver of employees’ statutory rights in Alexander v. Gardner-Denver, in part based on the nature of the arbitration process itself. That court recognized that the fact-finding process in arbitration may not be comparable to judicial fact-finding. In addition, court noted that the record created at an arbitration proceeding may not be as complete as a judicial transcript.

In arbitration, information gathering may be hampered because the federal or state rules of evidence, which are in effect in a judiciary proceeding, do not apply. The Alexander Court recognized that the rights and procedures that employees enjoy in civil trials, including discovery, compulsory process, the right to cross-examine witnesses, and the requirement that testimony be given under oath, may be extremely limited or nonexistent in an arbitration program. Moreover, the Court was concerned that “arbitrators typically have no obligation … to give their reasons for an award.”

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268 Id.
270 Id.
271 Id.
272 Id.
273 Id. at 45.
274 Id. at 45.
As noted earlier, the Supreme Court has consistently recognized that arbitration is attractive in part because its informality means that it is an “efficient, inexpensive, and expeditious means for dispute resolution.” This informality, however, led the Court to conclude that arbitration was a “less viable” than the federal courts as a means of resolving Title VII issues, at least back in 1974.

Perhaps following the lead of the reasoning in the Alexander case, some appellate courts still raise concerns about the adequacy of the arbitration process to vindicate employees’ statutory rights. It may be a combination of several factors that leads a court to invalidate an arbitration program on fairness grounds. For example, the Second Circuit refused to compel arbitration where the employer imposed on its employees an agreement which limited the arbitration hearing to one or two days, absent unusual circumstances.

That unenforceable program limited the relief an arbitrator could award in ways that were more restrictive than some employment statutes. Moreover, the program provided that each party would bear its own legal fees and expenses, that the parties would split the costs of the arbitration proceeding beyond the first day of hearing, and expressly prohibited the

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275. Id.
276. Id.
278. Id.
arbitrator from changing that allocation. Finally, it provided for a one year limitations period, a period considerably shorter than that provided under several employment statutes. It was this combination of factors that led the court to conclude that the program was unenforceable due to its unfairness.

The Supreme Court’s 2009 decision that required employees to arbitrate an age discrimination claim under the collective bargaining agreement that covered them discussed the viability of the Alexander decision. Without reversing that decision, the Court required that the employees arbitrate their discrimination claim, in part based on the determination that the employees’ rights would be protected since a union is bound to represent its members adequately in the arbitration process. The Court also determined that employees who were required to use arbitration to resolve discrimination claims would not be waiving those rights, but would only be attempting to resolve the issue in a different forum.

The Court’s recent decision is limited to collective bargaining agreements where the employer and the union specifically agree to arbitrate statutory claims of discrimination. The reasoning of the Court could potentially be used to require some more specific fairness provisions in the arbitration of unrepresented employee claims, particularly since the Court did not go so far as to overrule the Alexander decision. The following sections
outline several aspects of arbitration that can help to ensure the fairness of the process which should be more clearly required by the Supreme Court in the future.

*Discovery*

One of the rights in litigation that may be lost in an arbitration procedure is the ability to receive documents from an employer that may support an employee’s claim. In its decision in *Gilmer*, the Supreme Court noted that the lack of extensive discovery allowed in arbitration did not establish the impropriety of compulsory arbitration for Age Discrimination in Employment Act (ADEA) claims.284 It was unlikely, according to the Court, that age discrimination claims would necessarily warrant more extensive discovery than other claims which had previously been found to be arbitrable.285 Perhaps more importantly, the Court was satisfied with the New York Stock Exchange’s discovery proceedings, which allowed for document production, information requests, depositions, and subpoenas.286

Lower courts have sometimes expressed more concern than the Supreme court regarding the adequacy of discovery in an arbitration process. For example, limitations on discovery were concerning for the Sixth Circuit in

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284. 500 U.S. at 26-35.
285. *Id.*
286. *Id.*
reviewing the Ryan’s arbitration procedure. The Ryan’s process allowed “just one deposition as of right and additional depositions only at the discretion of the (arguably biased) panel, with the express policy that depositions ‘are not encouraged and shall be granted in extraordinary fact situations only for good cause shown.” The court was most concerned that the potentially biased arbitration panel controlled how much discovery the employee could have. The court concluded that these limitations on discovery, particularly when under the control of a potentially biased arbitration panel, could result in an unfair procedure for employees. In contrast to the concern expressed by the Ryan court, the circuit court for the District of Columbia enforced an agreement to arbitrate which did not guarantee broad discovery. The applicable AAA commercial arbitration rules allowed an arbitrator to decide which discovery tools to use, and the manner in which they could be used. The court concluded that the AAA’s failure to provide guidance outlining what discovery was available discovery, or other procedural questions, did not by itself invalidate the arbitration agreement.

287. Walker, 400 F.3d at 383.
288. Id.
289. Id. See also Ferguson v. Countrywide Credit Industries Inc., 298 F.3d 778, 783-84 (9th Cir. 2002)(limitation on discovery showed pattern of giving the employer undue advantage).
290. Id.
292. Id.
293. Id. (citing Green Tree, 531 U.S. at 92). See also, Johnson v. Long John Silver’s Restaurants Inc., 320 F.Supp.2d 656 (M.D. Tenn. 2004)(arbitration agreement enforceable where discovery was under arbitrator’s discretion, unclear how arbitrator would apply clause); Caley, 438 F.3d at 1371-72 (limitations on discovery part of inherent trade-off involved in arbitration process).
Like the decision of the D.C. Circuit, a provision of an employer's mandatory dispute resolution program that limited discovery did not make the program unenforceable. That program limited discovery to “essential and relative documents and witnesses,” rather than allowing discovery of documents “reasonably calculated to lead to discovery of admissible evidence,” as allowed under the federal rules of procedure. The program was upheld because the limited discovery had not been shown to be insufficient. The court noted that in arbitration, an employee gives up certain rights inherent in judicial procedures in exchange for the “simplicity, informality, and expedition of arbitration.”

As with the D.C. Circuit the Pep Boys arbitration process was enforced by a district court, even though it limited discovery by each party to only “one individual and any expert witness designated by other party.” The court did not find the process to be too biased to arbitrate employees' Fair Labor Standards Act (FLSA) wage claims. The employees had contended that the provision was “lopsided,” because the employer would have a need to depose employees (not supervisors) who might have relevant information.

295. *Id.*
296. *Id.*
297. *Id.*
while an employee asserting a claim would need to depose both employees
and any managers or supervisors with information that might support their
claims. The process was adequate in part because the rules provided for
exceptions to this limitation on discovery “when necessary.”\(^{299}\) Depending on
how an arbitrator chooses to exercise this discretion, an employee may or may
have an adequate opportunity to discover the information needed to pursue
his or her claim.

Arbitration may be more efficient by limiting the sometimes lengthy
and litigious period of discovery associated with federal litigation. At the same
time, employees’ pursuit of their claims might be impeded by an inability to
gather information prior to the arbitration hearing. One California court
recognized this concern, but still refused to find that the arbitration agreement
was unconscionable.\(^{300}\)

Associations which supply parties with arbitrators may provide some
protection for employees who wish to discover information. Under AAA
rules, however, the California court found that the arbitrator could limit
discovery and relax evidentiary rules regarding witness testimony.\(^{301}\) The court
accepted the AAA rules’ provision for discovery required for “full and fair
exploration of the issues in dispute.”\(^{302}\)

\(^{299}\) Id.
\(^{300}\) Miyasaki v. Real Mex Restaurants Inc., No. C 05-5331 VRW, 24 IER Cases 1794
(N.D. Cal. August 17, 2006).
\(^{301}\) Id.
\(^{302}\) Id.
Under the JAMS rules, the parties have an obligation to “cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information relevant to the dispute or claim immediately after commencement of the Arbitration.” The initial exchange of information begins 21 days after the employer’s receipt of pleadings or notices of claims. The parties have a continuing obligation to provide information to the other side. If a document was not exchanged, the JAMS rules provide that it cannot be considered by the arbitrator, unless the parties agree to its admission or “upon a showing of good cause.”

One deposition per side is also allowed by the JAMS rules. The arbitrator can then decide whether to grant any requests for additional depositions, “based upon the reasonable need for the requested information, the availability of other discovery, and the burdensomeness of the request on the opposing Parties and witnesses.” The JAMS arbitrator resolves any discovery disputes.

The National Academy of Arbitrators (NAA) has warned that an arbitrator should be wary of accepting a case where the documents defining his or her authority and scope of jurisdiction restrict the arbitrator’s “ability to control the proceeding,” including “unfair limitations on discovery or on the

305. Id.
306. Id.
307. Id.
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production of documents or witnesses.” More specifically, the policy states that “adequate but limited pre-trial discovery is to be encouraged,” and employees and their representatives “should have access to all information reasonably relevant” to the arbitration. This policy echoes the recommendation of the 1995 Task Force on Alternative Dispute Resolution in Employment. More broadly, the NAA suggests that an arbitrator should ensure that he or she “has the authority to make the necessary directions to ensure procedural fairness.”

Some circuit courts have followed the NAA’s warnings and imposed some procedural requirements. However, courts have tended to err on the side of protecting the informality of the process rather than protecting the rights of employees who may need broad discovery to pursue their claim. This limitation could have serious effects on their rights, since a court reviewing an arbitration decision will not allow any additional discovery or a trial so that the employee could introduce additional evidence.

Sufficiency of Hearing

Some arbitration programs may not withstand judicial scrutiny if they do not provide an adequate opportunity for an employee to present his or her


309. Id.


claim. One court refused to compel arbitration in part because the agreement limited the arbitration hearing to one or two days, absent unusual circumstances.\textsuperscript{312} Similarly, a district court held that an arbitration agreement was found to be unenforceable based on a clause that limits hearings to two days.\textsuperscript{313} Those employees had argued that two days would be an “impossible period of time in which to present their case.”\textsuperscript{314}

The process becomes more concerning where it favors one party over another. For example, the Hooters process was disallowed in part because it required employees to file a notice of the particulars of their claims, a list including all fact witnesses, along with a summary of their knowledge, while the company was required to do none of these.\textsuperscript{315} Moreover, Hooters could include any other matter in the arbitration to any matter, but the employee could only arbitrate matters asserted in the notice of their claim.\textsuperscript{316} Bias was also shown by the limitation that Hooters, but not the employee, could create a record or transcript of the proceeding. Hooters also retained the sole right to cancel the arbitration agreement or bring suit in court to vacate or modify the arbitration award. Finally, the company could unilaterally modify the rules at

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\textsuperscript{312} Brooks, 297 F.3d at 171. \\
\textsuperscript{313} Gourley v. Yellow Transportation LLC, 178 F. Supp. 2d 1196, 1202 (D. Colo. 2001). \\
\textsuperscript{314} Id. \\
\textsuperscript{315} Id. \\
\textsuperscript{316} Id. Hooters, 173 F.3d at 938-39.
\end{flushright}
any time without notice to the employee, even in the middle of an arbitration hearing.317

Shortened Statute of Limitations

Courts are sometimes reluctant to enforce arbitration agreements when the process shortens the time in which an employee may file a claim to some amount of time less than allowed under the applicable statute. Since the Circuit City decision, employers sometimes include strict time limits for filing a claim. One study found that courts ruled for employees in two of six cases where these limitation periods were shorter than provided by statute.318

A plan which provided that mediation was a mandatory prerequisite to arbitration provided that if the claim was not filed within a year of when it should have been discovered, it was lost.319 The Ninth Circuit held that the one-year limitation period made the arbitration agreement “substantively unconscionable” since it required that an employee arbitrate employment-related statutory claims.320

Similarly, the provision in an arbitration agreement that required an employee to present a discrimination claim to the employer in writing within 30 calendar days of event on which claim is based or waive that claim was

317. Id. But see Moorem-Brown v. Bear, Stearns, No. 99 CV 4130 (GBD), 95 FEP Cases 110 (S.D.N.Y. January 5, 2005) (arbitrators' failure to record telephone pre-hearing conferences did not by itself establish misconduct on their part).
318. LeRoy, supra note 52, at 310.
319. Davis v. O'Melveny & Myers, 485 F. 3d 1066, 1073-74 (9th Cir. 2007).
320. Id.
The 30-day notice provision was “clearly unreasonable and unduly favored the employer,” because it provided inadequate time to gather support for a claim. The time limit also failed to allow an employee to rely on continuing violation and tolling doctrines which would be available in court, and did not require the employer to provide written notice of the claim to the employee within the same time period.

In contrast to inadequate discovery procedures, courts seem to be more willing to invalidate an arbitration program if it does not give employees adequate time to make their claim.

Form of Decision

Employees may challenge the fairness of the arbitration process based on the failure of arbitrators to issue written decisions. The Gilmer Court specifically addressed concerns that “arbitrators often will not issue written opinions, potentially resulting in a lack of public knowledge of employers’ discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law.” However, the Court did not resolve

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322. Id.
323. Id. See also Alexander, 341 F.3d at 263-64 (requirement that employees present claims within 30 days of the event found to be substantively unconscionable where state law allowed longer limitations periods and 30 days was insufficient time to bring a well-supported claim); Nyulassy v. Lockheed Martin Corp., 120 Cal.App.4th 1267 (Cal. Ct. App. 6th Dist. 2004) (refusing to enforce 180-day limitations period on all claims).
324. 500 U.S. at 27.
this specific concern because the New York Stock Exchange (NYSE) rules, under which Gilmer was required to arbitrate, provided that arbitration awards under that program be in writing. In addition, the rules also required the inclusion of the parties’ names, a summary of the issues in controversy, and a description of the arbitration award.\(^{325}\)

Although courts may not often review the arbitrator’s decision-making process, outstanding deficiencies in the process may warrant reversal of the award.\(^{326}\) One award by a joint grievance panel was not enforced because the panel failed to interpret one agreement in question and instead, construed the master contract in a one-sentence, conclusory opinion that it reached after deliberating for only few minutes.\(^{327}\)

In arbitrations under a collective bargaining agreement, the arbitrator is not necessarily required to write a decision stating the reasons for the award.\(^{328}\) If an opinion is written, “mere ambiguity” which might support an inference that the arbitrator exceeded his authority was not enough in one case for to warrant refusal to enforce the award.\(^{329}\) If the arbitrator has provided no explanation for the award, courts may make inferences from the

\(^{325}\) Id. See 2 N.Y.S.E. Guide Para.2627(a), (c), p. 4321 (Rule 627(a), (c)). In addition, the award decisions are made available to the public. See id., at Para.2627(f), p. 4322 (Rule 627(f)).


\(^{328}\) See, e.g., Enter. Wheel & Car, 363 U.S. at 598; Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998).

\(^{329}\) Enter. Wheel & Car, 363 U.S. at 598.
record to address an allegation of manifest disregard of the law.\textsuperscript{330} The standard on review is limited – if the facts on the record provide \textit{a basis for the arbitrator's decision, the court will typically enforce the award.}\textsuperscript{331}

An award may be upheld based on its conformity to the requirements of the arbitration agreement, even if it does not satisfy basic requirements of a sufficient award. For example, one district court upheld an arbitrator's award that denied a postal worker's discharge grievance, even though the arbitrator summarily found that grievance \textit{was not supported by either due process rights or its merits.}\textsuperscript{332} The award was upheld since the arbitrator was \textit{“fully informed of parties' positions,”} and was \textit{very familiar with just-cause standards applicable to discharges under a collective-bargaining agreement.}\textsuperscript{333} The request to overturn the award was denied in part because the worker offered no evidence that the contract required the arbitrator to give a detailed explanation, or evidence that her the arbitrator’s finding of \textit{just-cause was “irrational or in conflict with the contract's terms.”}\textsuperscript{334} With such limited review, courts tend to see a requirement of a written award as irrelevant.

In contrast to these loose requirements from the courts, the NAA has stated that \textit{“the arbitrator should provide a written opinion and award.”}\textsuperscript{335}

\begin{footnotes}
\item333. \textit{Id}
\item334. \textit{Id}
\end{footnotes}
The NAA also suggests that the opinion “should recite the facts and reasoning for any conclusions made.” The NAA also suggests that the arbitrator should recognize and resolve all statutory, common law or contractual issues raised by the parties.

Like the NAA, JAMS also requires that an award include a “concise written statement of the reasons for the Award, stating the essential findings and conclusions on which the award is based.” In resolving the claim on its merits, “the Arbitrator shall be guided by the rules of law agreed upon by the parties,” or without such an agreement, “the arbitrator will be guided by the law or the rules of law that the Arbitrator deems to be most appropriate.”

Despite the “hands off” attitude of many courts, one district court has considered this line of reasoning before it upheld an arbitrator’s decision. The discharged employee alleged that his claims of discrimination, retaliation, and related state claims submitted to arbitration could be litigated in court because the arbitration panel had failed to provide a written decision including the reasons for the award. The failure to issue an opinion suggested that the panel manifestly disregarded the law and that the panel was biased against the discharged employee. However, because the panel was

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336 Id.
337 Id.
339 Id.
341 Id.
342 Id.
not required to provide explanation of its award, the court held that the arbitral award had to be confirmed if even a “barely colorable justification” for it could be found.\textsuperscript{343} Since the employee did not identify any specific law that the panel disregarded, the reviewing court decided that it could not examine the evidentiary record, other than to discern whether colorable basis existed for award.\textsuperscript{344}

The form of the award may affect its enforceability, if the court is willing to look at the evidence which would support an award in the employee’s favor.\textsuperscript{345} Given the extensive evidence of age discrimination on the record, the Second Circuit found that the arbitration panel “ignored the law, the evidence, or both.”\textsuperscript{345} Since the arbitrators did not explain their award and the evidence suggested that there was discrimination, the court considered the panel’s failure to explain the award in refusing to enforce the award.\textsuperscript{346} Unfortunately, the court noted that the arbitrators were told explicitly that they were “not required to follow the law and need not give reasons for their determination.”\textsuperscript{347}

\textit{Relief Available}

\begin{footnotes}
\footnote{343}{\textit{Id.}}
\footnote{344}{\textit{Id.}}
\footnote{345}{\textit{Halligan}, 148 F.3d at 201-203}
\footnote{346}{\textit{Id.}}
\footnote{347}{\textit{Id.} at 201 (citing George Nicolau, Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners, 1 U. Pa. J. Lab. & Emp. L. 175, 183 (1998)).}
\end{footnotes}
The Supreme Court’s reliance on arbitration as a valid alternative forum to pursue statutory rights of employee rests in large part on the availability of the same relief as would be available in court. The Supreme Court approved the arbitration of an age discrimination claim in *Gilmer* in part because those arbitrators had the “power to fashion equitable relief.”

The procedure in that arbitration placed no restriction on the types of relief an arbitrator could award, but merely refer to “damages and/or other relief.”

Since its decision in *Gilmer*, the Court has held generally that procedural questions “which grow out of the dispute and bear on its final disposition” are presumptively for the arbitrator, not a judge, to decide. More specifically, despite plaintiffs’ allegations that the limited remedies in an agreement to arbitrate were inconsistent with their federal statutory rights, the court may still compel arbitration. The *PacifiCare* Court declined to construe the arbitration agreement and determine in advance whether the bar on punitive damages prohibited treble damages. The Court chose not to speculate whether, in light of their ambiguity, an arbitrator could interpret these agreements so as to undermine their enforceability. The Court compelled arbitration, and expected the arbitrator to decide whether the

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348. 500 U.S. at 26-35.
349. 2 N.Y.S.E. Guide Para.2627(e), p. 4321 (Rule 627(e)).
352. Id
353. 538 U.S. at 406-07.
agreement barred treble damages which were available under federal law. Arbitration was compelled because “we do not know how the arbitrator will construe the remedial limitations.”

The availability of damages was addressed by the Task Force on Alternative Dispute Resolution in Employment, which states that an arbitrator “should be empowered to award whatever relief would be available in court under law.” The NAA has stated that an arbitrator should be wary of accepting a case where the documents defining his or her authority restrict the arbitrator’s remedial authority. The NAA goes on to state that “it is essential to ensure that [the arbitrator’s] remedial authority is equal to that of a judge or jury under any statute or the common law applicable to the matter…”

More specifically, the NAA policy states that “[r]emedies should be consistent with the statutory, common law or contractual rights being applied and with remedies a party would have received has the case been tried in court,” which could be more beneficial than contractual remedies. This authority should include allowance for the award of attorney’s fees as a

354 Id.
355 Id. See also, Johnson v. Long John Silver's Restaurants Inc., 320 F. Supp. 2d 656 (M.D. Tenn. 2004)(court does not have authority to decide whether contract permits class arbitrations).
358 Id.
359 Id.
remedy, “in accordance with applicable law or in the interests of justice.” 360 The NAA suggests that if the remedial authority of an arbitrator is unduly restricted, the arbitrator should not agree to the appointment. 361

Specific limitations on remedies under an arbitration agreement may cause more concern for a court asked to enforce that agreement. Under the AAA’s rules, an arbitrator “may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court.” 362 The JAMS rules include similar language. 363 According to JAMS, the written Award also must include a statement regarding the relief awarded for each claim. 364

Since the Supreme Court’s decision in Gilmer, the adequacy of arbitral remedies has been raised by employees in ten district cases, and employees have prevailed three times in those decisions. 365 One study found that some arbitration programs expressly limited the remedial authority of the arbitrators by limiting recovery to something less than the statutory damages that the law would allow for a successful employee. 366 In other cases, employees challenged the practice of denying attorneys’ fees to a prevailing employee, which would have been allowed by most courts. 367

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360 Id.
361 Id.
362 Available at www.adr.org.
364 Id.
365 LeRoy, supra note 52, at 306-07.
366 Id.
367 Id.
Some courts may leave it to the arbitrator to decide if any restrictions on his or her authority render the process invalid. Even before the Supreme Court’s decision in \textit{Green Tree}, the Third Circuit had held that the validity of shortened limitations periods and limitations on remedies was for the arbitrator to decide.\textsuperscript{368} Similarly, a former employee’s claims for alleged violations of federal, state and city law were stayed pending arbitration, despite her contentions that arbitration clause was unconscionable.\textsuperscript{369} The reviewing court refused to consider the employee’s argument that any recovery from an arbitrator would inevitably be smaller because the issue of arbitration clause’s enforceability rests exclusively with the arbitrator.\textsuperscript{370} The arbitration clause explicitly provided that the arbitrator had exclusive jurisdiction to resolve any dispute as to whether “all or any part of this Agreement is void or voidable.”\textsuperscript{371} In addition, the employee offered no basis for assuming that any damage recovery would be more limited in arbitration.\textsuperscript{372}

\textit{Injunctive Relief}

As part of their claims, employees often seek injunctive relief, such as an order to reinstate or to stop discriminating. Injunctive relief may be more
limited in the arbitration process. In appropriate circumstances, a court may order the enforcement of a prior arbitration award as a means of resolving a subsequent labor dispute.\textsuperscript{373} A court will only do so, however, when an employee can justify bypassing the normal grievance procedures.\textsuperscript{374} Such enforcement is available only if the award was intended to have prospective effect, and “it is beyond argument that there is no material factual difference between the new dispute and the one decided in the prior arbitration.”\textsuperscript{375}

Without such narrow circumstances, a reviewing court will require that the parties use the contract grievance procedure.\textsuperscript{376} If the employee fails to show a new and identical dispute, a court will not enforce the previous arbitration award.\textsuperscript{377}

The limitations of traditional arbitration as a source of future relief is illustrated by the case of an arbitration award which found that a hospital's staffing of nurses on a particular floor violated the labor contract's nursing standards provision.\textsuperscript{378} The union attempted to bypass the contractual grievance procedure and obtain direct judicial relief for subsequent alleged violations of the same contract provision by a public hospital.\textsuperscript{379} The cease and desist order in the first arbitration award was meant to be prospective, and

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\textsuperscript{373} See, e.g., Boston Shipping, 659 F.2d at 4.

\textsuperscript{374} Id.

\textsuperscript{375} Id.

\textsuperscript{376} Derwin v. Gen. Dynamics Corp., 719 F.2d 484, 491 (1st Cir. 1983).

\textsuperscript{377} Id.

\textsuperscript{378} Massachusetts Nurses Ass'n v. North Adams Reg'l Hosp., 461 F.3d 1195, 1197-99 (1st Cir. 2006).

\textsuperscript{379} Id.
the new allegations involved the same floor. However, the court sent the union back to the grievance procedure rather than enforcing the first arbitration award, based on the passage of three years and the complex variables involved with hospital staffing. In part because the hospital had begun making systemic changes that could affect those variables, the union failed to show that there was “no material factual difference between the new dispute and the one decided in the prior arbitration.”

An arbitrator may also feel limited in his or her ability to order reinstatement of an employee under certain circumstances. For example, a reviewing court held that an arbitrator properly found that a discharged employee's subsequent retirement rendered reinstatement beyond the arbitrator’s authority. The arbitrator had concluded that the employee had been unjustly discharged, but the appropriate remedy could not include reinstatement since the employee had retired and consequently withdrawn from the bargaining unit. The employee had argued that the arbitrator’s failure to reinstate her was a violation of law or public policy.

These cases illustrate the very tangible tension between honoring the “intentions of the parties” to the arbitration agreement and the protection of employees’ rights. In the cases

380 Id.
381 Id.
382 Id.
383 In re Auto Workers Local 2350 v. California State Employees’ Ass’n, No. S-05-1327 WBS EFB, 180 LRRM 3009, 3010-12 (E.D. Cal. October 12, 2006).
384 Id.
385 Id.
One specific limitation that can undermine the viability of an arbitration program is a limitation on an arbitrator's authority to award punitive damages. Like the issue of damages in general discussed above, courts have indicated that the parties' agreement as to punitive damages in an arbitration agreement is generally enforceable.\textsuperscript{386} According to one review, several courts have enforced arbitration agreements which prohibit or limit the award of punitive damages in arbitration.\textsuperscript{387} In contrast, the Ninth Circuit and several state courts have ruled that limitation of punitive damages in arbitration agreements is unconscionable.\textsuperscript{388} Appellate courts have followed the Supreme Court's \textit{PacifiCare} reasoning. The arbitration of FLSA claims was compelled even though the arbitration procedure's terms and remedial limitations appeared to be facially inconsistent with the FLSA statutory claims being asserted.\textsuperscript{389} Rejecting any appearance of judicial hostility to arbitration, the court wanted the arbitrator to have an opportunity to enforce the statutory rights of the claimants, because the arbitrator had been given the authority to decide statutory claims.\textsuperscript{390} The court assumed that an arbitrator can enforce substantive statutory rights, even if those rights may come into conflict with the

\textsuperscript{386} Randall, supra note 112, at 211
\textsuperscript{387} Id.
\textsuperscript{388} Id.
\textsuperscript{389} Bailey v. Ameriquest Mortgage Co., 346 F.3d 821 (8th Cir. 2003).
\textsuperscript{390} Id.
provisions of a collective agreement that also applies. The Eighth Circuit had previously suggested that it might uphold limitations on remedies, such as a clause limiting punitive damages to $5,000.

The unavailability of statutory damages in arbitration has caused concern for some courts. For example, one agreement was not enforced due to its failure to provide for all remedies available in a judicial forum. The agreement specifically limited available remedies to “actual direct damages” and expressly precluded parties from seeking “punitive, exemplary, indirect, special, consequential or incidental damages.” Those remedies were found to be inadequate where the state statute which the employees sought to enforce specifically allowed statutory penalties against employers that violated the act, as well as punitive damages if the employee could establish a retaliatory discharge claim. State courts have similarly severed unconscionable limitations on damages found in agreements to arbitrate employment disputes.

To protect the rights of employees who may be required to rely on arbitration to enforce their rights, and to promote the purposes of employment laws, courts need to ensure that arbitrators are consistently

391. Id.
392. Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 681 n.6 (8th Cir. 2001).
394. Id.
395. Id.
awarding damages that would be available to the employee in court. Even if the employee were able to eventually recover those damages through judicial review of an arbitration award, the time and expense of doing so may itself constitute a deprivation of their rights.

Class Actions

The preference for arbitration expressed in Circuit City has been extended to class actions. This extension of the obligation to arbitrate to cover claims of class members raises serious questions about the statutory rights of those class members. If treated as a class action, an arbitrator is not required to make a finding as to whether the individual class members assented to arbitration or whether the arbitration agreement was conscionable for them, as would be required under the Federal Rules of Civil Procedure.\(^{397}\)

The Fourth Circuit recently upheld the arbitration of FLSA claims on behalf of a class despite these questions.\(^{398}\) That court allowed the arbitration of claims of a class of managers seeking coverage by the FLSA despite the FLSA’s "opt-in" class provision, providing that “[n]o employee shall be a party plaintiff to any . . . action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”\(^{399}\) Instead of requiring the arbitrator to apply this provision, the

\(^{397}\) F.R.C.P. Rule 23.
\(^{399}\) 29 U.S.C. § 216(b).
court upheld the arbitrator’s application of the "opt-out" provision of the AAA Class Rules. This application bound class members to the arbitrator’s decision unless they affirmatively opted out of the class.

Similarly, another appellate court enforced the employer’s agreement to arbitrate as a bar to statutory rights brought as a class action, finding that the employees' class and individual discrimination claims against their employer are subject, under Georgia law, to mandatory dispute resolution policy and its modifications. The agreement to arbitrate was enforced despite contentions that policy was substantively unconscionable in part because it prohibited class actions, where the lack of protection procedures for class members was found to be “part and parcel” of arbitration's valued “simplicity, informality, and expedition.”

Some arbitration agreements that do not provide for class action relief have been challenged in litigation, particularly if the employee asserts a claim under the Fair Labor Standards Act (“FLSA”). One researcher found that a majority of courts have found that arbitration of a class’s claims did not infringe on the rights of those class members. These courts take support from dicta in Gilmer which states that "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator,

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400 Id.
401 Id.
402 438 F.3d at 1371-72.
403 Id.
404 LeRoy, supra note 52, at 320.
405 Id.
the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.\textsuperscript{406}

These cases illustrate that an employee may have his or her rights adjudicated by an arbitrator as a class member, without the protections inherent in the Federal Rules of Civil Procedure that allow a class member to be notified of the action and opt out. Courts may still need to address directly whether class members could bring their own action (outside of the class) if they did not individually agree to have their employment disputes arbitrated.

Assessment of Costs

Like limitations on remedies, the burden of arbitration costs and attorney’s fees could infringe on an employee’s right to proceed with a statutory-based claim. Under JAMS rules, an arbitrator may allocate arbitration fees as well as any compensation and expenses, “unless such an allocation is expressly prohibited by the parties’ agreement or by applicable law.”\textsuperscript{407} The award may also “allocate attorneys’ fees and expenses and interest if provided by the parties’ agreement or allowed by applicable law.”\textsuperscript{408}

Under the JAMS system, each party pays a proportionate share of the arbitration fees and expenses, unless the parties have agreed to a different
allocation. Fees and expenses must be paid prior to the hearing, which could impose a burden on an individual employee. JAMS rules indicate that if the arbitration has been required as a condition of employment, the employee’s obligation may be limited to paying the initial JAMS case management fee. But the JAMS rules do not specifically prevent an employee from volunteering to contribute to administrative and arbitrator fees and expenses.

On the issue of fees, the Task Force on Alternative Dispute Resolution in Employment recommended that an employer reimburse an employee for at least a portion of his or her attorney’s fees, and stated that an arbitrator “should have the authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law or in the interests of justice.”

Since the issuance of that protocol, consumer advocacy group Public Citizen found that high upfront costs of arbitration have had a “deterrent effect, often preventing a claimant from even filing a case.” Similarly, the

409. Id. at 31(a).
410. Id. at 31(a).
411. Id. at 31(c).
National Consumer Law Center concluded that “high arbitration costs favor companies and hurt consumers by deterring valid claims.”

At the same time, numerous defenders of arbitration have concluded that because the other costs involved with arbitration (such as discovery costs) are lower, arbitration enhances access to justice. Some would suggest that the availability of a contingent fee contract with an attorney would lessen the financial barriers to using the arbitration process.

The NAA policy statement suggests that the “impartiality of an arbitrator is best assured if the parties share fees and expenses.” However, if the employee’s economic status does not permit equal sharing, the NAA suggests that the parties agree to arrangements under which fees and expenses can be shared. Without such an agreement, the arbitrator must allocate the fees. Similarly, the AAA Rules explicitly provide that “[t]he arbitrator shall have the authority to provide for the reimbursement of a representative's fees, in whole or in part, as part of the remedy, in accordance with applicable law.”

The issue of allocating the costs of arbitration has become much more prevalent after the Supreme Court’s decision in Gilmer. One study

415. Id. at 730.
416. Id. at 733.
417. Id. at 734.
419. Id.
420. Id.
found that compared to only one case that raised the issue of costs before 1991, forty cases brought up the issue of costs after Gilmer was decided. Cost may not be a deciding factor for the enforceability of a program, since only twenty percent of these cases found that allocation of costs made the programs unenforceable. After the Supreme Court’s decision in Circuit City, cost-shifting was still an important issue for employees challenging an arbitration program, and they succeeded in 23.8% of those cases.

The Supreme Court has not addressed the issue of fees in the arbitration of employment disputes. Yet the Court stated in a consumer arbitration case that an arbitration agreement’s silence about the allocation of costs did not automatically make the agreement unenforceable. The burden was placed on the challenger to the agreement to show the likelihood of prohibitive costs. At the same time, the Court stated that “it may well be that the existence of large arbitration costs could prevent a litigant … from effectively vindicating her federal statutory rights in the arbitral forum.”

The Supreme Court’s decision in Green Tree may show that the passing on of costs to employees affects the employees’ access to a forum to assert their rights. The Green Tree Court was willing to consider a party’s

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422. LeRoy, supra note 52, at 306.
423. Id.
424. Id.
425. Green Tree, 531 U.S. at 84-86.
426. Id.
427. Id.
financial situation to determine whether they had adequate access to an arbitral forum. One commentator suggests that this analysis shows a bias against arbitration.

Cost Sharing in the Lower Courts

Even though the Supreme court has not addressed the issue of cost allocation in an employment arbitration case, the issue has been prevalent in the lower federal courts. Lower court opinions differ as whether an arbitration agreement validly can require or allow an arbitrator to place some or even all of the costs of arbitration on the employee.

The Supreme Court has shaped the parameters of this discussion in the Green Tree case, which upheld arbitration of a consumer’s claim. In that arbitration of a consumer claim, that the Court held that a party must establish the likelihood that it will actually incur such costs. Some showing of individualized prohibitive expense is necessary to invalidate an arbitration agreement, but the court failed to decide how much detail the party must provide to then shift the burden to party seeking arbitration to provide evidence that the cost is not prohibitive.

429. Green Tree, 531 U.S. at 84-86.
431. Green Tree, 531 U.S. at 84-86.
432. Id.
433. Id.
In contrast to the support of arbitrator discretion in *Green Tree*, some lower courts had previously expressed concern about the issue of fees and costs for employees who are parties to arbitration agreements.\(^{434}\) The Circuit Court for District of Columbia raised the issue of costs in holding that an arbitration agreement which required an employee to pay for an arbitrator would “undermine Congress’s intent to prevent employees who are seeking to vindicate statutory rights.”\(^{435}\) The *Cole* court suggested that employers should bear all the costs of arbitration except for a reasonable “cost of filing fees and other administrative expenses.”\(^{436}\)

As evidence of the shifting tide in favor of arbitration, the same court more recently refused to vacate an arbitration award which held an employee responsible for nearly $8,400 in forum fees, even though she prevailed in part on the merits.\(^{437}\) That arbitration panel did not manifestly disregard the law by ordering a female former employee who prevailed on one common-law claim but not on her statutory claims to pay 12 percent of arbitral forum fees.\(^{438}\) The court relied on the potentiality that costs levied against her were associated with her non-statutory claims, and the potential that the fees may have included expenses beyond the arbitrator’s fee.\(^{439}\) Similarly, the same

\(^{434}\) See, e.g., *Cole*, 105 F.3d at 1479-81.
\(^{435}\) *Cole*, 105 F.3d at 1479-81.
\(^{436}\) *Id.*
\(^{437}\) *LaPride*, 246 F.3d at 705.
\(^{438}\) *Id.*
\(^{439}\) *Id.*
court has refused to extend the Cole reasoning to cases involving non-statutory state law.\textsuperscript{440}

Not all courts have been willing, at least before the Green decision, to impose significant costs on employees when an arbitrator hears a statutory employment claim. Several courts have held that a cost-sharing provision denies an employee from having an “accessible forum” for vindicating statutory rights.\textsuperscript{441} One court specifically found that a cost-sharing provision would deny a plaintiff from having an “accessible forum” for enforcing statutory rights.\textsuperscript{442}

In another decision preceding Green, a provision of an arbitration agreement requiring each party to pay its own costs and attorneys' fees was invalidated, regardless of the outcome of the arbitration.\textsuperscript{443} The requirement was found to be contrary to the provisions in Title VII and ADEA that call for an award of fees and costs to the prevailing party.\textsuperscript{444} The agreement was unenforceable because it precluded the arbitrator from awarding fees to a prevailing employee.\textsuperscript{445} The requirement that the agreement must be read in manner consistent with federal law did not make the agreement enforceable, since the agreement also stated: “[i]n the event of any inconsistency between

\begin{footnotesize}
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\item \textsuperscript{440} Brown v. Wheat First Securities, Inc. Nos. 00-7171 and 00-7173, 17 IER 1410, 1414 (D.C. Cir. July 31, 2001).
\item \textsuperscript{441} Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F.3d 1230, 1232-33 (10th Cir. 1999). See also Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2001); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054 (11th Cir. 1998).
\item \textsuperscript{442} Shankle, 163 F.3d at 1233.
\item \textsuperscript{443} Spinetti v. Service Corp. International, 304 F.3d 212, 218-19 (3d Cir. 2003).
\item \textsuperscript{444} Id.
\item \textsuperscript{445} Id.
\end{itemize}
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this Agreement and the statutes … the terms of this Agreement shall apply.” The Seventh Circuit has reached a similar conclusion regarding an employee’s ability to recover attorney’s fees if she prevails.

A second court, also before Green, has held that an employer could not require the arbitration of an employee’s claim in part because the arbitration agreement required that the employee pay a filing fee of up to $125 and to share equally with employer all the other costs besides the costs of the first hearing day. The possibility that an employee could be required to pay thousands of dollars in arbitration costs made the agreement to arbitrate unenforceable.

Some courts take more of a case-by-case approach when reviewing cost-splitting provisions. This may be the more common approach. For example, one court considered the amount of money that would ultimately be paid by the claimant, and the fact that the overall cost of arbitration would be equal to or less than the cost of litigation in court. In finding that the fee-splitting provision did not automatically render the arbitration agreement unenforceable, the court considered if the difference between the costs of

446. Id.
447. McCaskill v. SCI Management Corp., 298 F.3d 677, 679 (7th Cir. 2002) (arbitration agreement that prohibits recovery of attorneys’ fees regardless of outcome is unenforceable).
448. Ferguson, 298 F.3d at 782-83.
449. Id.
450. See Blair v. Scott Specialty Gases, 283 F.3d 595 (3d Cir. 2002) (remanding case to allow discovery on the estimated costs and the plaintiff’s ability to pay).
arbitration and court litigation was “so substantial as to deter an employee’s filing of a claim.” Like the Green decision, the court focused on the amount of money that claimant would ultimately pay.

The actual amount of costs that could be imposed on an employee may not be significant enough to undermine the agreement to arbitrate. For example, a district court in Pennsylvania held that an employee could be compelled to arbitrate his discrimination claim even though the arbitration agreement required that he incur certain costs and fees. The court relied on the limited expenses he would absolutely incur: his $140 share of initial arbitration filing fee, compared to the $250 he spent filing his civil action. As in Green, the other costs and expenses that he might have faced did not undermine the arbitration program because those costs were “wholly speculative.”

Similarly, Circuit City’s arbitration program was upheld after the agreement no longer required a substantial up-front payment within three months, which was likely to deter a potential claimant. Moreover, the employee was not automatically obligated to pay a share of the arbitration costs – only when so ordered by the arbitrator. The agreement was also

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453 Id.
454 Id.
456 Id.
457 Id.
459 Id.
viable because an employee could only be no more than $500 or three percent of his most recent salary.\textsuperscript{460} These costs were not seen as excessive where the normal costs of civil litigation often the amount that the claimant was expected to pay.\textsuperscript{461} Thus, the employee’s potential responsibility for costs under the arbitration agreement was no more than, and could be less than, potential costs arising from civil litigation.\textsuperscript{462}

In congruence with the Supreme Court’s standard in \textit{Green}, courts reviewing arbitration programs appear reluctant to reject the program simply because the employee faces some limited expenses to participate in the program, where additional greater expenses are merely speculative.

\textit{Employee’s Ability to Pay}

In addition to the costs of arbitration relative to a civil action, the issue of cost assessment may be influenced by the employee’s ability to pay. Generally this factor is not considered in a court action.\textsuperscript{463} One appellate court has enforced arbitration agreements despite employees’ claims that the possibility of a large assessment arising from the arbitration of their claims

\textsuperscript{460} \textit{Id.}
\textsuperscript{461} \textit{Id.}
\textsuperscript{462} \textit{Id.}
\textsuperscript{463} See \textit{Bradford}, 238 F.3d at 552-54; \textit{Adkins v. Labor Ready Inc.}, 303 F.3d 496 (4th Cir. 2002)(ignoring claim that arbitration costs were anticipated to be high compared to the relatively small amounts expected to be recovered for each individual claimant).
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prevented them from attempting to vindicate their rights.\textsuperscript{464} That employee was unsuccessful in showing that the arbitrator inappropriately concluded that she was financially able to pay any assessment, \textit{where the} arbitrators had a bias for concluding that the evidence presented by that employee did not fully reflect her \textit{financial resources}.\textsuperscript{465}

The amount of set costs relative to the employee's ability to pay may be considered by some courts. A provision in an arbitration agreement that required the discharged employee to pay an \textit{initial, non-refundable filing fee of $500} to the AAA, an additional filing fee of $2,750, a case-filing fee of $1,000, as well as an additional charge of $150 for each day of hearing and half of the \textit{cost of arbitrator} was found to deny an employee an opportunity to vindicate her statutory rights.\textsuperscript{466} The court considered the employee's period of unemployment which followed her dismissal, as well as the difference between her earnings and her expenses, in finding that the \textit{cost-shifting provision interfered with her statutory rights}.\textsuperscript{467}

Another arbitration agreement that required the parties to bear their own costs and expenses, including arbitrator fees and attorneys' fees, was found to be substantively unconscionable as to two discharged heavy-

\textsuperscript{464} LaPride, 246 F.3d at 705-6.
\textsuperscript{465} LaPride, 246 F.3d at 705-6.
\textsuperscript{466} Spinetti, 304 F.3d at 216-17.
\textsuperscript{467} See also Clary v. The Stanley Works, No. 03-1168-JTM, 8 WH Cases2d 1649, 1655 (D. Kan. 2003)(factual issue as to whether costs of travel and arbitrator selection are prohibitive to preclude employee's access to arbitral forum).
equipment operators.\textsuperscript{468} The agreement was found to be very one-sided and unjustifiably favored the large multinational employer, in part because the state law provided that a court “shall award reasonable attorneys' fees and costs to prevailing plaintiff.”\textsuperscript{469}

That agreement also was one-sided because the employer’s program did not allow for any limitation on relief the employer could recover in a claim against its employees.\textsuperscript{470} The provision concerned the court because the rates for arbitrators went up to $1,000 per day, and the employees’ status as discharged refinery workers would not permit them to meet this financial burden.\textsuperscript{471} Therefore, they were effectively denied recompense for employer's alleged misconduct, and the employer never indicated that it would pay for arbitration fees and costs.\textsuperscript{472}

More than a bald allegation regarding the impact of costs on the employee may be necessary to avoid arbitration. For example, one court refused to allow an employee to avoid arbitration based on his contention that he could not afford to pay the anticipated costs of arbitration.\textsuperscript{473} The contention was insufficient where it was “based on conjecture as to amount of

\textsuperscript{468} Alexander, 341 F.3d at 260.
\textsuperscript{469} Id.
\textsuperscript{470} Id.
\textsuperscript{471} Id.
\textsuperscript{472} Id. See also Ball v. SFX Broadcasting Inc., 165 F. Supp. 2d 230 (N.D.N.Y. 2001) (agreement unenforceable if employee may be responsible for significant arbitrators’ fees or other costs that would not be incurred in judicial forum); Gourley v. Yellow Transportation LLC, 178 F. Supp. 2d 1196 (D. Colo. 2001) (arbitration agreement requiring employees to share costs of arbitration is unenforceable against four employees who could not afford costs).
those costs” because costs would depend on his financial situation and outcome of case. The court then refused to invalidate the arbitration agreement in advance of arbitration. Potential responsibility of the employee for a share of the arbitration costs, including part of arbitrator's fee, was inadequate reason to refuse to enforce the arbitration program. Such arbitration-related expenses did not undermine the viability of the program since they did not “render the arbitral forum inaccessible to a statutory claimant.”

Similarly, a former employee's claims for alleged violations of federal and state law were stayed pending arbitration, despite her contentions that arbitration clause was unconscionable. The employee failed to convince the district court that the arbitration fees “effectively would deny her adequate and accessible substitute forum” for her to assert her statutory rights, and therefore the fees did not make the arbitration agreement unenforceable.

Relying on the Fourth Circuit’s order to arbitrate an ADEA claim in Bradford, this district court focused on the following:

- employee's ability to pay the arbitration fees and costs
- the expected cost differential between arbitration and litigation in court, and

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474 Id.
475 Id.
476 Id.
478 Id.
whether that cost differential is so substantial as to deter the bringing of claims.\textsuperscript{479}

The employee failed to submit sufficient evidence regarding her inability to pay and did not firmly establish her expected costs in litigation, so that the court could assess difference in costs of arbitration and litigation.\textsuperscript{480}

*Loser pays*

A special issue related to the costs of arbitration is the possibility that an employee would be required to cover an employer’s costs associated with arbitration of a claim. Some arbitration agreements may require that either an employer or an employee pay the costs of the other side if they are unsuccessful in the arbitration. At first glance, such a provision appears to be in conflict with the Supreme Court’s position in *Christiansburg Garment Co. v. EEOC*, where the Court held that Title VII’s provision for awarding costs and attorney fees to the prevailing party only allowed a prevailing defendant to be awarded attorney fees where the plaintiff’s law suit was frivolous.\textsuperscript{481} The Court reasoned that to allow the routine award of attorney fees to prevailing defendants would undermine Title VII by deterring plaintiffs from bringing claims.\textsuperscript{482}

\textsuperscript{479} *Id.*

\textsuperscript{480} *Id.*

\textsuperscript{481} 434 U.S. 412, 416-17 (1978).

\textsuperscript{482} *Id.*
Some circuit courts have followed this logic in refusing to enforce arbitration agreements which allow an arbitrator to require that an employee pays the employer’s attorney’s fees if the employee’s claim is unsuccessful. In line with the Christiansburg Garment Co. decision, a loser-pays provision was not enforced by the Sixth Circuit because the costs were so high that they would deter an employee who sought to pursue a sexual harassment action against her employer or similarly situated employees from exercising their right to arbitrate. 483

The Sixth Circuit’s refusal to enforce an agreement to arbitrate was based on the costs under AAA rules prevailing on the date that the employer filed its motion to compel her to arbitrate the claim, as well as the employee's out-of-pocket costs. 484 That agreement to arbitrate was not enforced based on the possibility of an award of fees and expenses by the arbitrator to the employee, where the agreement did not state that the cost provision could be severed. 485 The Eleventh Circuit has reached a similar conclusion with respect to equal sharing of the costs of arbitration and all fees imposed by an arbitrator. 486

In a sexual harassment claim, the Seventh Circuit similarly refused to compel arbitration under an arbitration agreement that mandated each party to

483. Cooper v. MRM Investment Co., 367 F.3d 493, 504-6 (6th Cir. 2004).
484 Id.
485 Id.
486. See Perez v. Globe Airport Security Services Inc., 253 F.3d 1280 (11th Cir. 2001) (provision stating that costs of arbitration and fees imposed by arbitrator shall be shared equally by employee and employer not enforced).
pay its own attorneys' fees regardless of outcome.\footnote{487} The mandate prevented the claimant from effectively vindicating her rights in arbitral forum by preemptively denying her remedies authorized by Title VII and was thus unenforceable.\footnote{488} The employer had argued that the provision regulated only what the employee was responsible for paying and not what she may be awarded and that it is thus possible for the arbitrator to award her attorneys' fees consistent with the agreement so long as she uses such award to pay her attorneys.\footnote{489}

As in other circuits, an arbitration agreement provision that “other than arbitrator's fees and expenses, each party shall bear its own costs and expenses, including attorney's fees” was found to be substantively unconscionable.\footnote{490} Application of this provision to an employee's discrimination claims arising under both Title VII and Virgin Island statutes was inappropriate where federal law ordinarily allows prevailing plaintiffs to recover their attorneys' fees.\footnote{491} The court concluded that the provision made the arbitral forum prohibitively expensive for the employee.\footnote{492} The prospect that the employee could pay the entire amount of the expenses could decrease the employee’s willingness to initiate a claim.\footnote{493}

\footnote{487} McCaskill v. SCI Management Corp, 285 F.3d 623, 625-26 (7th Cir. 2002).
\footnote{488} Id.
\footnote{489} Id.
\footnote{490} Parilla v. LAP Worldwide Servs. VI Inc., 368 F.3d 269, 281-82 (3d Cir. 2004).
\footnote{491} Id.
\footnote{492} Id.
\footnote{493} 368 F.3d at 281-82.
Some courts have upheld provisions in arbitration agreements that appear to have been designed to deter employees from pressing claims. The Eleventh Circuit, relying on Green Tree, has enforced an arbitration agreement that contained "loser pays" provisions. That court required a plaintiff to arbitrate a Title VII claim pursuant to an arbitration agreement that provided for the award to costs and attorney fees to the prevailing party.

Other employees have been compelled to arbitrate claims despite the possibility of paying the employer's costs if they are unsuccessful. Arbitration was compelled under AAA rules which provided that the arbitrator had the power to award any type of legal or equitable relief that would be available in a court of competent jurisdiction. This included the costs of arbitration, attorney fees and punitive damages for causes of action when such damages are available under the law. For example, the arbitrator could assess attorney fees against the employee or the employer if either party made a claim that was frivolous, or factually or legally groundless. Fees could also be assessed if the employee used a method other than arbitration to resolve a covered claim, and the employer incurred expenses in obtaining dismissal of the action.

494. See Musnick, 325 F.3d at 1259-60. See also Manuel v. Honda R & D Ams., Inc., 175 F. Supp. 2d 987 (S.D. Ohio 2001) (enforcing arbitration provision that imposed arbitrator's fees and other costs on losing party).

495. Id.


497. Id.

498. Id.

499. Id.
Some courts do not automatically disallow an arbitration agreement under which employees must pay their own costs and attorney's fees and half of costs of arbitrator. Where there was assent, clear notice, and no unfair surprise, mere inequality in bargaining power did not make the agreement automatically unconscionable. The employee asserting a claim had to meet the high threshold of proving that the provision prevents him from raising his claims against the employer under the ADEA and state law. To avoid the cost provision in the agreement, the employee would need to provide evidence to estimate the length of the arbitration and corresponding amount of arbitrators' fees, as well as evidence of his particular financial situation.

Some courts will not resolve the issue of cost and fee assessment until the case has been heard by the arbitrator. For example, a federal district court in Tennessee refused to determine whether the fee-shifting provisions in the arbitration agreement would allow for effective vindication of the employee's rights. The discovery and fee-shifting clauses provided for arbitrator discretion, and it was unclear how an arbitrator would apply these clauses.

500. Faber v. Menard Inc., 367 F.3d 1048, 1051-52 (8th Cir. 2004).

501 Id.
502 Id.

503. See also Wilks, 241 F. Supp. 2d at 864-65 (in FLSA claim, enforce arbitration agreement under which employee's share of arbitration filing fee limited to $125, employer pays all of arbitrator's compensation).
505 Id.
Therefore, the court declined to decide whether the agreement was unenforceable. 506

These cases illustrate the need for judicial oversight of arbitration programs to ensure the protection of employee rights while still preserving the benefits of arbitration for all of the parties involved. By ensuring the impartiality of the arbitrator and the thoroughness of the process, employers can better ensure that the results of arbitration will be enforceable in court. In addition, employers should ensure that the arbitration program provides employees with substantially similar remedies and allocation costs as they would experience in court. By structuring the arbitration process in this way, employees will be significantly limited in their ability to relitigate a claim in court after completing the arbitration process.

V. EFFECT OF FAIR ARBITRATION ON LITIGATION

If an employer establishes that the employee has agreed to arbitration and that process is fair, that employee’s litigation in court will at least be stayed until the arbitration has been completed in accordance with the terms of the agreement. 507 Some courts will dismiss the employee’s claim rather than issue a stay. 508 The Green Tree decision suggests that a district court’s order

506 Id.


508. Choice Hotels Intern., Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709-10 (4th Cir. 2001); Green v. Ameritech Corp., 200 F.3d 967, 973 (6th Cir. 2000)(dismiss case when all of the issues raised in the district court must be submitted to arbitration).
compelling arbitration and dismissing all other claims is ‘final’ and therefore appealable. Several courts have held that a district court's decision to dismiss the action without prejudice and order the parties to arbitrate was a final, appealable decision in accordance with Green Tree.510

Bar of Judicial Relief for Statutory Claims

Most employers adopt an arbitration program to avoid litigation in federal court.511 At the same time, if the program is not carefully constructed, all of the cases outlined above illustrate that an employee may still be free to litigate an employment law claim despite the existence of an arbitration program. Litigation in federal court may not be the most attractive option for employees. Although the Equal Employment Opportunity Commission (EEOC) has initial jurisdiction of most employment discrimination claims, it sues on less than one percent of all complaints.512 For the tens of thousands of complainants not represented by the EEOC, plaintiff lawyers take just five percent of these employment discrimination complaints.513

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510 Interactive Flight Technologies, Inc. v. Swissair Swiss Air Transport Co., 249 F.3d 1177 (9th Cir. 2001); Employers Insurance of Wausau v. Bright Metal Specialties, Inc., 251 F.3d 1316 (11th Cir. 2001); Blair v. Scott Specialty Gases, 283 F.3d 595 (3d Cir. 2002).
511 See LeRoy, supra note 52, at 298.
512 Id.
513 Id.
employee succeeds in finding legal representation, he or she faces the congestion of court dockets.\textsuperscript{514}

It is estimated that less than five percent of civil complainants have their case go to trial and result in a verdict.\textsuperscript{515} One study found that a typical employment claim in court can take more than two years to get to trial, and the process can cost the parties more than $50,000.\textsuperscript{516} Even then, many cases go up on appeal, and federal appeals courts have reversed an average of forty-four percent of cases that were won by employees.\textsuperscript{517}

In contrast to federal litigation, complainants won 63% of their cases in a study of AAA cases from 1993-1995.\textsuperscript{518} A sample of arbitration cases reviewed in the federal courts since the decision in Circuit City contained sixty-nine decisions (fifty-four district and fifteen appellate cases).\textsuperscript{519} District court enforcement of arbitration programs did not change significantly before and after the Supreme Court’s decision in Circuit City.\textsuperscript{520} In decisions where employees could proceed with their lawsuits, the rate slightly declined.\textsuperscript{521} In apparent response to Circuit City, appellate courts significantly increased the percentage of their decision which enforced arbitration programs, from 49% to 73%.\textsuperscript{522}

\textsuperscript{514} \textit{Id.} \\
\textsuperscript{515} \textit{Id.} \\
\textsuperscript{516} \textit{Id.} \\
\textsuperscript{517} \textit{Id.} \\
\textsuperscript{518} \textit{Id.} at 299. \\
\textsuperscript{519} \textit{Id.} \\
\textsuperscript{520} \textit{Id.} \\
\textsuperscript{521} \textit{Id.} \\
\textsuperscript{522} \textit{Id.}
The U.S. Supreme Court had held that an employee's rights under Title VII are not susceptible to prospective waiver.523 Yet in Circuit City Stores, Inc. v. Adams, that same Court held that the FAA applies to most arbitration agreements.524 The Court has also recognized that employees may be required to arbitrate federal statutory claims under the FAA, because an arbitration agreement changes the forum for the resolution of the claim.525

One researcher has found that by presenting the waiver issue, employees in seven of thirty-two decisions (21.9 percent) have been allowed to avoid arbitration, after the Supreme Court’s decision in Gilmer.526 Employees were most effective in asserting the waiver argument when courts applied the “knowing and voluntary standard.”527 One commentator found that this finding was at odds with the decision in Gilmer, since that Court did not accept the employee’s waiver argument.528 Cases since that decision seem to distinguish the fact that Gilmer was an experienced businessman.529

Arbitration agreements have been enforced, and litigation in federal court blocked, under an agreement providing that “any dispute or controversy arising out of or relating to any interpretation, construction, performance or

526. LeRoy, supra note 52, at 305.
527. Id.
528. Id.
529. Id.
breach of this Agreement, shall be resolved exclusively by binding arbitration.”

Some conflicts still exist among the circuits. While some courts have enforced agreements to arbitrate federal statutory claim, the Ninth Circuit has held that employment rights under the FLSA and California’s Labor Code are “public rights.” An arbitration program’s complete bar to such administrative actions was contrary to federal and state precedent. As the decisions described earlier illustrate, most courts require that an employee rely on arbitration to resolve even statutory claims, as long as the agreement to arbitrate is conscionable and the process is fair.

VI. JUDICIAL REVIEW OF ARBITRATION AWARDS

Assuming that an arbitration agreement passes the tests of conscionability and fairness, the question remains as to the scope of a court’s review of an arbitration award. Section 2 of the FAA states that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” The

530. Oblix, 374 F.3d at 450-51. See also, Butler Manufacturing Co. v. Steelworkers, 336 F.3d 629 (7th Cir. 2003) (arbitrator had authority to hear FMLA claim under contractual provision that assured equal employment opportunity “in accordance with the provisions of law”).


532. See, e.g., Albertson’s, Inc. v. United Food & Commercial Workers Union, 157 F.3d 758, 761 (9th Cir. 1998).

533. Davis, 485 F.3d at 1078-80.

Supreme Court has long established a practice of limiting the review of arbitration decisions on the merits. In 1987, the Supreme Court reaffirmed this practice in *United Paperworkers International Union, AFL-CIO v. Misco*.

Under that decision, a reviewing court does not have the authority to overturn an arbitration award by

1. asserting a public policy without substantiating its existence within existing laws and legal precedents as a “well defined and dominant” policy as opposed to a “general consideration of supposed public interests,”

2. second-guessing the arbitrator's fact-finding, particularly insofar as the conclusion that the asserted public policy would be violated by the employee's reinstatement depends on drawing factual inferences not made by the arbitrator, or

3. second-guessing the arbitrator's reasonable construction of the “just cause” clause, and of the rules of evidence and procedure appropriate to a “just cause” determination, under the collective-bargaining agreement.

Any public policy relied upon to overturn an arbitration award must be “explicit,” “well defined,” and “dominant,” and must be ascertained by reference to the laws and legal precedents, not from general considerations of

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535. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)(order arbitration unless clause is not susceptible of interpretation that covers asserted dispute); United Steelworkers v. American Manufacturing Co., 363 U.S. 564, 568 (1960)(if collective bargaining agreement provided that dispute should be submitted to arbitration, underlying question of contract interpretation is for the arbitrator); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960)(refusal of courts to review merits of an arbitration award is proper because federal policy of settling labor disputes by arbitration would otherwise be undermined).


537. *Id.*

538. *Id.*

539. *Id.*
supposed public interests.\textsuperscript{540} A reviewing court must determine “whether the award itself, as contrasted with the reasoning that underlies the award, ‘create[s] [an] explicit conflict with other laws and legal precedents’ and thus clearly violates an identifiable public policy.”\textsuperscript{541}

Following its decision in \textit{Misco}, the Supreme Court reaffirmed its commitment to arbitration in its \textit{Gilmer} decision.\textsuperscript{542} There, the court held that an employee with a claim arising under the ADEA would first need to arbitrate that claim before a court could review it.\textsuperscript{543} Yet the \textit{Gilmer} Court made no specific findings regarding the ability of arbitrators to interpret statutory protections for employees. The Court only noted that an employee claiming age discrimination in an arbitration procedure would still be able to file a charge with the Equal Employment Opportunity Commission (EEOC), even though the claimant is not able to institute a private judicial action.\textsuperscript{544}

Again in 2001, the Supreme Court took the position that federal courts’ review of labor-arbitration decisions is “very limited.”\textsuperscript{545} If the arbitrator was “even arguably construing or applying the contract,” the award would be enforced.\textsuperscript{546} Only “when the arbitrator strays from interpretation

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item \textit{Misco}, 484 U.S. at 43.
\item 500 U.S. at 26-35.
\item Id. Numerous courts have determined that the Gilmer holding is equally applicable to Title VII proceedings. \textit{e.g.}, \textit{Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.}, 39 F.3d 1482, 1487 (10th Cir. 1994); \textit{Bender v. A.G. Edwards & Sons, Inc.}, 971 F.2d 698, 700 (11th Cir. 1992); \textit{Mago v. Shearson Lehman Hutton, Inc.}, 956 F.2d 932, 935 (9th Cir. 1992).
\item Id.
\item \textit{Major League Baseball Players Ass’n v. Garvey}, 532 U.S. 504, 509 (2001).
\item Id at 509.
\end{enumerate}
\end{footnotesize}
and application,” “effectively ‘dispens[ing] his own brand of industrial justice,’” is the decision “unenforceable.” An arbitrator's “improvident, even silly, fact finding” does not provide a basis for a reviewing court to refuse to enforce the award.

At the same time, Circuit Courts reviewing arbitration awards have recognized some nonstatutory bases upon which a reviewing court may vacate an arbitrator's award, including where the awards are "completely irrational,""arbitrary and capricious," or contrary to an explicit public policy.

Public Policy Considerations

Despite the strong deference to the decisions of arbitrators, the Supreme Court will sometimes delve into a deeper evaluation of the award based on public policy. For example, the Court reviewed the reinstatement of an employee by an arbitrator based on the unenforceability of an award that is “contrary to public policy.” The Court considered the public policy against drug use by employees in safety-sensitive transportation positions, as

547. Id.
548. Id.
551. Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 481 F.3d 813, 819 (D.C. Cir. 2007); Twin Cities Galleries, LLC v. Media Arts Group, Inc. 476 F.3d 598, 600 (8th Cir. 2007).
embodied in Omnibus Transportation Employee Testing Act and its implementing regulations.553

In this case, the Supreme Court made a determination that the act and its implementing regulations’ policy favoring rehabilitation of employees who use drugs supported the arbitration award.554 The award was upheld because it was consistent with the statutory rules that mandated completion of substance-abuse treatment before an employee returned to work, as well compliance with act’s driving-license suspension requirements and its rehabilitative concerns.555 In enforcing the award, the Supreme Court also considered that neither Congress nor the Secretary of Transportation had mandated discharge of an employee who tests positive for drugs two times.556

In situations where public policy issues are raised, the court’s role has been defined as determining “whether the remedy imposed [by the arbitration award] can be fairly and unequivocally shown to violate a well-established public policy.”557 Focusing on the award and the remedy imposed is the proper “result-oriented approach” the court should take with respect to testing arbitration decisions with public policy.558

As in the Mine Workers’ case, lower courts have been reluctant to overturn arbitrator’s decisions on public policy grounds. For example, one
district court upheld an arbitration award requiring that an employer reinstate a male employee who had been discharged following incident that allegedly constituted “unacceptable and inappropriate harassment of a female office employee.”\textsuperscript{559} Despite the recognized strong public policy against sexual harassment that encourages employers to punish inappropriate workplace behavior before it becomes legally actionable, the court upheld the arbitrator's decision that there was no violation of the employer's anti-harassment policy.\textsuperscript{560}

In this case, the arbitrator had applied the legal definition of sexual harassment rather than definition of violation in employer's EEO policy, and the court held that the award did not violate public policy favoring employers that have anti-harassment policies, and that nothing in arbitration award would impede the employer in further instituting its \textit{zero-tolerance} sexual-harassment policy.\textsuperscript{561} The court also upheld the arbitrator's finding that the employee was not offended, based on the female employee's failure immediately to report the incident.\textsuperscript{562} According to the court, this reasoning did not violate Title VII's explicit public policy that affords complainants 300 days within which to make a claim.\textsuperscript{563}

\textsuperscript{559} \textit{Just Born Inc. v. Local 6}, No. 02-2626, 90 FEP Cases 1290, 1293-95 (E.D. Pa. December 12, 2002).

\textsuperscript{560} \textit{Id.}

\textsuperscript{561} \textit{Id.}

\textsuperscript{562} \textit{Id.}

\textsuperscript{563} \textit{Id.}
An arbitration award to reinstate an employee who has engaged in offensive behavior will typically be enforced unless the agreement to reinstate violates some public policy.\textsuperscript{564} For example, an arbitrator’s award that reinstated a white employee who had been discharged for making a racially offensive remark to a black co-worker was enforced.\textsuperscript{565} Even though the employer’s equal employment opportunity policy permitted the employer to discharge the employee, the court held that the arbitration award did not violate any public policy against discrimination.\textsuperscript{566}

While upholding the award, this same court gave more than a cursory consideration of the public policy implications of the arbitrator’s decision.\textsuperscript{567} Public policy considerations were satisfied since the arbitrator noted that “a serious offense [h]ad occurred,” and the award subjected the employee to a loss of pay for six months and probation for five years.\textsuperscript{568} In addition, the employee had to acknowledge that he could remain in workplace only if he understood what he did and complied with employer’s discrimination policies.\textsuperscript{569}

Public policy may not be strong enough to justify overturning an arbitrator’s award. An employer failed in its appeal of an arbitration award

\textsuperscript{564} Tamko v. Roofing Products Inc. v. Local 107, 11 United Steelworkers of America, 265 F.3d 1064, 1064 (11th Cir. 2001)(upholding arbitration award which reinstated a white employee who had made a single racially offensive comment). See also GITS Manufacturing Co. v. Local 281, 261 F. Supp. 2d 1089 (S.D. Iowa 2003)(enforcing arbitration award reinstating white employee who referred to black employee as “nigger.”).
\textsuperscript{565} Way Bakery v. Truck Drivers Local 164, 363 F.3d 590, 592-93 (6th Cir. 2004).
\textsuperscript{566} Id.
\textsuperscript{567} Id.
\textsuperscript{568} Id.
\textsuperscript{569} Id.
ordering the reinstatement of a violent employee based on the Occupational Safety and Health provision that “[e]ach employer … shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” The reviewing court found that the policy outlined in OSHA's general duty clause lacked specificity, clear definition, and dominance, so as to warrant a reversal of the arbitrator's award. Similarly, the criminal provision prohibiting the handling of explosive materials by any individual under indictment for a felony, did not bar the employee’s reinstatement because the criminal provision was not implicated by his job duties.

An employee may also try to rely on public policy to support his rights asserted in arbitration. A pilot was successful both in arbitration and with the reviewing court after he was discharged for refusing to fly a plane, where he understood that doing so would constitute a violation of a Federal Aviation Administration regulation. The arbitrator acted within its authority when it recognized an illegality exception to the general rule that an employee

570. Independent Chemical Corp. v. Local 807, No. 05-CV-1987 (DLI)(JMA), 179 LRRM 2664, 2668-70 (E.D.N.Y. April 21, 2006).

571. Id.

572. Id. See also Louis J. Kennedy Trucking Co. v. Teamsters Local 701, No. 05-6005 (JLI), 182 LRRM 2984 (D.N.J. September 17, 2007)(allowing reinstatement of driver with road rage despite federal motor carrier safety regulation prohibiting employer from allowing disqualified drivers to operate commercial vehicles).

first must obey an objectionable order and grieve it later.\textsuperscript{574} Even though its arbitrators had been given the authority to interpret more than just the vague contractual provisions, the public policy standards cited by the airline were not specific, explicit, or well-defined in statute or regulation.\textsuperscript{575} Rather, the court concluded that the pilot's reinstatement was consistent with the FAA's regulation that the pilot thought he would be violating.\textsuperscript{576}

\textit{Disregard of Law}

Like the public policy basis for overturning arbitration awards, arbitration awards can be vacated if they are in “manifest disregard of the law.”\textsuperscript{577} More than 30 years ago, the \textit{Alexander v. Gardner-Denver} Court questioned arbitrators’ competence to decide legal issues.\textsuperscript{578} That Court noted that “the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.”\textsuperscript{579}

Later, in \textit{Gilmer}, a different Supreme Court stressed that “[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its

\textsuperscript{574} Id.
\textsuperscript{575} Id.
\textsuperscript{576} Id.
\textsuperscript{577} First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995); see also Cole, 105 F.3d at 1486.
\textsuperscript{578} Gardner-Denver, 415 U.S. at 57.
\textsuperscript{579} Id.
remedial and deterrent function.”580 Even the District of Columbia circuit court’s Cole decision stresses the procedural protections rather than the ability of arbitrators to address and resolve legal questions.581

Conversely, the availability of judicial review has been used to support an arbitration order even where the process may lack procedural protections for the complaining employee. Courts have specifically held that if there be any procedural inadequacies or unfairness in the application of the arbitration rules in a specific case, judicial review will be available.582 With the availability of judicial review, one appellate court upheld a trial court’s refusal to permit a deposition of the National Association of Securities Dealers (“NASD”) prior to ordering submission of the dispute to arbitration.583

Limited Grounds for Reversal

Taking the lead of the U.S. Supreme Court, appellate courts have set very narrow grounds for reversing or refusing to enforce an arbitrator’s award on substantive grounds. The Sixth Circuit has held that it will uphold an arbitrator’s award unless one the following factors apply:

1) the arbitrator acted outside his authority by resolving a dispute not committed to arbitration,

2) the arbitrator committed fraud, had a conflict of interest or otherwise acted dishonestly, or

581. 105 F.3d at 1486.
582. Seus, 146 F.3d at 185.
583. 146 F.3d at 185.
3) the arbitrator did not arguably construe or apply the contract, in resolving legal or factual disputes.\textsuperscript{584}

Serious errors, as well as improvident or silly errors, were not reason to overturn an arbitration award.\textsuperscript{585}

In that case, the arbitrator appropriately interpreted the agreement since he quoted from and analyzed the pertinent provisions of the agreement, and at no point did he “say anything indicating that he was doing anything other than trying to reach a good-faith interpretation of the contract.”\textsuperscript{586} The arbitrator’s interpretation was not “so untethered from the agreement that it casts doubt on whether he was engaged in interpretation, as opposed to the implementation of his ‘own brand of industrial justice.’”\textsuperscript{587} The court had originally overturned the arbitrator’s award because the arbitrator exceeded his authority by adding an “additional requirement” not expressly provided in labor contract when he required that any cost-of-living increase provided to nonunion employees must be provided to union employees.\textsuperscript{588} Note that no statutory rights were asserted by the employees seeking the cost of living increase.

\textsuperscript{584} Michigan Family Rest, Inc. v. SEIU Local 517M, 475 F.3d 746 (6th Cir. 2007).
\textsuperscript{585} Id.
\textsuperscript{586} 475 F.3d at 750-52.
\textsuperscript{587} Id. \textit{See also} Hotflame Gas Co. v. Teamsters Local 328, No. 2:06-CV-145, 182 LRRM 2088, 2090 (W.D. Mich. April 4, 2007) (Court should uphold award so long as it would be legally plausible to argue that the award’s outcome is based on an interpretation of the CBA).
\textsuperscript{588} Id.
Since that decision, the Sixth Circuit has again enforced an arbitration award under the more lax review standard.\textsuperscript{589} The court once again held that if an arbitrator \textit{appeared to be} interpreting the relevant collective bargaining agreement, the court must enforce the award.\textsuperscript{590} The court enforced the award since it referenced and applied the relevant provisions of the collective bargaining agreements, and performed a “good-faith interpretation of those agreements.”\textsuperscript{591} Clearly, under this standard, arbitrators have a wide range of latitude in interpreting contractual rights of employees.

The Second Circuit has also limited judicial review on statutory grounds. In 1989, that court stated that “[m]anifest disregard of the law . . . refers to error which was obvious and capable of being readily and instantly perceived by average person [who] qualifies to serve as arbitrator.”\textsuperscript{592} Further, “the doctrine implies that arbitrator appreciates existence of clearly governing legal principle but decides to ignore or pay no attention to it.”\textsuperscript{593}

Since that decision, the same court has only modified or vacated an award on these grounds:

1. the arbitrators knew of a “governing legal principle,” yet refused to apply it or ignored it altogether, and

\textsuperscript{590} Id.
\textsuperscript{591} Id. See also Dobson Industrial Inc. v. Iron Workers Local 25, No. 06-1023, 181 LRRM 3295 (6th Cir. June 5, 2007)(district court correctly sustained the arbitrator’s decision, which was “arguably construing” the agreement); Poland Spring Corp. v. UFCW Local 1445, 314 F.3d 29 (1st Cir. 2002)(arbitrator could not reduce the discipline for insubordination provided for in CBA).
\textsuperscript{592} Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Intern., Ltd., 888 F.2d 260 (2d Cir. 1989).
\textsuperscript{593} Id.
(2) the law ignored by the arbitrators was “well defined, explicit, and clearly applicable to the case.”

More recently, that court noted that a court’s review of an arbitration award under the manifest disregard of the law standard is “highly deferential” and consequently, reversal of an award on these grounds is rare. An arbitrator's manifest disregard for the law may justify a court’s decision to vacate an arbitration award, if the arbitrator was “fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in effect, ignoring it.”

The Ninth Circuit takes a more interventionist view. Under its review of arbitration awards, legally dispositive facts may be so firmly established that an arbitrator cannot fail to recognize them without manifestly disregarding the law. Under that standard for review, the court refused to enforce an arbitration decision requiring the Postal Service to reinstate a former employee who had participated in an illegal strike for approximately two hours. Given those undisputed facts, a conclusion that the employee did not strike would constitute manifest disregard of the law. Yet even that court has not established an independent "manifest disregard of the facts"
ground for vacatur, and does not permit a reviewing court to reexamine the "ultimate weight of [the] evidence". 601

Despite the relatively lax attitude of most courts, the EEOC continues to take the position that agreements to arbitrate statutory claims are unenforceable. 602 The EEOC has opined that arbitration, if it is not knowing and voluntary, can undermine the rights of employees which are provided by Congress, “especially where the procedures are unfair and specifically designed not to safeguard statutory rights.” 603 The EEOC’s objections to the procedures include the fact that nothing requires arbitration’s adherence to statutory requirements and standards of Title VII, and the lack of required training or expertise in employment law among arbitrators. 604

Compared to the extensive litigation surrounding the procedural protections afforded by an arbitration program, it is difficult to locate judicial decisions which overturn an arbitration award on legal grounds. This level of review does sometimes result in a court’s refusal to enforce an arbitrator’s award. An arbitration award denying the claims of an employee was enforced, for example, where a reviewing court was inclined to find that arbitrators

602. See, e.g., Duffield v. Robertson Stephens & Co., No. C-95-0109-EFL (N.D. Cal.) (amicus brief filed by EEOC); Cosgrove v. Shearson Lehman Bros., No. 95-3432 (6th Cir.) (amicus brief filed by EEOC).
604. Id.
manifestly disregarded the law or the evidence under the ADEA. As a consequence, the reviewing court reversed the dismissal of the discrimination complaint filed in the district court by the employee, because there is no enforceable award to bar the suit on res judicata principles.

Under the manifest disregard of the law standard, an appellate court refused to enforce an arbitration agreement in the employer’s favor. Where the employee sued her former employer for overtime pay pursuant to the FLSA and the employer's attorney repeatedly urged the arbitration panel to disregard the FLSA, the court reversed the award denying the claim where there was no evidence that the arbitrators rejected the urging of the employer to disregard the law. In addition, the court held that there was a lack of factual support for the ruling.

Similarly, without any explanation in the award, there may be no “arguable or plausible basis” for an arbitrator to rule against an employee. One reviewing court found that an employee was entitled to payment of his

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605. Halligan 148 F.3d at 201-3.
606. Id.
607. Montes v. Shearson Lehman Brothers, Inc., 128 F. 3d 1456, 1459-60 (11th Cir. 1997)
608. Id.
609. Id. See also Ace Electrical Contractors v. Electrical Workers IBEW Local 292, 414 F.3d 896, 899-900 (8th Cir. 2005)(reversing arbitration decision that contract's age-ratio provisions were enforceable, applying Minnesota's Human Rights Act).
wages under state law or the contract.\textsuperscript{611} Therefore, the panel's denial of wages was made in manifest disregard of the law.\textsuperscript{612}

Often, even if the applicable statute is considered, the reviewing court will affirm the arbitrator's award. For example, the Third Circuit affirmed an arbitrator's award finding that a postal employee was discharged for just cause after allegedly filing an application for workers' compensation benefits that falsely claimed that she suffered a work-related knee injury.\textsuperscript{613} The award was enforced even though, at time of rendering award, the arbitrator was aware of fact that Office of Workers' Compensation Programs (“OWCP”) had granted the employee her workers' compensation benefits, after reversing its prior finding that employee had not suffered work-related injury.\textsuperscript{614} The Court held that the OWCP's factual conclusions did not bind the arbitrator, even though the state statute stated that an action of OWCP in allowing or denying payment is “final and conclusive for all purposes and with respect to all questions of law and fact.”\textsuperscript{615}

In contrast to that case, an arbitrator's reliance on federal law provided the reviewing court with grounds for enforcing his award in favor of

\textsuperscript{611} Id.
\textsuperscript{612} Id. (contrasting U.S. Energy Corp. v. Nuken, Inc., 400 F.3d 822, 831 (10th Cir. 2005) (remanded where two reasonable alternative interpretations of arbitration award were possible).
\textsuperscript{613} Letter Carriers v. U.S. Postal Service, 272 F. 3d 182, 185-87 (3d Cir. 2001).
\textsuperscript{614} Id.
\textsuperscript{615} Id.
an employee who had taken leave covered by the FMLA. The arbitrator properly interpreted the FMLA in determining that the employee was wrongfully discharged for absences covered under act, even though the arbitrator did not explain how the parties' agreement or their submissions gave him the authority to consider the FMLA. According to that court, "an arbitral decision shows a manifest disregard of the law only when it orders parties to violate the law." Any alleged misunderstanding of the FMLA by the arbitrator was not considered relevant because the employer agreed to resolve disputes by arbitration. Rejecting the employer's argument that the arbitrator lacked authority to interpret the FMLA, the court held that it must enforce the arbitral award "[s]o long as the [arbitrator's] interpretation can in some rational manner be derived from the agreement, viewed in the light of its language, its context, and other indicia of the parties' intention.

In contrast with the Seventh Circuit's affirmation of an arbitrator's award which failed to apply the FMLA, a district court overturned an arbitration award even if the arbitrator appeared to be relying on statutory protection for an employee. Without any consideration of an employee's possible protection under the FMLA the arbitrator's award in favor of an

617. Id.
618. Id.
619. Id. (party willingly and without reservation allows an issue to be submitted to arbitration).
620. Id.
employee was overturned by the reviewing court. This arbitrator exceeded his authority when, after finding that the employer had just cause to discharge an employee for his excessive absences from work, without required documentation, he ordered the employee's reinstatement on the basis that his physician's post-discharge letter was satisfactory evidence of an acceptable reason for the absence. The court reversed the arbitration award because the employee had several chances to provide documentation before he was discharged. Regardless of any statutory protections that might have supported the award, the award was reversed because the contract did not provide for indefinite suspension or reinstatement upon the submission of required documents.

Similar to that decision, an arbitration award was not enforced where it provided employees with benefits coverage without considering the protections of the ERISA. The award was based on non-contractual notions of “industrial justice,” so the court refused to enforce the award because it adopted an “enforceable obligation” requirement that was not significantly different from the “legal obligation” requirement imposed by

622. Id.
623. Id.
624. Id.
625. Id.
previous court decisions.\textsuperscript{627} Because the award did not “draw its essence” from the contract, it was vacated.\textsuperscript{628}

These decisions establish that the scope of review of arbitration decisions on either statutory or public policy grounds is very limited. Courts’ reluctance to become involved in substantive review once an arbitrator makes a decision makes the fairness of the process that much more important.

\section*{VII. Conclusion and Recommendations}

Employers can establish an enforceable arbitration program by ensuring that employees have knowingly entered into the agreement to arbitrate their employment disputes. As long as the process is fair, with unbiased arbitrators and an adequate process and decision writing guidelines, as well as adequate remedies available, an employer should be able to enforce the agreement to arbitrate. Without this structure in place, an employer can face an employee claim in court despite the implementation of an arbitration program. Even worse, the employer could proceed with arbitration of the claim, only to have that award reversed by a reviewing court because the agreement to arbitrate was unconscionable or the process was unfair.

Once the agreement to arbitrate is enforceable, courts will be very reluctant to overturn the arbitrator’s interpretation of the facts or application of the law.\textsuperscript{629} Only if the award conflicts with an express public policy or blatantly

\textsuperscript{627} Id.
\textsuperscript{628} Id.
\textsuperscript{629} See, e.g., Michigan Family Rest, Inc. v. SEIU Local 517M, 475 F.3d 746 (6th Cir. 2007).
disregards the applicable legal standards will a court step in to reverse the award. 630

A bar of all arbitration of employment disputes, as suggested by the Arbitration Fairness Act’s proposed amendment to the FAA, would force both employers and employees to give up the benefits of arbitration in resolving disputes in the workplace. Given the differences in standards for ensuring the conscionability and fairness of arbitration programs, as outlined in this paper, the Supreme Court could provide some guidance as to what employers should do to protect the rights of their employees, while still preserving the benefits of arbitration over litigation.

If legislators are unwilling to wait for clearer guidance from the Supreme Court, policy makers should follow the lead of the arbitration agencies by setting standards. Legislated standards could ensure that arbitration agreements are explained to employees so that they understand the ramifications of such agreements. As a substitute for litigation, arbitration should ensure that the arbitrator is unbiased and the proceedings provide an opportunity for the employee to present his or her claims. At the same time policy makers must ensure that the benefits of arbitration – including timely and less costly resolution of a dispute – are not lost.

630 Id.