**2002 SIA COMPLIANCE & LEGAL DIVISION ANNUAL SEMINAR**

**Marriott Desert Springs Resort & Spa**
**March 7-15, 2002**

# ARBITRATION v. LITIGATION

**Mark S. Dichter**
**Ian Matheson Ballard**
**Morgan, Lewis & Bockius LLP**
**1701 Market Street**
**Philadelphia, PA 19103**

**TABLE OF CONTENTS**

**TABLE OF CONTENTS**
(continued)

**TABLE OF CONTENTS**
(continued)

## TABLE OF AUTHORITIES

### CASES

**STATUTES**



**MISCELLANEOUS**

## I. INTRODUCTION

The United States Supreme Court's March 2001 decision in Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001) has generated a great deal of discussion in the labor and employment law community. Although the decision certainly indicates the Court's continued endorsement of arbitration for dispute resolution, it did not resolve the many issues surrounding the validity and enforcement of mandatory arbitration agreements.

Indeed, the issue in Circuit City was very narrow: whether Section 1 of the Federal Arbitration Act ("FAA"), which excludes from the statute's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," extended to all employment contracts or to only employment contracts involving transportation workers. In a 5-4 decision, the Court read the exclusion narrowly to apply only to those employees actually involved in the transport of goods.

In dicta, the Court did restate its general approval of arbitration in employment disputes, citing to its decision in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), in which the Court compelled an Age Discrimination in Employment Act ("ADEA") claim to arbitration and rejected "generalized attacks" on arbitration clauses such as the employee being "prone to unequal bargaining power." In Circuit City, the Court explained that there are "real benefits to the enforcement of arbitration provisions," including the reduction of costs, complexity and uncertainty. Id. at 1313. Such benefits or advantages do not "somehow disappear when transferred to the employment context." Id. Indeed, according to the Court, the lower cost of arbitration is a benefit of "particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." Id.

Despite this favorable dicta, the Circuit City decision really only addressed the scope of Section 1 of the FAA, and the Court's conclusion on this issue was consistent with the decisions of all the appellate courts to consider this issue, with the exception of the Ninth Circuit Court of Appeals. See Craft v. Campbell Soup Co., 177 F.3d 1083, 1093 (9th Cir. 1999) (holding that Section 1's exclusion applies beyond employment agreements in the transportation industry). Significantly, the case did not involve claims brought under the federal anti-discrimination statutes. As a result, one issue that is still unresolved is the extent to which these statutes, other than the ADEA that was considered in Gilmer, evidence congressional intent to preclude arbitration of claims brought under them. In the past, only the Ninth Circuit has taken the position that Title VII claims are not subject to mandatory arbitration, based on its reading of the legislative history of the 1991 Amendments to the Civil Rights Act of 1964. Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1198-1200 (9th Cir. 1998), cert. denied, 525 U.S. 996 (1998). The basis for the Duffield decision, its repudiation by other courts, and its continued viability are discussed in more detail below.

The Circuit City Court also did not have occasion to examine the arbitration clause used by the employer, and therefore did not consider its validity or enforceability. As a result, challenges will continue to be made to various provisions in arbitration agreements and how they are implemented, focusing on two major areas: (1) the extent to which the arbitral forum allows employees to vindicate their statutory rights, a requirement of Gilmer; and (2) whether the agreement comports with basis contract law principles, a function of Section 2 of the FAA, which permits challenges "upon such grounds as exist at law or in equity for the revocation of any

contract." 9 U.S.C. § 2. As discussed in more detail below, these challenges typically involve claims that the agreement was not supported by consideration, that the agreement does not evince an intent to arbitrate specific claims, or that the process favors the employer or is unfair to the employee. One area that is especially unsettled is the extent to which an employee can be asked to share in the costs of the arbitration process, and whether requiring the employee to pay anything beyond nominal filing fees renders the agreement unenforceable. Also of interest is whether an employee can validly agree not to participate in class actions, both in court and in arbitration. These and other issues are discussed in more detail below.

Another unresolved issue is the extent to which union members can be bound by agreements to arbitrate statutory disputes that are contained in a collective bargaining agreement between their union and employer. Although prior Supreme Court decisions showed a reluctance to compel arbitration in such circumstances, the Court's more recent decisions have suggested that it would be willing to do so as long as the CBA's agreement to arbitrate such claims was "clear and unmistakable." So far, only the Fourth Circuit Court of Appeals has compelled union members to arbitrate such claims, but in light of Circuit City and other recent Supreme Court decisions, it is possible that other circuit courts will follow suit. This issue is discussed further below.

Finally, at least one unsettled issue should be resolved by the Supreme Court this term. In EEOC v. Waffle House, Inc., 193 F.3d 805 (4th Cir. 1999), cert. granted, 121 S. Ct. 1401 (2001), the Court is to decide whether the EEOC is prevented from seeking individual relief, such as reinstatement, back pay or punitive damages, on behalf of employees who have entered into binding arbitration agreements with their employers. The decision will resolve a split in the circuit courts, in which the Second and Fourth Circuit have held that the EEOC may not seek such relief, while the Sixth Circuit holding that the agency can.

In sum, the Circuit City decision does not mean that it is "all over" when it comes to the enforceability of pre-dispute arbitration agreements. To the contrary, the decision is merely part of the swing of the pendulum begun in Gilmer towards increased judicial acceptance of such agreements. Many issues will need to be resolved before ADR gains full acceptance by the courts, employers, and employees. Only then will the process fulfill its promise of providing an efficient, cost-effective means of resolving many workplace disputes, the majority of which are not well-suited for full-scale litigation in court.

## II. FACTORS AFFECTING ENFORCEABILITY

### A. What Claims Can Be Subjected to Mandatory Arbitration? *Did Congress Intend to Preclude Compulsory Arbitration of Title VII Claims?*

In Gilmer, the Supreme Court held that individual agreements to arbitrate may be void where "Congress itself has evinced an intention," which is discoverable in a statute's text, legislative history, or through an inherent conflict between arbitration and the purpose of the statute, "to preclude a waiver of judicial remedies for the statutory rights at issue." Gilmer, 500 U.S. at 24-26.

After Gilmer was decided in 1991, Congress amended the Civil Rights of 1964 to include the following language:

> where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by [this chapter].

See Pub. L. 102-166 § 118, 105 Stat. 1071, 1081 (1991) (codified as historical and statutory note to 42 U.S.C. § 1981) (applicable to Title VII and the ADEA). An identical provision is included in the Americans with Disabilities Act ("ADA"). 42 U.S.C. § 12212.

Most courts have viewed this provision as providing a clear congressional endorsement of arbitration. See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 9 (1st Cir. 1999) (provision manifests a "presumption in favor of arbitration") (citations omitted); Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 203-06 (2d Cir. 1999) (provision is not ambiguous and expresses support for arbitration), cert. denied, 531 U.S. 1069 (2001); Seus v. John Nuveen & Co., 146 F.3d 175, 182 (3d Cir. 1998) ("on its face, the text of § 118 [of the Civil Rights Act of 1991] evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims"), cert. denied, 525 U.S. 1139 (1999); Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 937 (4th Cir. 1999) (same); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991) (same); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307-12 (6th Cir. 1991) (same); Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130 (7th Cir. 1997) (same); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837 (8th Cir. 1997) (same); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487 (10th Cir. 1994) (same); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998) (same); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1467-68 (D.C. Cir. 1997) (same).

The Ninth Circuit, however, has refused to extend Gilmer to Title VII claims, and has held that employees cannot be required to arbitrate such claims. Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1198-1200 (9th Cir. 1998), cert. denied, 525 U.S. 996 (1998). The court in Duffield based its decision on its review of the context, language and legislative history of the Civil Rights Act of 1991. According to the Duffield court, Congress' intent to preclude compulsory arbitration of Title VII claims is evidenced in the expansion of employees' rights and remedies contained in the 1991 amendments.

Although Circuit City did not address the statutory interpretation issues raised in Duffield, the Supreme Court's endorsement of arbitration in that case has cast doubt on the continued viability of the Ninth Circuit's position. At least one court within the Ninth Circuit has concluded that Duffield is no longer viable. See Olivares v. Hispanic Broad. Corp., No. CV 00-00354-ER, 2001 WL 477171 (C.D. Cal. Apr. 26, 2001) (rejecting Duffield and ordering arbitration); but see Melton v. Philip Morris Inc., No. 01-93-KI, 2001 LEXIS 12601 (D. Or. Aug. 9, 2001) (finding Duffield still viable as to Title VII and Oregon discrimination laws but compelling arbitration on ADEA and state common-law tort claims).

### B. Knowing and Voluntary Agreement
### *Is There an Actual Agreement to Arbitrate and What Claims Are Covered?*

Since the duty to arbitrate is a contractual obligation, courts look to whether the parties intended the particular dispute to be arbitrated as evidenced by the language contained in the agreement. See Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163 (8th Cir. 1984). Where an employee does not "knowingly" agree to arbitrate employment disputes, a court may refuse to find that the

employee has waived the statutory rights, remedies and procedural protections of the anti-discrimination statutes.

The "knowing and voluntary" cases typically involve at least one of the following two issues: (1) whether there was actually an agreement to arbitrate, which usually centers on how the policy was communicated to the employee and whether the employee has acknowledged an intent to be bound by the policy; and (2) whether the language of the arbitration agreement encompasses the dispute that is at issue. Whether there was an agreement to arbitrate is an issue that arises frequently when the policy is contained in an employee handbook, a situation that is described in more detail in the next section.

The Ninth Circuit Court of Appeals decision in Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994), cert. denied, 516 U.S. 812 (1995) involved both of these issues. In Lai, the court held that the employees' U-4 applications did not put them on notice that they were agreeing to waive their right to sue because the form did not describe the types of disputes subject to arbitration. The U-4 application included an agreement "to arbitrate any dispute, claim or controversy that ... is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register." The plaintiffs subsequently registered with the National Association of Securities Dealers ("NASD"), which requires that disputes "arising in connection with the business" of its members be arbitrated. The Lai court held that this was insufficient to constitute a knowing agreement to submit statutory employment claims to arbitration. Id. at 1305. Moreover, the plaintiffs had alleged that when they signed the U-4 form, they were told only that they were applying to take a test and were told to sign in the space provided without being given an opportunity to read the forms. Id. at 1301.

Most courts, however, reject the "knowing waiver" requirement of Lai on the grounds that its premise – that an agreement to arbitrate statutory discrimination claims forces a waiver of substantive rights – is inconsistent with the conclusion in Gilmer that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute." Gilmer, 500 U.S. at 26 (citation omitted); see Haskins v. Prudential Ins. Co. of Am., 230 F.3d 231, 235-36 (6th Cir. 2000) (rejecting Lai and compelling arbitration even though arbitration form did not identify claims subject to arbitration and employee did not receive copy of arbitration rules), cert. denied, 531 U.S. 1113 (2001); Cosgrove v. Shearson Lehman Bros., 105 F.3d 659 (6th Cir.) (distinguished Lai and upheld the trial court's grant of defendant's motion for enforcement of an arbitration award resolving sexual harassment and retaliation claims where "the plain language of the agreement at issue here makes clear that all employment disputes are to be resolved through arbitration [and where] this was the second time that plaintiff had signed such an agreement."), cert. denied, 522 U.S. 864 (1997); Emeronye v. CACI Int'l Inc., 141 F. Supp. 2d 82 (D.D.C. 2001) (rejecting Lai and the employee's argument that there was no "meeting of the minds" because she did not recall signing the agreement or having any discussion with her employer about it); Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1474 (N.D. Ill. 1997) (prevailing view is that Lai is incompatible with the Supreme Court's decision in Gilmer, ignores core principles of contract interpretation, and inappropriately used legislative history to contradict plain statutory language).

### 1. Cases considering whether there was an agreement to arbitrate

Second Circuit

- Gibbs v. Conn. Gen. Life Ins. Co., No. CV97 0567009, 1998 WL 123010, at *3 (Conn. May 3, 1998) (agreement not enforceable where it was announced via interoffice memorandum and no acknowledgement was required indicating receipt of the policy).

- Vaccaro v. Ins. Co. of N. Am., No. 3:96CV1161 AHN, 1996 WL 762234 (D. Conn. Dec. 23, 1996) (dispute over plaintiff's receipt and knowledge of arbitration policy that was mailed to employees with no acknowledgement form requires a jury trial).

- Maye v. Smith Barney Inc., 897 F. Supp. 100 (S.D.N.Y. 1995) (one "who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them.").

Third Circuit

- Seus v. John Nuveen & Co., 146 F.3d 175, 179, 180 (3d Cir. 1998) (statement that "Applicant should read the provisions carefully," indicated that the agreement was neither oppressive nor unreasonably favorable to the employer), cert. denied, 525 U.S. 1139 (1999).

- Caldwell v. KFC Corp., 958 F. Supp. 962 (D.N.J. 1997) (arbitration agreement "buried" in employment application encompassing "any claims concerning the termination of [one's] employment" was insufficient to notify employee of agreement to arbitrate a civil rights claim for retaliatory termination).

- Young v. Prudential Ins. Co. of Am., Inc., 688 A.2d 1069, 1076 (N.J. Super. 1997), (rejecting Lai and employee's argument that he did not know he was agreeing to arbitrate state law discrimination claims when he signed a U-4 agreement), certif. denied, 149 N.J. 408 (1997).

Fifth Circuit

- Prevot v. Phillips Petroleum Co., No. Civ.A. G-00295, 2001 WL 245708 (S.D. Tex. Mar. 7, 2001) (finding that arbitration agreements were unconscionable and therefore unenforceable where agreements were written in English and the plaintiffs testified in sworn affidavits that they could not read English at the time they signed the agreements and were told by supervisor to sign agreements quickly so they could return to work).

- Hickman v. PaineWebber Inc., No. 1 :96-CV-273, 1996 WL 700099 (E.D. Tex. Oct. 30, 1996) (rejecting the plaintiff's argument that failure to select Self-Regulating Organization on U-4 agreement failed to establish binding agreement to arbitrate and

referring the plaintiff's claims of fraud, duress, and lack of consideration to arbitrator to decide).

Sixth Circuit

- Haskins v. Prudential Ins. Co. of Am., 230 F.3d 231, 235-36 (6th Cir. 2000) (rejecting Lai and compelling arbitration even though arbitration form did not identify claims subject to arbitration and employee did not receive copy of arbitration rules), cert. denied, 531 U.S. 1113 (2001)

- Cosgrove v. Shearson Lehman Bros., 105 F.3d 659 (6th Cir.) (distinguished Lai and upheld the trial court's grant of defendant's motion for enforcement of an arbitration award resolving sexual harassment and retaliation claims where "the plain language of the agreement at issue here makes clear that all employment disputes are to be resolved through arbitration [and where] this was the second time that plaintiff had signed such an agreement."), cert. denied, 522 U.S. 864 (1997).

- Walker v. MDM Servs. Corp., 997 F. Supp. 822 (W.D. Ky. 1998) (arbitration agreement that was signed at commencement of employment was enforceable even though the plaintiff does not recall signing it and where she has failed to show fraud or coercion beyond mere unequal bargaining power).

- Beauchamp v. Great W. Life Assurance Co., 918 F. Supp. 1091 (E.D. Mich. 1996) (enforcing arbitration clause in U-4 agreement and rejecting the plaintiff's contention that she did knowingly agree to arbitrate because she was not aware of the arbitration clause or that it included statutory discrimination claims).

- Harmon v. Philip Morris Inc., 697 N.E.2d 270 (Ohio Ct. App. 1997) (O'Donnell, J.), appeal not allowed, 688 N.E.2d 1046 (Ohio 1998) (reversed order of arbitration upon finding that employer's unilateral promulgation of a dispute resolution policy including arbitration did not effectively modify the terms of employment where the employee's signing of an acknowledgment form did not constitute express assent to the terms of the policy).

Seventh Circuit

- Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, (N.D. Ill. 1997) (prevailing view is that Lai is incompatible with the Supreme Court's decision in Gilmer, ignores core principles of contract interpretation, and inappropriately used legislative history to contradict plain statutory language).

Eighth Circuit

- Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163 (8th Cir. 1984) (courts should look to language of agreement).

- Battle v. Prudential Ins. Co. of Am., 973 F. Supp. 861 (D. Minn. 1997) (rejecting Lai and employee's argument that he did not know he was agreeing to arbitrate statutory discrimination claims when he signed a U-4 agreement that was handed to him in a "hurried manner" and he was told to sign at the "x").

- Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447, 1454 (D. Minn. 1996) ("in the absence of fraud, mistake, duress, coercion, or unconscionable terms, a literate party who signs a contract, in ignorance of its contents, remains bound by its terms and conditions.").

Ninth Circuit

- Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299 (9th Cir. 1994), cert. denied, 516 U.S. 812 (1995) (U-4 applications did not put employees on notice that they were agreeing to right to sue because form did not describe types of disputes subject to arbitration).

- Crisan v. A.G. Edwards & Sons. Inc., No. 94-20025, 1996 WL 67317 (N.D. Cal. Feb. 13, 1996) (distinguishing facts of Lai because the plaintiff was "aware of the documents she was signing and was in no way prevented from reading their provisions"; court compelled arbitration).

- Tjart v. Smith Barney, Inc., 28 P.3d 823 (Wash. App. Div. 2001) (enforcing arbitration agreement; "whether or not Tjart read or understood the terms of the Shearson application to constitute an agreement to arbitrate, she assented to its terms; also rejecting the plaintiff's argument that arbitration of statutory claims violated public policy).

Tenth Circuit

- Cole v. Halliburton Co., No. CIV-00-0862-T, 2000 WL 1531614 (W.D. Okla. Sept. 6, 2000) (granted defendant's motion to compel arbitration despite fact that employee had not received all materials related to arbitration program; the materials he did receive, along with his continued employment, were sufficient to put him on notice of the program).

Eleventh Circuit

- Kelly v. UHC Mgmt. Co., 967 F. Supp. 1240 (N.D. Ala. 1997) (employees signed an acknowledgment form confirming receipt of an employee handbook mandating the arbitration of employment-related disputes. Court compelled arbitration even if the agreements were offered on a take it or leave it basis with no opportunity for bargaining on the part of the plaintiffs, as there is "nothing inherently unfair or oppressive about arbitration clauses.").

D.C. Circuit

- Bailey v. Fed. Nat'l Mortgage Ass'n, 209 F.3d 740 (D.C. Cir. 2000) (finding that arbitration policy that stated it would become a condition of employment for all employees on the effective date and that starting or continuing work on or after that date would indicate acceptance of the policy was insufficient to bind employee who continued working after effective date but who had never agreed to policy in writing or even orally).

- Phox v. Allied Capital Advisers, Inc., No. 96-2745, 1997 WL 198115 (D.D.C. Apr. 14, 1997) (refusing to compel arbitration where language of agreement – that the employee "may submit the dispute to final and binding arbitration" – was permissive and the agreement was contained in handbook that employee never signed or acknowledged receiving).

- Emeronye v. CACI Int'l Inc., 141 F. Supp. 2d 82 (D.D.C. 2001) (rejecting Lai and the employee's argument that there was no "meeting of the minds" because she did not recall signing the agreement or having any discussion with her employer about it).

- Nur v. KFC, 2001 U.S. Dist. LEXIS 3420 (D.D.C. Mar. 21, 2001) (parties are bound to contracts they read and sign; irrelevant to validity whether party understood the terms; employers are not required "to go out of their way…to recommend to the employee that he or she think the matter through before signing it").

### 2. Cases considering what claims the parties agreed to arbitrate

First Circuit

- Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 18-19 (1st Cir. 1999) (holding that the employer will bear the risk of the employee's ignorance about the range of claims subject to arbitration, at least where the arbitration agreement expressly identified the range by reference to another document, which employee claimed was not provided to her).

- Mugnano-Bomstein v. Crowell, 677 N.E.2d 242 (Mass. App. Ct. 1997) (rejecting the plaintiff's argument that arbitration agreement that included "any controversy arising out of or in connection with [her] employment or termination of employment...." is too vague or ambiguous to include sexual harassment or gender discrimination claims), review denied, 680 N.E.2d 101 (Mass. 1997).

Second Circuit

- Hoffman v. Aaron Kamhi, Inc., 927 F. Supp. 640, 645 (S.D.N.Y. 1996) (refusing to compel arbitration of ADA and FMLA claims where the agreement was signed before these statutes were enacted, therefore making it impossible for the parties to have intended to encompass these claims).

- DeGaetano v. Smith Barney. Inc., No. 95 Civ. 1613, 1996 WL 44226 (S.D.N.Y. Feb. 5, 1996) (rejecting Lai and enforcing arbitration agreement that referred to the types of disputes to be arbitrated and instructed employees to become familiar with the materials they signed).

- Gateson v. Aslk-Bank, N.V., No. 94 Civ. 5849 (RPP), 1995 WL 387720 (S.D.N.Y. Jun. 29, 1995) (enforcing arbitration agreement that was signed four years after hiring and distinguishing Lai since agreement was explicit regarding arbitration of employment disputes).

- Lomeli v. N. Cent. Conn. Anesthesia Assocs., No. CV 94 0541335, 1995 WL 370785 (Conn. Super. June 9, 1995) (requiring arbitration of discrimination and unequal pay claims where employment contract required arbitration of all disputes "arising out of or in connection with this Agreement or the breach thereof . . .").

Third Circuit

- Caldwell v. KFC Corp., 958 F. Supp. 962 (D.N.J. 1997) (arbitration agreement "buried" in employment application encompassing "any claims concerning the termination of [one's] employment" was insufficient to notify employee of agreement to arbitrate a civil rights claim for retaliatory termination).

- Garfinkel v. Morristown Obstetrics & Gynecology Assocs. P.A., 773 A.2d 665, 672 (N.J. 2001) (holding that an arbitration provision must expressly indicate that employee is waiving right to file state law statutory discrimination claims).

Fourth Circuit

- Rudolph v. Alamo Rent A Car, Inc., 952 F. Supp. 311 (E.D. Va. 1997) (held that Title VII sexual harassment claims are not subject to arbitration under an employment contract's arbitration clause which provides arbitration for alleged violations of the contract only, not an employment-related dispute, and which does not bind the employer to comply with the statutes prohibiting discrimination.)

Fifth Circuit

- Reynolds v. Brown & Root, Inc., No. 96-2800, 1997 WL 269484 (S.D. Tex. Jan. 30, 1997) (enforcing arbitration agreement and distinguishing Lai since agreement had clear language regarding employment disputes).

Sixth Circuit

- Haskins v. Prudential Ins. Co. of Am., 230 F.3d 231, 235-36 (6th Cir. 2000) (rejecting Lai and compelling arbitration even though arbitration form did not identify claims subject to arbitration and employee did not receive copy of arbitration rules), cert. denied, 531 U.S. 1113 (2001)

- Cosgrove v. Shearson Lehman Bros., 105 F.3d 659 (6th Cir.) (distinguished Lai and upheld the trial court's grant of defendant's motion for enforcement of an arbitration award resolving sexual harassment and retaliation claims where "the plain language of the agreement at issue here makes clear that all employment disputes are to be resolved through arbitration [and where] this was the second time that plaintiff had signed such an agreement."), cert. denied, 522 U.S. 864 (1997).

Seventh Circuit

- Matthews v. Rollins Hudig Hall Co., 72 F.3d 50, 54 (7th Cir. 1995) (arbitration agreement that purported to cover only claims related to the breach of that agreement was broad enough to include ADEA claim because the allegations of discrimination "clearly entwine the question of breach of contract with the ADEA claim and demonstrate that both claims are 'related.'").

- Kahalnik v. John Hancock Funds, Inc., No. 95 C 3933, 1996 WL 145842 (N.D. Ill. Mar. 27, 1996) (compelling arbitration of ADEA claim and rejecting the plaintiff's argument that such a claim was not within the scope of the NASD's Code requiring the arbitration of any dispute, claim, or controversy "arising out of the employment or termination of employment . .").

Eighth Circuit

- Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943 (8th Cir. 2001) (arbitration agreement provided that employee "retained the right to file a claim or charge with any State or Federal agency . . ." but that "except as to claims or charges handled within a State or Federal agency, You and the Company agree to use [Employment Dispute Services Inc.] to resolve legal claims concerning You that either party would otherwise bring in State or Federal court." The Eighth Circuit found this language was "unambiguous and clear" regarding the plaintiff's duty to arbitrate Title VII claims, and rejected her argument that the agreement excluded all matters submitted to the EEOC from arbitration).

- Keymer v. Mgmt. Recruiters Int'l, Inc., 169 F.3d 501 (8th Cir. 1999) (affirmed denial of employer's motion to compel arbitration of ADEA termination claim where the "unambiguous" language of the employment contract excluded those claims related to the "termination" of the employment agreement).

Ninth Circuit

- Renteria v. Prudential Insurance Co. of America, 113 F.3d 1104, 1105-06 (9th Cir. 1997) (plaintiff signed U-4 application in 1992 agreeing to arbitrate "any dispute, claim or controversy that may arise between me and my firm . . ." under the rules of the NASD as "may be amended from time to time." In 1993, the NASD code was amended to include "claims arising out of the employment or termination of employment." The plaintiff was

subsequently discharged, and the employer moved to compel arbitration. Relying on Lai, the Ninth Circuit refused to compel arbitration and rejected the contention that the arbitration agreement encompassed the 1993 NASD amendment: "Whether an agreement to arbitrate constitutes a knowing waiver of a right is analyzed from the time the agreement is made," not as of the time the agreement is amended.

Tenth Circuit

- Ludwig v. Equitable Life Assurance Soc'y of the United States, 978 F. Supp. 1379 (D. Kan. 1997) (employee signed securities industry U-4 agreement requiring arbitration of "any dispute, claim or controversy . . . arising out of the employment or termination of employment . . ."; court compelled arbitration and rejected employee's argument that the agreement was "confusing and ambiguous" and that she had not received NASD Code where no evidence that she denied a copy).

- Alcaraz v. Avnet, Inc., 933 F. Supp. 1025 (D.N.M. 1996) (refusing to enforce arbitration agreement where parties only agreed to contract damages, precluding arbitration of statutory claims which provided for additional remedies).

D.C. Circuit

- Phox v. Allied Capital Advisers, Inc., No. 96-2745, 1997 WL 198115 (D.D.C. Apr. 14, 1997) (refusing to compel arbitration where language of agreement – that the employee "may submit the dispute to final and binding arbitration" – was permissive and the agreement was contained in handbook that employee never signed or acknowledged receiving).

### C. Enforceability of Handbook Provisions

Some employers simply include arbitration agreements in their employee handbooks. Although courts have found arbitration procedures published in personnel policy manuals to be enforceable, an employer has a greater likelihood of demonstrating the employee's voluntary agreement to arbitrate if the employer has a separate arbitration policy and requires employees to sign an express agreement to its terms.

#### 1. Handbook cases involving dissemination of policy and employee receipt and acknowledgement

Second Circuit

- Chanchani v. Salomon/Smith Barney, Inc., No. 99 CIV 9219, 2001 WL 204214 (S.D.N.Y. Mar. 1, 2001) (employees who acknowledged receipt of employee handbook containing arbitration provision were required to arbitrate dispute, even though they had not signed acknowledgement form for subsequent handbook).

- Bishop v. Smith Barney, Inc., No. 97 Civ. 4807, 1998 WL 50210 (S.D.N.Y. Feb. 6, 1998) (granting defendant's motion to compel arbitration of Title VII, EPA, and state claims pursuant to arbitration policy distributed to employees when instituted with accompanying explanatory memorandum and later outlined in employee handbook, despite plaintiff's failure to sign any agreement to arbitrate in policy, because employer incorporated by reference into plaintiff's original employment agreement by making plaintiff's agreement to arbitrate condition of employment and including agreement in handbook).

Fourth Circuit

- O'Neil v. Hilton Head Hosp., 115 F.3d 272 (4th Cir. 1997) (granting motion to stay civil action pending arbitration of FMLA claims under handbook arbitration clause where employee signed acknowledgement form indicating receipt of handbook).

- Reese v. Commercial Credit Corp., 955 F. Supp. 567 (D.S.C. 1997) (finding arbitration agreement enforceable which was contained in employee handbook where arbitration policy was also distributed by mail to all employees when adopted and where handbook included disclaimer that concerned only employment-at-will relationship).

- Martin v. Vance, 514 S.E.2d 306 (N.C. Ct. App. 1999) (reversing trial court's order denying employer's motion compel arbitration and finding arbitration agreement contained in personnel policy manual enforceable where employee signed certification, which incorporated by reference personnel policy manual, when she requested transfer to different department in which she agreed to submit any dispute regarding her employment or termination from employment to arbitration).

Fifth Circuit

- Circuit City Stores, Inc. v. Curry, 946 S.W.2d 486 (Tex. Ct. App. 1997) (conditionally granting writ of mandamus requiring lower court to vacate order denying employer's motion to compel arbitration and to stay civil proceedings of employee's workers' compensation retaliation claim where arbitration agreement in handbook was enforceable because it included opt-out provision that employee did not exercise and employee signed receipt of acknowledgement of handbook and separate rules and procedures for arbitration).

- Burlington N. R.R. Co. v. Akpan, 943 S.W.2d 48 (Tex. Ct. App. 1996) (reversing trial court's denial of employer's motion to compel arbitration and finding arbitration agreement enforceable where employer sent copies of arbitration policy to all employees when it adopted policy and distributed policy again two years later to all employees in updated copy of employee handbook).

Sixth Circuit

- Leonard v. Clear Channel Communications, No. 972320-D/A, 1997 WL 581439 (W.D. Tenn. July 24, 1997) (granting defendant's motion to compel arbitration of employee's federal and state race discrimination and retaliation claims and finding that employee accepted agreement to arbitrate contained in employee handbook, even though employee never executed written acceptance of agreement to arbitrate, where employee's continued performance of duties with employer, which had acquired employee's former employers, constituted acceptance of terms of agreement to arbitrate).

- Trumbull v. Century Mktg. Corp., 12 F. Supp. 2d 683 (N.D. Ohio 1998) (finding arbitration clause in employee handbook unenforceable where handbook itself not a valid contract due to lack of mutuality of obligation where handbook not executed by plaintiff as condition of employment and finding plaintiff's signing acknowledgement of receipt of handbook not sufficient to make handbook's terms enforceable, including agreement to arbitrate).

- Trumbull v. Century Mktg. Corp., 12 F. Supp. 2d 683 (N.D. Ohio 1998) (finding arbitration agreement contained in employee handbook unenforceable where no evidence was submitted regarding circumstances under which employee signed handbook).

Seventh Circuit

- Bauer v. Morton's of Chicago, No. 99 C 5996, 2000 WL 149287 (N.D. Ill. Feb 9, 2000) (holding that arbitration provision added to the employee handbook after Plaintiff began her employment was valid and enforceable).

Eighth Circuit

- Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837-38 (8th Cir. 1997) (arbitration acknowledgment found in an employee handbook found to be enforceable despite general rule in Missouri that employer's unilateral publication of a handbook does not create a contract).

- Lang v. Burlington N. R.R., 835 F. Supp. 1104 (D. Minn. 1993) (mandatory arbitration clause added to handbook more than 25 years after employee's hire was enforceable).

Ninth Circuit

- Kummetz v. Tech Mold, Inc., 152 F.3d 1153 (9th Cir. 1998) (holding that arbitration agreement contained in employee handbook was unenforceable where acknowledgment of receipt of handbook signed by employee contained no explicit reference to arbitration policy or employee's waiver of his right to sue).

- Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756, 762 (9th Cir. 1997) (holding employee did not knowingly agree to arbitrate ADA claim by signing form

acknowledging receipt of employee handbook including arbitration provisions where acknowledgement form did not reference arbitration agreement and employee only agreed to "read and understand" handbook, not "agree" to its terms), cert. denied, 523 U.S. 1072 (1998).

- Continental Airlines, Inc. v. Mason, 87 F.3d 1318 (9th Cir. 1996) (compelling arbitration under California law based on an arbitration procedure in 70-page handbook and where employee signed acknowledgment form that clearly referenced the handbook).

- Nghiem v. NEC Elec., Inc., 25 F.3d 1437 (9th Cir.), cert. denied, 513 U.S. 1044 (1994) (finding arbitration agreement enforceable where, although employee signed employment contract which did not contain arbitration clause, employee also signed acknowledgment for receipt of company handbook which included explanation of arbitration process).

D.C. Circuit

- Phox v. Allied Capital Advisers, Inc., C.A. No. 96-2745, 1997 WL 198115 (D.D.C. Apr. 14, 1997) (finding arbitration agreement contained in handbook not enforceable where there was no evidence that employee signed handbook or otherwise acknowledged that he understood and agreed to any of its provisions and provision describing arbitration procedures provided that employee "may" submit dispute to arbitration, suggesting that procedure was not mandatory).

**2. Handbook cases focusing on whether arbitration provision separate and distinct**

Second Circuit

- Sherry v. Sisters of Charity Med. Ctr., No 98-CV-6151, 1999 WL 287738 (E.D.N.Y. May 4, 1999) (refusing to enforce arbitration clause in employee handbook where the clause was not highlighted or otherwise set apart from other handbook provisions).

Eighth Circuit

- McClendon v. Sherwin Williams, Inc., 70 F. Supp. 2d 940, 943 (E.D. Ark. 1999) (employee handbook was sufficiently distinct because it dealt only with compulsory arbitration procedure and employee disputes and did not address other employee issues such as vacation and sick leave policies).

**3. Handbook cases involving employer's mutual agreement to abide by terms**

First Circuit

- Ramirez-De-Arellano v. Am. Airlines, Inc., 133 F.3d 89, 90 (1st Cir. 1997) (stating in dicta that arbitration agreement contained in handbook provision not enforceable because

not subject to "back and forth bargaining" and because handbook stated that it was not a contract and was subject to unilateral amendments by employer at any time).

- Corion Corp. v. Chen, No. CIV. A. 91-1 1792-Y, 1991 WL 280288 (D. Mass. Dec. 27, 1991) (denying employer's declaratory judgment action that employee was not entitled to arbitrate employer's termination decision and finding arbitration agreement contained in personnel policies manual, copy of which was provided to employee at or near commencement of his employment where employer's reliance on provisions of manual in dealings with employee over course of his employment manifested employer's intent to be bound by manual's provisions, including arbitration agreement), appeal denied, 964 F.2d 55 (1st Cir. 1992).

Fifth Circuit

- Tenet Healthcare Ltd. v. Cooper, 960 S.W.2d 386 (Tex. Ct. App. 1998) (finding arbitration agreement contained in employee handbook unenforceable because, inter alia, language in handbook and employee acknowledgment form reflected only unilateral contract, as it denied employer was bound by policies set forth therein).

Seventh Circuit

- Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126 (7th Cir. 1997) (finding arbitration agreement unenforceable where employee signed understanding in which employee agreed to submit to arbitration which referred to policy manual before having received copy of policy manual which included explanation of arbitration and its procedures because of absence of "meaningful link" between employee's promise, contained in understanding, and employer's obligation, set forth in manual).

### 4. Effect of employer contractual disclaimer

Including arbitration agreements in employee handbooks also puts the employer in the position of arguing that the arbitration policy is a contract, when generally employers do not want handbook policies to be considered contracts. Several courts have declined to enforce arbitration policies in a handbook for this reason. Heurtebise v. Reliable Bus. Computers, 452 Mich. 405 (1996), cert. denied, 520 U.S. 1142 (1997) (clause in handbook reserving right of employer to modify policies at its sole discretion indicated that employer did not intend to be bound by handbook and therefore arbitration policy was not enforceable); Reilly v. Stroehmann Bros. Co., 367 Pa. Super. 411 (1987) (for handbook to be construed as a contract it must contain unequivocal provisions that employer intends to be bound by it, and renounces the principle of at-will employment); cf. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) (arbitration clause that was on separate page of handbook and used contractual terms such as "I understand" was enforceable despite state law that handbooks generally do not create a contract).

a. **Contractual disclaimer cases enforcing arbitration agreements:**

- Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) (arbitration clause that was on separate page of handbook and used contractual terms such as "I understand" was enforceable despite state law that handbooks generally do not create a contract).

- Johnson v. Travelers Prop. Cas., No. 98 C 7547, 1999 WL 498708 (N.D. Ill. July 7, 1999) (granting employer's motion to compel arbitration of former employee's federal age discrimination claim where employer's reciprocal promise to arbitrate employment disputes contained in employee handbook was sufficient consideration to bind employee, even where employee acknowledgement contained disclaimer that handbook did not create contract of employment, as disclaimer indicated only that handbook does not alter employment-at-will relationship).

- Kelly v. UHC Mgmt. Co., 967 F. Supp. 1240 (N.D. Ala. 1997) (granting defendant's motion to compel arbitration of employees' race discrimination claims and finding arbitration agreement contained in employee handbook was enforceable where employer provided employees' several written communications describing employer's intention to implement arbitration and where employees signed acknowledgment form indicating that provisions of handbook were not binding, except for provision requiring arbitration and where handbook itself included detailed explanation of arbitration procedures).

- Reese v. Commercial Credit Corp., 955 F. Supp. 567 (D.S.C. 1997) (finding arbitration agreement enforceable which was contained in employee handbook where arbitration policy was also distributed by mail to all employees when adopted and where handbook included disclaimer that concerned only employment-at-will relationship).

- Topf v. Warnaco, Inc., 942 F. Supp. 762 (D. Conn. 1996) (finding enforceable arbitration agreement that was contained in employee handbook where employee's acknowledgment contained language that indicated, while handbook did not create contract of employment, it was "entire agreement concerning each party's right to arbitrate employment disputes. . .")

b. **Contractual disclaimer cases not enforcing arbitration agreements:**

- Heurtebise v. Reliable Bus. Computers, 452 Mich. 405 (1996), cert. denied, 520 U.S. 1142 (1997) (clause in handbook reserving right of employer to modify policies at its sole discretion indicated that employer did not intend to be bound by handbook and therefore arbitration policy was not enforceable).

- Reilly v. Stroehmann Bros. Co., 367 Pa. Super. 411 (1987) (for handbook to be construed as a contract it must contain unequivocal provisions that employer intends to be bound by it, and renounces the principle of at-will employment).

- Snow v. BE & K Constr. Co., 126 F. Supp. 2d 5 (D. Me. 2001) (finding agreement to arbitrate included in employee handbook was invalid for lack of consideration where employer included disclaimer in handbook which purported to allow it to modify or discontinue arbitration procedure, rendered its implied promise to arbitrate illusory).

- Beasley v. Brookwood Med. Ctr., 712 So. 2d 338, 340-41 (Ala. 1998) (vacating lower court to vacate order to compel pursuant to agreement to arbitrate contained in employee handbook where handbook contained disclaimer indicating that "no written statement or agreement in this handbook is binding" and where agreement to arbitrate was contained in handbook, not in employee acknowledgement form).

- Stewart v. Fairlane Mental Health Ctr., 571 N.W.2d 542 (Mich. App. 1997) (holding that arbitration provision in handbook was unenforceable where it explicitly stated it was not an employment agreement nor a contract of employment and allowed employer unilaterally to amend policies at any time and where employee did not sign acknowledgment agreeing to employer's new binding-arbitration policy).

- Trumbull v. Century Mktg. Corp., No. 3:97CV7672, 1998 WL 400511 (N.D. Ohio July 7, 1998) (finding arbitration agreement contained in employee handbook unenforceable where handbook included unilateral provision allowing employer "to modify, augment, delete, or revoke any and all policies, procedures, practices and statements contained in this Handbook at any time, without notice").

### D. Consideration

#### 1. New Employees

Like any contract, an arbitration agreement must be supported by consideration. For new employees, the inception of employment usually constitutes sufficient consideration for the employee's agreement to arbitrate or employ ADR:

- Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361, 368 (7th Cir. 1999) (finding adequate consideration in the employer's promise to employ an applicant who signed an arbitration agreement), cert. denied, 528 U.S. 811 (1999).

- Sheller v. Frank's Nursery & Crafts, Inc., 957 F. Supp. 150 (N.D. Ill. 1997) (holding there was sufficient bilateral consideration to render agreement to arbitrate contained in employment application valid where defendant agreed to consider plaintiff for employment if plaintiff, upon employment, agreed to abide by company rules which included arbitration of all claims).

- Carr v. Rockwell Int'l Corp., No. 3:96 CV 2964 D, 1997 WL 102482 (N.D. Tex. Feb. 28, 1997) (enforcing arbitration agreement where employee signed an agreement upon hire and there were mutual promises to arbitrate).

- Topf v. Warnaco, Inc., 942 F. Supp. 762 (D. Conn. 1996) (holding that plaintiff's employment, which served as consideration for employment contract, which explicitly incorporated employee handbook that contained agreement to arbitrate, was sufficient consideration for mutual agreement to arbitrate).

- Hull v. NCR Corp., 826 F. Supp. 303, 304 (E.D. Mo. 1993) (arbitration provision in at-will employment contract signed at inception of employment enforceable)

- Brooks v. Circuit City Stores, Inc., 1997 U.S. Dist. LEXIS 16955 (D. Md. May 30, 1997) (finding arbitration agreement unenforceable against applicant for lack of mutual promises between employer and applicant because of unilateral ability of employer to bring claims to court whereas employee is forced to arbitrate all claims and where employer did not promise to undertake investigation and consideration of employment application).

### 2. Incumbent Employees: Continued Employment

For incumbent employees, the consideration and implementation issues are more complicated. Most courts have concluded that continued employment constitutes adequate consideration for an agreement to arbitrate entered into with current employees:

- Venuto v. Ins. Co. of N. Am., No. Civ. A. 98-96, 1998 WL 414723, at *5 (E.D. Pa. July 22, 1998) ("[A]n employee's decision to continue working with an employer for a substantial period of time after the imposition of a new [arbitration] policy, demonstrates acceptance of its terms.")

- Durkin v. CIGNA Prop. & Cas. Corp., 942 F. Supp. 481, 487 (D. Kan. 1996) (holding that an at-will employee's continued employment provided sufficient consideration for the arbitration provision)

- Kinnebrew v. Gulf Ins. Co., C.A. No. 3:94-CV-1517-R, 1994 WL 803508, at *2 (N.D. Tex. Nov. 28, 1994) ("Federal courts do not hesitate to find enforceable an agreement to arbitrate when an arbitration policy is instituted during an employee's employment and the employee continues to work for the employer thereafter.")

- Nadeau v. Thomas, No. 96-20383, 1997 WL 542708 (N.D. Cal. Aug. 21, 1997) (denying defendant's motion to compel arbitration, finding that mere continuation of employment does not constitute acceptance of newly imposed arbitration policy or knowing agreement to waive statutory rights).

### 3. Impact on At-Will Employment Status

However, employers who rely on continued employment as the sole consideration for an agreement to arbitrate claims with incumbent employees may run the risk of losing the "at-will" employment status for their employees. Some courts have held that an arbitration agreement alters the at-will employment relationship, and held that arbitration agreements governing employee discharges imply a requirement that discharge be only for just cause. PaineWebber, Inc. v. Agron, 49 F.3d 347, 352 (8th Cir. 1995) (enforcing arbitration award and holding that the use of arbitration "necessarily alters the employment relationship from at-will to something else .

. ."; however, agreement contained provision for discharge for "cause"); Shearson Hayden Stone, Inc. v. Liang, 653 F.2d 310, 312-13 (7th Cir. 1981) ("It has been held repeatedly that an agreement to arbitrate disputes about employee discharge implies a requirement that discharges be only for 'just cause.'"). However, most courts have held that employers can rely on continued at-will employment as consideration for an agreement to arbitrate without losing the at-will employment status. See Gibson v. Neighborhood Health Clinics Inc., 121 F.3d 1126 (7th Cir. 1997) ("An employer's specific promise to continue to employ an at-will employee may provide valid consideration for an employee to forgo certain rights"; however, the court did not enforce arbitration agreement because there was no specific promise of continued employment); Bradford v. KFC Nat'l Mgmt. Co., 5 F. Supp. 2d 1311, 1313 (M.D. Ala. 1998) (holding that arbitration agreements "in no way violate a prohibition, or limitation, on employment at other than at-will status."); Hull v. NCR Corp., 826 F. Supp. 303, 304 (E.D. Mo. 1993) (fact that employment was at-will did not render agreement to arbitrate illusory).

### 4. Incumbent Employees: Mutual Agreement to Arbitrate

In addition to stating that the agreement to arbitrate is supported by the employee's continued employment, employers should also make clear that the agreement to arbitrate is mutual. Courts are more likely to enforce arbitration agreements for current employees where consideration can be found in the employer's mutual agreement to arbitrate its disputes with employees.

- Michalski v. Circuit City Stores, Inc., 177 F.3d 634 (7th Cir. 1999) (compelling arbitration of plaintiff's Title VII claims, holding that Title VII did not preclude enforcement of pre-dispute arbitration agreements, particularly where arbitration agreement had opt-out provision, and finding employer's mutual agreement to arbitrate constituted sufficient consideration, pursuant to Wisconsin law, to bind parties to agreement.)

- Hull v. Norcom, Inc., 750 F. 2d 1547, 1550 (11th Cir. 1985) ("the consideration exchanged for one party's promise to arbitrate must be the other party's promise to arbitrate at least some specified class of claims")

- Johnson v. Circuit City Stores, Inc., 148 F.3d 373, 377 (4th Cir. 1998) (employers agreement to be bound by the arbitration process sufficient consideration even if employer not required to submit all of its claims for arbitration), cert. denied, 530 U.S. 1276 (2000)

- Hellenic Lines, Ltd. v. Louis Dreyfus Corp., 372 F.2d 753, 758 (2d Cir. 1967) ("Hellenic's promise to arbitrate was sufficient consideration to support Dreyfus's promise to arbitrate.")

- Wilson v. Darden Restaurants. Inc., No. Civ.A. 99-5020, 2000 WL 150872 (E.D. Pa. Feb. 11, 2000) (granting Defendant's motion to dismiss and compel arbitration of plaintiff's Title VII claims and holding that plaintiff's continued employment after defendant made arbitration condition of employment, illustrated her assent to be bound by such policy where agreement also included employer's mutual agreement to arbitrate).

- Morrison v. Circuit City Stores, 70 F. Supp. 2d 815 (S.D. Ohio 1999) (finding there was valid consideration for arbitration agreement between employer and current employee where employer agreed to consider employee for employment and then to continue her employment and where employer promised to be bound by arbitration process and any resolution reached through that promise and could only alter or revoke this promise under limited circumstances).

- Reese v. Commercial Credit Corp., 955 F. Supp. 567 (D.S.C. 1997) (arbitration agreement was enforceable as accepted by employee's continued employment after receiving notice of arbitration policy).

- Dempsey v. George S. May Int'l Co., 933 F. Supp. 72 (D. Mass. 1996) (holding that agreement to arbitrate "any dispute, claim or controversy [which] shall arise between the Employee, on the one hand, and Employer, on the other hand, as to any issue whatsoever," which was contained in fourth of four employment contracts renewed annually, was supported by sufficient consideration in that restriction of employee's freedom to act was balanced by countervailing restriction on employer).

- Brown v. Rexhall Indus., Inc., No. 3:96-CV-349RM, 1996 WL 662449 (N.D. Ind. Oct. 8, 1996) (compelling arbitration where employee did not sign agreement until end of first day of work but agreement contained mutual promise to arbitrate).

- Lacheney v. ProfitKey Int'l., Inc., 818 F .Supp. 922 (E.D. Va. 1993) (enforcing arbitration agreement and concluding that mutual promise to arbitrate sufficient consideration (citing Hellenic Lines, Ltd. v. Louis Dreyfus Corp., 372 F.2d 753 (2d Cir. 1967)).

- Connell v. Meritor Sav. Bank, C.A. No. 90-5916, 1991 U.S. Dist. LEXIS 2269 (E.D. Pa. Feb. 27, 1991) (enforcing arbitration agreement and concluding that continued employment was sufficient consideration for an arbitration agreement signed one month after hiring; also relies on PA's Uniform Written Obilgations Act which provides that written agreement containing express intention to be bound needs no additional consideration).

The employer's agreement to arbitrate at least some of its disputes with an employee should constitute sufficient consideration even if the employer does not agree to arbitrate certain types of disputes, such as breach of a non-compete or theft of trade secrets. See Quinn v. EMC Corp., 109 F. Supp. 2d 681, 684 (S.D. Tex. 2000) (fact that employer did not agree to arbitrate misappropriation claims against employee did not render agreement invalid for lack of consideration); cf. Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519 (1997) (agreement to arbitrate was unconscionable for failure of mutuality where arbitration clause exempted from arbitration claims most likely to be brought by the employer (breach of covenant not to compete or release of trade secrets) while requiring all other employment disputes to be submitted to arbitration). Consider including the following language: "[Company] agrees to follow this Employee ADR Program in connection with the associate whose signature appears above," or "You and we would have had a right or opportunity to litigate disputes through a court but have

agreed instead to resolve disputes through binding arbitration." See Johnson v. West Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000) (enforcing cited language in non-employment case), cert. denied, 121 S. Ct. 1081 (2001).

### 5. Practical Issues

#### a. Incumbent Employees: Tie Agreement to Specific Payment or Benefit

Another option for incumbent employees is to require them to sign an agreement to arbitrate as a condition of receiving new or enhanced benefits such as bonuses, stock options or compensation plans. Adopting this approach provides the employer with a strong argument that the employee received a tangible benefit for his or her waiver of statutory rights, in addition to a mutual agreement to arbitrate. However, the employer is not likely to obtain the agreement of all employees. Obviously, the greater the incentive, the greater likelihood that employees will participate, but such incentives may be costly.

#### b. Be Aware of Consideration Issues If Modifying Policy

Employers who make changes to their ADR policies that add additional obligations for employees should be cognizant of consideration issues. See Blair v. Scott Specialty Gases, No. CIV.A. 00-3865, 2000 WL 1728503 (E.D. Pa. Nov. 21, 2000) (finding all of plaintiff's claims were subject to arbitration and that mere fact that defendant could modify the agreement did not render the agreement illusory; but rather, finding that agreement was supported by sufficient consideration because defendant promised to put any change in writing, promised to provide plaintiff with a copy of any material changes, and permitted plaintiff to accept material changes by remaining employed with defendant).

#### c. Clearly Identify the Consideration

The existence of consideration is a question of fact. Consequently, it would be prudent to expressly identify the consideration in the arbitration agreement. Failure to do so may provide the court with an opportunity to invalidate the arbitration agreement. See Gibbs v. Conn. Gen. Life Ins., No. CV 97 0567009, 1998 WL 123010, at *3 (Conn. May 3, 1998) (striking down arbitration clause because of lack of consideration because the employer failed to communicate to the employee that it would forgo discharging the employee in exchange for the employee's promise to submit claims to arbitration); Phillips v. CIGNA Investments, Inc., 27 F. Supp. 2d 345, 353-59 (D. Conn. 1998) (applying Gibbs).

#### d. What if the employee refuses to sign?

The EEOC has taken the position that withdrawing an offer of employment or terminating a current employee for failure to sign an arbitration agreement is retaliatory conduct. In EEOC v. Luce, Forward, Hamilton & Scripps, LLP, 122 F. Supp. 2d 1080 (C.D. Cal. 2000), the agency brought an action on behalf of an individual who had his conditional offer of employment rescinded after he refused to sign an arbitration agreement. The district court, relying on the Ninth's Circuit's decision in Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir.

1998), cert. denied, 525 U.S. 928 (1998), which held that employers may not compel individuals to waive their Title VII right to a judicial forum, agreed with the EEOC's position and enjoined the employer from requiring its employees to agree to arbitration of their Title VII claims as a condition of employment and from attempting to enforce any such previously executed agreements. Id. at 1093. The district court made clear that its decision was based only on its duty to follow Duffield, and that a "great weight of legal authority" outside the Ninth Circuit supported the employer's position. Id. This case is currently on appeal to the Ninth Circuit, which will force that court to determine if Duffield is still viable after Circuit City. As noted above, at least one court within the Ninth Circuit has concluded that Duffield is no longer viable. See Olivares v. Hispanic Broad. Corp., No. CV 00-00354-ER, 2001 WL 477171 (C.D. Cal. Apr. 26, 2001) (rejecting Duffield and ordering arbitration); but see Melton v. Philip Morris Inc., No. 01-93-KI, 2001 LEXIS 12601 (D. Or. Aug. 9, 2001) (finding Duffield still viable as to Title VII and Oregon discrimination laws but compelling arbitration on ADEA and state common-law tort claims).

Because the district court's decision in Luce Forward was dependent on Duffield, it is unclear whether the EEOC will pursue its position on this issue in other jurisdictions, or continue to do so in the Ninth Circuit if Duffield is overturned in light of Circuit City. Alternatively, at least one other court has found a violation of a state anti-discrimination statute when an employee was terminated for refusing to sign an arbitration agreement. Ackerman v. The Money Store, 728 A.2d 873 (N.J. Super. 1998). The court found that terminating an employee for failure to sign the agreement violated the statute's prohibition on interfering with "the exercise or enjoyment of any right" protected by the statute, which included the right to file a complaint with the state administrative agency or sue in court for discrimination. Id. at 878; see also EEOC v. River Oaks Imaging & Diagnostic, No. Civ. A. H-95-755, 1995 WL 264003 (S.D. Tex. Apr. 19, 1995) (making permanent earlier injunction enjoining employer from enforcing its mandatory ADR policy was "so misleading and against the principles of Title VII . . . that its use violates such law," which court ruled was designed to chill anti-discrimination suits, and ordered employer to cease retaliating against employees who refused to sign the policy); cf. Borg-Warner Protective Servs. Corp. v. Gottlieb, 116 F.3d 1485, 1997 WL 349043 (9th Cir. 1997) (unpublished opinion) (holding that arbitration agreement that was signed under threat of losing at-will employment was not coercive and was enforceable); Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 203-06 (2d Cir. 1999) (rejecting employee's claim that revocation of offer of employment after she crossed out arbitration provision in U-4 agreement violated her constitutional and statutory civil rights), cert. denied, 531 U.S. 1069 (2001).

In addition, an employer's failure to take uniform action against those who refuse to accept its policy carries additional risks. Non-uniform enforcement subjects an employer to claims of discriminatory implementation and places such employers in an awkward position with respect to lawsuits from current employees who are in clear violation of the policy.

### E. Sharing of Arbitration Fees

Based on the Supreme Court's holding in Gilmer that the arbitral forum must be capable of vindicating the employee's statutory rights, some courts have held that employees cannot be forced to pay the costs of arbitration, or at least any costs beyond nominal amounts. In the leading case on this issue, Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997), Chief Judge Edwards reasoned that employees who elect to bring their claims in federal court need not pay for the services of a judge, but rather only for a filing fee. The Court concluded that to require an employee to pay for arbitration would undermine congressional intent and deter employees from pursuing their discrimination claims. Id. at 1467. According to the Cole court, the "only way that an arbitration agreement of the sort at issue here can be lawful is if the employer assumes responsibility for the payment of the arbitrator's compensation." Id. at 1468.[1] Other courts have followed the reasoning of Cole. See Shankle v. B-G Maintenance Mgmt. of Colo., Inc., 163 F.3d 1230 (10th Cir. 1999) (finding arbitration agreement unenforceable because of a mandatory fee-splitting provision); Perez v. Globe Airport Sec. Servs. Inc., 253 F.3d 1280 (11th Cir. 2001) (arbitration agreement unenforceable due to fee-splitting provision, even where arbitrator awarded fees and costs to the plaintiff); Paladino v. Avnet Computer Techs., 134 F.3d 1054 (11th Cir. 1998) (concluding that high costs of arbitration that may be imposed against an employee provide a legitimate basis for nullifying an arbitration agreement). The District of Columbia Circuit Court of Appeals recently held that its holding in Cole applies only to arbitration of federal statutory claims and not common law claims rooted in public policy. Brown v. Wheat First Secs., Inc., 257 F.3d 821 (D.C. Cir. 2001).

Other courts have rejected a per se prohibition on fee-splitting as adopted in Cole, and instead have adopted a case-by-case analysis that focuses upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims. Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 556 (4th Cir. 2001); Williams v. Cigna Fin. Advisors Inc., 197 F.3d 752, 763-64 (5th Cir. 1999) (evidence did not indicate that plaintiff was unable to pay one-half of the forum fees or that they were prohibitively expensive for him, such that he was prevented from having a full opportunity to vindicate his claims effectively), cert. denied, 529 U.S. 1099 (2000); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 18-19 (1st Cir. 1999) (refusing to invalidate arbitration agreement simply because of the possibility that the arbitrator would charge the plaintiffs a forum fee "which may be as high as $3,000 per day and tens of thousands of dollars per case," because, among other reasons, "arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim

---

[1] In reaching this decision, the Court stated that "under NYSE Rules and NASD Rules, it is standard practice in the securities industry for employers to pay all of the arbitrators' fees" and therefore the Supreme Court in Gilmer had only "endorsed an arbitration system in which the employees are not required to pay for the arbitrator assigned to hear their statutory claim." In fact, NASD Rule 10205(c) states in relevant part: "The arbitrators in their award, shall determine the amount chargeable to the parties as forum fees and shall determine who shall pay such forum fees."

in court"); Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361 (7th Cir. 1999) (holding that mere possibility of high fees is insufficient to invalidate arbitration agreement), cert. denied, 528 U.S. 811 (1999); Zumpano v. Omnipoint Communications, Inc., No. CIV. A. 00-CV-595, 2001 WL 43781 (E.D. Pa. Jan. 18, 2001) (enforcing arbitration agreement where plaintiff failed to demonstrate that a fee-sharing agreement in an arbitration provision rendered the provision unenforceable and invalid); Howard v. Anderson, 36 F. Supp. 2d 183, 186 (S.D.N.Y. 1999) ($500 arbitration filing fee not a barrier to the vindication of the claimant's statutory rights).

In Bradford, the Fourth Circuit relied on the Supreme Court's decision in Green Tree Financial Corp. v. Randolph, 121 S. Ct. 513 (2000), in which the Court held in a consumer credit case that despite the prospect of high fees, the mere risk of such costs was too speculative to justify the invalidation of the arbitration agreement. Id. at 522. Instead, the claimant had the burden of establishing that she was likely to incur prohibitive costs that would deter her from arbitrating her claims. Id.. The Bradford court concluded that a per se rule against fee-splitting would run counter to the Supreme Court's directive in Green Tree Financial to assess the impact of such a provision on a case-by-case basis. 238 F.3d at 557.

The safest course appears to be for the employer to pay the arbitrator's fees and expenses, but require the employee to contribute a reasonable amount for the costs of initiating and implementing the process. In addition, employers should consider a waiver of such employee-paid fees on the showing of financial hardship, or at least provide the arbitrator with the ability to waive the fees. The ABA's Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (May 1995) (the "ABA Protocol") suggests that the bias potential of disparate contributions may be avoided by paying the arbitrator through a third party, who would not disclose the share paid by each party.

### 1. Cases involving arbitration fees

- LaPrade v. Kidder, Peabody & Co., Inc., 2001 U.S. App. LEXIS 7381 (D.C. Cir. April 24, 2001) (affirming district court's decisions to confirm arbitrator's award requiring plaintiff to pay 12% ($8,000) of the forum fees, but fees were not for arbitrators' compensation and there were non-statutory claims involved)

- Ball v. SFX Broad., Inc., Civ. A. No. 00-CV-1090; 2001 U.S. Dist. LEXIS 12510 (N.D.N.Y. Aug. 21, 2001) (holding that analysis should focus on whether arbitration fees are significantly higher than costs of judicial forum, rather than ability of individual plaintiff to pay).

- Goodman v. ESPE Am., Inc., No. 00-CV-862, 2001 WL 64749 (E.D. Pa. Jan. 19, 2001) (granted defendant's motion to compel arbitration and rejecting plaintiff's argument that "loser pays" provision of arbitration agreement was invalid where plaintiff failed to allege that imposition of arbitration fees would preclude him from arbitrating his claims and record suggested otherwise, nor did plaintiff present evidence indicating what costs plaintiff would incur and how prohibitively expensive those costs would be, and where agreement neither required up-front payment of costs before commencing action nor mandated sharing of costs after conclusion of case, which court found suggested that plaintiff would not be liable for any costs at any time if his claim were successful; thus,

plaintiff's speculation about prohibitive costs was not enough to invalidate an otherwise enforceable arbitration provision).

- Fuller v. Pep Boys-Manny, Moe & Jack of Del., Inc., No. Civ.A.00-B-132, 2000 WL 339949 (D. Colo. Mar. 29, 2000) (granting defendant's motion to compel arbitration, despite holding that fee-sharing provision was unenforceable because it found savings clause within agreement valid and struck provisions of agreement that required plaintiffs to share arbitration fees, while upholding mutual agreement to arbitrate employment related disputes).

- Arakawa v. Japan Network Group, 56 F. Supp. 2d 349 (S.D.N.Y. 1999) (granting defendant's motion to compel arbitration and rejecting plaintiff's clam that arbitration clause was invalid because it required plaintiff to split fees and costs of arbitration, where plaintiff's costs included $250 filing fee and $75 per day in administrative fees, which were not "so great a burden upon [plaintiff] as to make the arbitration an inadequate forum for resolution of her Title VII claims" and that possibility of paying one-half of arbitrator's fees, if so directed by arbitrator, likewise did not render arbitration clause unenforceable as a matter of law).

- Smith v. Creative Res., Inc., No. CIV. A. 97-6749, 1998 WL 808605 (E.D. Pa. Nov. 23, 1998) (dismissing plaintiff's Title VII and state law claims as subject to binding arbitration and finding that, where arbitration agreement is silent on payment of arbitration costs, employer shall be pay costs).

### F. Limitations on Remedies

In Gilmer, the United States Supreme Court reiterated "'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.'" Gilmer, 500 U.S. at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). This proposition suggests that an agreement to arbitrate merely shifts the forum, not a claimant's right to the substantive benefits of the statute. But Gilmer does not make clear whether the availability of certain remedies and attorney's fees under employment statues constitutes "substantive rights afforded by the statute."

The Gilmer Court was not asked to decide whether a claimant's agreement to surrender relief available under the federal employment statutes was enforceable. However, the Court did note that the remedies available to the claimant in Gilmer under the rules of the NYSE "do not restrict the type of relief an arbitrator may award, but merely refer to 'damages and other relief.'" Gilmer, 500 U.S. at 32. Thus, the Court understood that Gilmer himself was afforded the full array of remedies available to a discrimination plaintiff in court. See id.

#### 1. Cases involving complete bar on punitive damages

Courts addressing the issue of mandatory arbitration agreements that limit a claimant's available remedies have adopted a variety of approaches. In at least two cases, courts relied on Gilmer to

compel arbitration under agreements which precluded claimants from seeking punitive damages. DeGaetano v. Smith Barney, Inc. No. 95 1613, 1996 WL 44226 (S.D.N.Y. Feb. 5, 1996); Maye v. Smith Barney, Inc., 897 F. Supp. 100 (S.D.N.Y. 1995) In DeGaetano, as in Maye, the district court compelled arbitration where the plaintiffs had executed agreements precluding punitive damages and attorney's fees, noting that "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." DeGaetano, 1996 WL 44226, at *6 (Mitsubishi, 473 U.S. at 628); Maye, 897 F. Supp. at 103 (citation omitted). In both of these cases, the court was silent on the issue of whether the plaintiffs would have the right to seek punitive damages in another forum.

### 2. Cases involving limitations on punitive damages

Other cases have considered arbitration agreements that place limits on the amount of punitive damages. For example, in Morrison v. Circuit City Stores, Inc., 70 F. Supp. 2d 815 (S.D. Ohio 1999), the arbitration agreement at issue limited punitive damages to "the monetary sum of the front pay, back pay, and benefits awarded, or $5,000, whichever is greater." Id. at 826. The court compelled arbitration, finding that the limits on damages did not prevent the plaintiff from vindicating her rights in the arbitral forum. Id. at 827; see also Ward v. Circuit City Stores, Inc., No. CIV-S-97-0227, 1997 U.S. Dist. LEXIS 23833 (E.D. Cal. Mar. 29, 1997) (finding that the remedies available under the same agreement are not unconscionable because they are sufficiently similar to limits in federal and state law); but see Johnson v. Circuit City Stores, Inc., 203 F.3d 821, 2000 WL 19166 (4th Cir.) (per curiam) (unpublished) (affirmed district court's conclusion that arbitration agreement was unenforceable because it failed to provide plaintiff with the full set of remedies to which she would have been entitled to under Section 1981), cert. denied, 530 U.S. 1276 (2000). The Eighth Circuit Court of Appeals recently held that this remedies limitation in the Circuit City agreement should simply be severed from the contract and the matter should proceed to arbitration. Gannon v. Circuit City Stores, Inc., No. 00-3243, 2001 WL 930550 (8th Cir. Aug. 17, 2001). See also Great W. Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir.), cert. denied, 522 U.S. 915 (1997) (affirming district court order compelling arbitration and finding enforceable arbitration agreement that was detailed in employee handbook despite provision excluding some remedies available under state anti-discrimination statute employer sought to arbitrate).

However, other courts have shown a reluctance to place limits on a claimant's right to the full panoply of statutory remedies available. In Johnson v. Hubbard Broadcasting, Inc., 940 F. Supp. 1447, 1462 (D. Minn. 1996), a federal district court noted that an agreement denying the full array of statutory remedies established under state and federal law might render the agreement unenforceable as unconscionable. Id. (leaving issue of whether agreement denied such recovery of statutory rights for arbitrator to decide). The Eleventh Circuit Court of Appeals has invalidated an arbitration agreement that appeared to preclude any punitive damage award to a Title VII claimant. Paladino v. Avnet Computer Techs., 134 F.3d 1054, 1062 (11th Cir. 1998) (invalidating employer's mandatory arbitration agreement that appeared to limit damages for Title VII claim to contract damages because it "defeated that statute's remedial purposes because it insulated [the employer] from Title VII damages and equitable relief."). See also EEOC v. Astra USA, Inc., No. CIV. A. 98-40014, 1998 WL 80324 (D. Mass. Feb. 5, 1998 (approving consent order under which employer may continue to require arbitration agreements as condition of employment, provided that employer waives those provisions of its current arbitration

agreement which limit arbitrator's ability to award full range of damages available under Title VII, including compensatory and punitive damages, interest on back pay, attorney fees and front pay and provided that any arbitration agreement it requires in future as condition of employment includes all such substantive rights available under Title VII.); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 152 (Ct. App. 1997) (declining to compel arbitration where "the arbitration clause provides the employer more rights and greater remedies than would otherwise be available and concomitantly deprives employees of significant rights and remedies they would normally enjoy," and finding provision, which deprived employees of remedies such as punitive damages and equitable relief and which allowed employer to litigate certain claims, to be unconscionable).

Other courts have at least implicitly suggested that arbitration agreements that do not provide claimants with all of the relief available in court were inconsistent with the principles set forth in Gilmer. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) (looking favorably on agreement that provided for "all of the types of relief that would otherwise be available in court"); Kuehner v. Dickinson & Co., 84 F.3d 316, 320 (9th Cir. 1996) (compelling arbitration of FLSA claim where arbitrator would have full power to award all remedies).

#### 3. Excluding certain damages may affect overall arbitrability

Another court severed a claim of punitive damages from other arbitrable claims, granting the claimant the opportunity to return to court to have his punitive damages claim heard after arbitration. DiCrisi v. Lyndon Guar. Bank of N.Y., 807 F. Supp. 947, 953 (W.D.N.Y. 1992). In Alcaraz v. Avnet, Inc., 933 F. Supp. 1025 (D.N.M. 1996), the court read the exclusion of certain damages as an implicit exclusion of statutory claims from the agreement's purview, and compelled arbitration only on the claimant's common law claims.

Any attempt to explicitly carve out remedies substantially risks the enforceability of the agreement. Moreover, the rules of certain arbitration fora, such as the American Arbitration Association ("AAA") and JAMS/Endispute, require that remedies available under arbitration mirror those to which a claimant would be entitled under the applicable statute. As a result, an ADR process that offers employees the complete range of statutory remedies is more likely to survive judicial scrutiny. However, an arbitration or ADR agreement should not enumerate available remedies. Rather, the arbitrators or mediators should be left the discretion to apply applicable law as they deem fit, preserving each party's entitlement to argue in arbitration or mediation why any remedy should be granted or denied. As experience has shown, employers are far less likely to suffer an adverse verdict awarding astronomical punitive damages or invasive injunctive relief in an arbitral forum.

### G. Limitations on Discovery

The Gilmer Court acknowledged that some limitations on discovery may be appropriate in order to achieve the arbitration goals of efficient and inexpensive resolution of disputes; however, the Court indicated that an arbitration process that precludes all discovery may affect the enforceability of the arbitration agreement. Gilmer, 500 U.S. at 31 ("Although [arbitration discovery] procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'") (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614

(1985)); see also Cole v. Burns Int'l Security Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997) (an employee must be given the right to at least minimal discovery in arbitration).

Accordingly, an arbitration agreement that places severe limits on discovery may not be enforced by a court. See, e.g., Penn v. Ryan's Family Steakhouses, Inc., 95 F. Supp. 2d 940, 948 (N.D. Ind. 2000) (holding that arbitration provision that provided for only one deposition per side was insufficient and denied motion to compel arbitration); Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985, 995 (S.D. Ind. 2001) (same).

On the other hand, courts are more likely to look favorably upon arbitration agreements that permit limited, but reasonable, discovery. See Morrison v. Circuit City Stores, 70 F. Supp. 2d 815, 826 (S.D. Ohio 1999) (arbitration agreement that set specific limitations on the amount of discovery was reasonable in requiring that: (1) the employer supply the employee with documents from the employee's personnel file; (2) one set of interrogatories with a document request; (3) three depositions; and (4) any additional discovery upon a showing of substantial need; and (5) discovery be completed within 90 days with time extended for good cause).

The ABA Protocol recommends "adequate but limited pre-trial discovery" in which employees "should have access to all information reasonably relevant" to their claims. The Protocol also provides that "necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available." It is advisable to temper any limits on discovery with a provision that allows the arbitrator to allow additional discovery where necessary. The AAA rules provide that "The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration."

#### 1. Other cases involving discovery limitations:

- Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430 (N.D. Ill. 1993) (rejecting plaintiff's argument that arbitration agreement was unenforceable which incorporated American Arbitration Association rules and procedures for arbitration which she claimed were inadequate since they do not contain any provision for permitting or denying discovery and that she would be unable to benefit from liberal discovery available under the Federal Rules, finding instead that American Arbitration Association rules were adequate since they authorize arbitrator to subpoena witnesses and documents either independently or upon request of a party and noting that defendants repeatedly expressed their willingness to pursue discovery voluntarily).

- Montgomery v. Earth Tech Remediation Servs., No. Civ.A. 99-5612, 2000 WL 276101 (E.D. Pa. Feb. 29, 2000) (enforcing arbitration agreement where employee limited to one deposition but could apply to arbitrator for additional depositions upon a showing of substantial need).

### H. Time Limits for Submitting Claims

As long as a reasonable time period is available in which employees may submit their claims to arbitration, an employer may be able to establish a statute of limitations that is shorter than the

law provides for a particular type of claim. See Soltani v. W. & S. Life Ins. Co., 2001 U.S. App. LEXIS 9267 (9th Cir. Aug. 6, 2001) (unpublished opinion) (holding under California law that provision in employment contract that limited filing period to six months for employment claims was enforceable); Taylor v. W. & S. Life Ins. Co., 966 F.2d 1188 (7th Cir. 1992) (upholding district court's dismissal of Section 1981 claim as untimely: contractual six-month limitation valid under Illinois law since it was knowingly accepted, reasonable, and not contrary to public policy); Myers v. W.-S. Life Ins. Co., 849 F.2d 259, 260-61 (6th Cir. 1988) (agreement's 6-month limitation period for bringing employment claims was reasonable even though it was shorter than limitation period provided in state discrimination statute); Morrison v. Circuit City Stores, 70 F. Supp. 2d 815, 826 (S.D. Ohio 1999) (finding agreement's one-year statute of limitations period for bringing employment claim reasonable even though it was shorter than the limitation period provided by the state statute or under Title VII); Montgomery v. Earth Tech Remediation Servs., No. Civ.A. 99-5612, 2000 WL 276101 (E.D. Pa. Feb. 29, 2000) (enforcing arbitration agreement that required employee to raise dispute with immediate supervisor within six months); but see Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519 (1997) (refusing to enforce arbitration agreement that set forth one-year statute of limitations not subject to tolling).

Employers should exercise caution in this area, however, as there is not a large body of case law addressing the statute of limitations issues and the consequences of an adverse ruling could be significant.

## I. Arbitration Agreement Limiting Right to Initiate or Participate in a Class Action

Another open question is the extent to which an employee can validly agree through a mandatory arbitration agreement not to initiate or participate in class action litigation or arbitration. To date, there has been no definitive judicial pronouncement on whether such a provision is enforceable with respect to employment discrimination claims.

Because arbitration is a creature of contract, courts typically focus on the wording of the arbitration agreement to determine how the class claims should be treated. As a result, the following section will describe the courts' treatment of class claims where the arbitration agreement: (1) expressly prohibits arbitration of class claims; (2) is silent as to the treatment of class claims; and (3) expressly prohibits class actions – in court or in arbitration.

### 1. Effect of arbitration agreement that expressly prohibits arbitration of class claims

Courts have permitted class actions to proceed in court where the arbitration agreement expressly prohibited class arbitration or incorporated arbitral rules, such as those adopted by the securities industry, that explicitly exclude such claims from arbitration. In Olde Discount Corp. v. Hubbard, 4 F. Supp. 2d 1268 (D. Kan. 1998), aff'd, 172 F.3d 879 (10th Cir. 1999), a stockbroker threatened Olde Discount after his employment was terminated with a race discrimination class action unless the company paid him $250,000. Id. at 1269. Olde Discount then brought a petition to compel the stockbroker to arbitrate his dispute pursuant to his Form U-4 agreement and an arbitration provision in his employment agreement. The stockbroker responded by filing a class action lawsuit in federal court. In denying Olde Discount's petition to compel, the court

concluded that, because the arbitration agreements incorporated the Rules of the NASD and NYSE, which expressly precluded arbitration of class claims, the stockbroker's claims were "ineligible for arbitration at this time." Id. at 1270. The stockbroker, therefore, was permitted to maintain his class action lawsuit against Olde Discount. The court further reasoned:

> Olde's filing of the instant [petition to compel] could be viewed as retaliation for [the stockbroker's] settlement demand which threatened a class action suit. If the court required [the stockbroker] to arbitrate his claims in this action, then potential class action plaintiffs would be discouraged from attempting to settle their claims (which would be encompassed by a class action suit) prior to filing suit. The court declines to adopt such a position.

Id. at 1271; see also Nielson v. Piper, Jaffray & Hopwood, Inc., 66 F.3d 145, 148-50 (7th Cir. 1995) (finding that class action claim based on securities fraud was outside the scope of the arbitration agreement because of class action preclusion provisions in the NYSE and NASD Rules), cert. denied, 516 U.S. 1116 (1996); Martens v. Smith Barney, Inc., 181 F.R.D. 243, 252 (S.D.N.Y. 1998) (court observed that class action claims were not arbitrable because, inter alia, the U-4 forms signed by plaintiffs stated that class claims are not subject to NASD arbitration); Hoang v. E*TRADE Group, Inc., 738 N.E.2d 87, 90 (Ohio Ct. App. 2000) (holding that lower court's denial of online investing service company's motion to compel arbitration of class action claims brought by service subscriber was premature until such time as lower court determined whether class certification was appropriate; noting that, because arbitration agreement prohibited arbitration of certified class actions, if the trial court granted certification, then arbitration should be denied).

#### 2. Effect of arbitration agreement that is silent as to treatment of class claims

In those few cases involving arbitration agreements that do not expressly exclude class action claims, the courts generally have stayed or dismissed the putative class actions and compelled arbitration of the individual claims. None of these cases, however, involved employment-related disputes. See Erickson v. Painewebber, Inc., No. 87 Civ. 10592, 1990 WL 104152, at *2 (N.D. Ill. July 13, 1990) (staying class action proceedings by investor and compelling arbitration of claims); Herrington v. Union Planters Bank, N.A., 113 F. Supp. 2d 1026, 1033-34 (S.D. Miss. 2000) (dismissing class action allegations brought under the Truth in Savings Act and granting defendants' motion to compel arbitration), aff'd, No. 00-60158 (5th Cir. July 6, 2001); Lieschke v. Realnetworks, Inc., No. 99 Civ. 7274, No. 99 Civ. 7380, 2000 WL 198424, at *3 (N.D. Ill. Feb. 11, 2000) (granting RealNetworks' motion to stay putative class action, finding that license agreement entered into by users required arbitration of the dispute; court reasoned that "the FAA requires district courts to compel arbitration, 'even where the result would be the possibly inefficient maintenance of separate proceedings in different forums'") (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985)).

Moreover, in the absence of specific provisions in the arbitration agreement providing for classwide arbitration, federal courts generally have declined to order classwide arbitration. See Champ v. Siegel Trading Co., 55 F.3d 269, 275 (7th Cir. 1995) ("For a federal court to read [class arbitration] into the parties' agreement would 'disrupt [] the negotiated risk/benefit

allocation and direct [] [the parties] to proceed with a different sort of arbitration' . . . . We thus . . . hold that section 4 of the FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter") (internal citation omitted); Herrington, 113 F. Supp. 2d at 1034 ("After reviewing the arbitration provision and determining that it does not expressly provide for consolidated arbitration, the Court finds that the plaintiffs are not entitled to arbitrate as a class. The Court therefore finds that the defendants' motion to dismiss the plaintiffs' class action allegations should be granted"); Gammaro v. Thorp Consumer Discount Co., 828 F. Supp. 673, 674 (D. Minn. 1993) (holding that, where arbitration agreement made no provision for class treatment of disputes (between borrowers and lenders), court lacked power to order matter to proceed to arbitration as class action, and, because arbitration agreement was enforceable, class allegations were dismissed), appeal dismissed, 15 F.3d 93 (8th Cir. 1994); McCarthy v. Providential Corp., No. 94 Civ. 0627, 1994 WL 387852, at * 8 (N.D. Cal. July 19, 1994) (granting motion to compel arbitration of individual claims of plaintiff who brought a putative class action under the Truth in Lending Act, reasoning that court could not compel arbitration on a class basis where the agreement did not specifically provide for it), cert. denied, 525 U.S. 921 (1998).

Some state courts, however, have held that a court may order classwide arbitration, even where the arbitration agreement is silent on the issue, where state law specifically authorizes classwide arbitration. See Blue Cross of Cal. v. Superior Court, 78 Cal. Rptr. 2d 779, 790 (Cal. Ct. App. 1998) (holding that California law permitting classwide arbitration was not preempted by the FAA and, therefore, that classwide arbitration against health insurers was permissible where the arbitration agreement was silent on the issue), cert. denied, 527 U.S. 1003 (1999); Izzi v. Mesquite Country Club, 231 Cal. Rptr. 315, 322 (Cal. Ct. App. 1986) (noting that California has already recognized the existence of classwide arbitration and remanding for a determination of the practicability of a classwide arbitration procedure in dispute between purchasers and vendors); see also Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 866-67 (Pa. Super. Ct. 1991) (ordering trial court to mandate classwide arbitration pursuant to client arbitration agreement if it found the prerequisites for class action had been satisfied, reasoning that the arbitral class action "best serves the dual interest of respecting and advancing contractually agreed upon arbitration agreements while allowing individuals who believe they have been wronged to have an economically feasible route to get injunctive relief"), appeal denied, 532 Pa. 663 (1992).

### 3. Effect of arbitration agreement that expressly prohibits class actions – in court and in arbitration

A few cases – again, outside the employment context – have enforced arbitration provisions that specifically prohibited a party from initiating, or participating in, class action litigation and class action arbitration. In Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000), cert. denied, 121 S. Ct. 1081 (2001), the plaintiff entered into a short-term loan agreement with the defendant bank which provided that all claims would be "resolved by binding arbitration by and under the Code of Procedure of the National Arbitration Forum." Id. at 369. Rule 19 of the Code of Procedure of the National Arbitration Forum provides: "Any individual or entity may, only with the consent of all other Parties, join any dispute, controversy, Claim or Response in an arbitration by filing a Claim document stating the grounds, accompanied by the fee as provided in the Fee

Schedule." (emphasis added). The plaintiff sought to bring a class action suit under the Truth in Lending Act ("TILA") and the Electronic Fund Transfer Act ('EFTA"), arguing that forcing him into arbitration and denying him the ability to bring a class action would run counter to the public policy goals of those consumer statutes. Id. at 368.

The Third Circuit Court of Appeals, relying heavily on Gilmer, concluded that the right to proceed as a class is "merely a procedural one, arising under [Rule 23], that may be waived by agreeing to an arbitration clause." Id. at 369. The Court also noted that even if the TILA could be construed as providing a right to proceed as a member of a class, Gilmer indicates that rights of this nature are waivable so long as the rights the statute was designed to protect may be vindicated by other means. Id. at 377-78. The court noted that even though the ADEA specifically provides for collective litigation, this was not an obstacle in Gilmer to ordering the matter to arbitration "notwithstanding the unavailability of the class action remedy. . ." Id. at 377. The Court also rejected the notion that requiring arbitration of claims that might have been pursued as part of class actions would impair the statute's public policy goals. Id. at 374-75.

Other courts have held that similar arbitration provisions that expressly prohibit class actions are enforceable. See Furgason v. McKenzie Check Advance of Ind., Inc., No. IP 00-121-C H/G, 2001 WL 238129, at *12 (S.D. Ind. Jan. 3, 2001) (holding that lender's arbitration agreement, which included "clear and prominent waivers of any right to pursue a class action, either in court or in arbitration," was clear and enforceable and not contrary to public policy); Lloyd v. MBNA Am. Bank, N.A., No. Civ. A 00-109-SLR, 2001 WL 194300, at *3 (D. Del. Feb. 22, 2001) (holding that arbitration agreement, which prohibited class actions in arbitration and in court, was valid and enforceable because it did not conflict with the Truth in Lending Act ("TILA") by discouraging class actions; court therefore had had no jurisdiction over dispute); Zawikowski v. Beneficial Nat'l Bank, No. 98 Civ. 2178, 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999) (in finding that the arbitration clause in loan contract prohibited class actions and was enforceable, the court held: "[n]othing prevents the Plaintiffs from contracting away their right to a class action.").

In Horenstein v. Mortgage Market, Inc., No. 99 Civ. 36125, 2001 WL 502010, at *1 (9th Cir. May 10, 2001), employees brought an action against their employer for an alleged violation of the Fair Labor Standards Act ("FLSA"). In an unpublished opinion, the Ninth Circuit affirmed the district court's decision compelling arbitration, rejecting the plaintiff's contention that the arbitration clause was unenforceable because it eliminated their statutory right to a collective action. Relying on the Third Circuit's decision in Johnson, the Ninth Circuit described the right to bring a class action as a "procedural right" and emphasized that, although the employees who signed the arbitration agreement in that case "lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the [FLSA]." Id. Although this unpublished decision is of limited precedential value, it is highly significant in that the court specifically held that the arbitration agreement's elimination of the statutory right to bring a collective action was insufficient to render it unenforceable.

These cases notwithstanding, any arbitration agreement that seeks to have an employee waive his/her rights to pursue *any* type of class-based relief is likely to be closely scrutinized. Moreover, such an express prohibition in an arbitration agreement may result in the entire arbitration agreement being declared void under Section 2 of the FAA due to unconscionability,

e.g., because it deprives the employee of the right to bring any class action, or void as against public policy because it does not promote judicial economy. See Paladino, 134 F.3d at 1058 (noting "the presence of an unlawful provision in an arbitration agreement . . . render[s] the agreement completely unenforceable, not just subject to judicial reformation."). However, employers faced with the prospects of class action lawsuits may decide that the uncertainty over enforcement is outweighed by the expense and burden of these collective actions.

### J. Fairness of Process

Central to Gilmer is the Supreme Court's requirement that "an employee who is made to use arbitration as a condition of employment effectively may vindicate [his or her] cause of action in the arbitral forum." Gilmer, 500 U.S. at 28. Accordingly, courts will look at a variety of factors to determine if the arbitration process is fair and impartial such that the employee is capable of vindicated his or her rights within the arbitral forum. Such factors include:

#### 1. Mutual Selection of Arbitrator

Courts are not likely to enforce an arbitration agreement that provides the employer with control over the selection of the arbitrator(s). Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306 (6th Cir. 2000), cert. denied, 121 S. Ct. 763 (2001) (holding that employees did not validly waive their right to bring an action in federal court where procedures set up by arbitration agreement lacked mutuality of arbitration where it gave third party arbitration services provider complete discretion over arbitration rules and procedures and gave provider unlimited right to modify the rules without employees' consent); Hooters of Am., Inc. v. Hooters of Myrtle Beach, Inc., 173 F.3d 933, 937 (4th Cir. 1999) (employee entitled to rescission of arbitration agreement where rules permitted employer to select its own arbitrator and the entire panel); Gothic Constr. Group, Inc. v. Port Auth. Trans-Hudson Corp., 312 N.J. Super. 1, 9-11 (App. Div. 1998) (arbitration provision held unenforceable where drafter of provision was designated as arbitrator); Chimes v. Oritani Motor Hotel, Inc., 480 A.2d 218 (N.J. Super. 1984) (refusing to enforce arbitration agreement between union members and employer where agreement designated union board as arbitrator of dispute); Cheng-Canindin v. Renaissance Hotel Assocs., 50 Cal. App. 4th 676, 688 (Ct. App. 1996) (affirming trial court's denial of employer's petition to compel arbitration and finding that employer's review committee procedure was not "arbitration" where it was not impartial, but rather "[e]veryone involved in the decision making process is employed by, selected by, and under the control of the [employer].").

#### 2. Written opinion

Most courts hold that an agreement that requires a written opinion from the arbitrator is a factor weighing in favor of enforceability. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997). However, this does not mean that the arbitrator is required to issue findings of fact and conclusions of law or to set forth the reasons for the decision. There are a variety of considerations as to whether reasoned opinions should be required or even permitted. Among those are the impact on court challenges to the arbitration decision. If there is no reasoned opinion a standard of review similar to that used in reversing general jury verdicts is typically applicable under the FAA.

### 3. Location of hearing

Establish the location of the arbitration that would not impose an unreasonable burden on the employee. If the location poses an obstacle, a court might find that the employee was effectively denied access to the process.

### 4. Representation by counsel or a spokesperson

Precluding an employee's ability to be represented by counsel or a representative at the arbitration hearing may affect the enforceability of the agreement. Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1103 (W.D. Mich. 2000) (noting that providing employees with right to counsel is factor to consider in assessing validity of arbitration agreement). The ABA Protocol recommends that employees should have the right to be represented by a spokesperson of their own choosing.

## K. Other Drafting Considerations

### 1. FAA drafting requirements

Arbitration agreements must be in writing under the FAA. 9 U.S.C. §2; Durkin v. CIGNA Prop. & Cas. Corp., 942 F. Supp. 481, 487 (D. Kan. 1996).

The FAA requires agreements to provide for federal court jurisdiction to enforce the award. 9 U.S.C. § 9 (federal court's jurisdiction to confirm arbitration awards limited to cases where "the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration."); Oklahoma City Assocs. v. Wal-Mart Stores, Inc., 923 F.2d 791, 793 (10th Cir. 1991)

### 2. At-will disclaimer

Include a plainly-worded disclaimer stating that the arbitration agreement does not express an intent to modify the employee's at-will status and that the employee continues to be employed at-will. Otherwise, if a wrongful discharge lawsuit develops, the employee may attempt to use the arbitration agreement as evidence of an implied agreement to create a contract restricting the employer's ability to discharge employees. As discussed above, most courts will not find an arbitration agreement changes the at-will status of employees.

### 3. Limitations on types of claims

Clearly express which disputes will not be submitted to arbitration, if any. For example, certain types of claims do not lend themselves to arbitration, such as disputes about restrictive covenants and confidentiality agreements. These types of claims often require immediate injunctive relief from a court, which is not available via arbitration. Other types of claims may already be subject to resolution in non-judicial fora, such as workers compensation or unemployment compensation. It also may be advisable to exclude ERISA claims, as such claims typically involve more limited remedies and a deferential standard of review in court. Employers also may want to exclude non-serious claims, such as those related to raises, bonuses, vacation

scheduling, or changes to company policy, except if the employee believes the changes were discriminatory. In placing limits on the types of claims, employers should be cautious not to render meaningless the company's mutual agreement to arbitrate, which, as discussed above, may be the only consideration supporting the arbitration agreement.

**4. Issue of arbitrability is arbitrable**

Specify that the issue of whether a matter is subject to arbitration is an issue to be resolved by the arbitrator. Although the Supreme Court in Prima Paint Corp. v. Flood and Conklin Manufacturing Co., 388 U.S. 395, 403-404 (1967), ruled that the issue of arbitrability generally should be submitted to the arbitrator, courts and arbitrators have had not consistently followed this decision.

**5. Choice of law**

Include a choice of law provision. Generally, issues of arbitrability should be resolved by the arbitrator, but if courts are involved, then federal substantive law should govern. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). In addition, the employer should consider which state's substantive laws will govern the resolution of disputes.

**6. Notice requirements**

Notice is required not only of the time and place of the arbitration proceeding, but also of the issues to be arbitrated. Notice of the issues can be accomplished by the joint preparation of a submission agreement, specifying the issues of law and fact to be decided by the arbitrator. Notice should be sufficient to allow an employee adequate time to prepare his or her case.

**7. Scope of arbitrator's authority**

The Arbitrator's authority should be limited to the issues submitted to him or her in writing prior to the arbitration, and subject to expansion or contraction only with the stipulation of the parties.

The ABA Protocol suggests that the arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the place of the hearing, permit reasonable discovery, issue subpoenas, decide arbitrability issues, preserve order and privacy in the hearings, rule on evidentiary matters, determine the close of the hearing and procedures for post-hearing submissions, and issue an award resolving the submitted dispute. The arbitration agreement also should permit the arbitrator to place time limits on the length of the hearing.

The arbitration agreement also should give the arbitrator the authority to rule on motions to dismiss and motions for summary judgment, pursuant to the standards set forth in the Federal Rules of Civil Procedure and/or applicable state law, and require the arbitrator to apply substantive law as well as the law on the allocation of burden of proof.

**8. Severability**

State that any unenforceable provisions or provisions deemed waived are severable from the rest of the agreement. In Gannon v. Circuit City Stores, Inc., 2001 WL 930550 (8th Cir. Aug. 17,

2001), the court found that a provision in an arbitration agreement placing limits on punitive damages could be severed, leaving the rest of the agreement intact. The court relied on language in the agreement that specifically allowed for such a severance.

#### 9. Preclusive effect of arbitration award

Once the arbitration process is complete, a court may be called in to review the arbitrator's award. However, such review is extremely narrow, both in the collective bargaining context and in the non-union setting. The FAA provides for court review of arbitration awards in very limited situations, such as (1) where the award was procured by fraud or undue means, (2) where there was partiality or misconduct on the part of the arbitrator, and (3) where the arbitrator goes beyond the authority conferred by the arbitration agreement. 9 U.S.C. § 10. The Gilmer Court concluded that even though limited, "judicial scrutiny of arbitration awards . . . is sufficient to ensure that arbitrators comply with the requirements of the statute at issue." Gilmer, 500 U.S. at 32 n.4 (quoting Shearson/American Express v. McMahon, 482 U.S. 220, 232 (1987)).

## III. ENFORCEABILITY PURSUANT TO COLLECTIVE BARGAINING AGREEMENTS

In the collective bargaining context, perhaps the most significant unresolved issue is whether union members are obligated to honor their unions' promises, made through collective bargaining agreements, to arbitrate individual employment discrimination claims arising under federal statutes. In other words, the issue is whether CBA arbitration clauses are enforceable in the same way that individual agreements to arbitrate are enforceable under Gilmer.

### A. The Supreme Court Has Not Resolved the Issues

In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Supreme Court held that a black employee who had already arbitrated and lost his race discrimination claim under his union's CBA was not thereafter barred from bringing a Title VII race claim in federal court. The Court reasoned that a contract-based anti-discrimination guarantee created in an employee's CBA is a separate claim from those claims arising from the statutory protections afforded by Congress through federal anti-discrimination laws. In that case the arbitration provision applied only to the contract provision. In Gardner-Denver, the Court also indicated that union employees, such as the employee in that case, have special concerns regarding their individual discrimination claims since their interests may not always be the same as those of their unions. Id. at 58 n.19.

Most circuit courts that have addressed the above issue have relied on Gardner-Denver to hold that CBA clauses that require arbitration of statutory discrimination claims brought by individual union members are unenforceable. See Doyle v. Raley's Inc., No. 97-15863, 1998 WL 697395 (9th Cir. Sept. 22, 1998) (noting that CBA provision was substantially similar to that in Gardner-Denver and therefore constituted an agreement only to arbitrate contractual rather than statutory rights); Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997) (holding that Gilmer does not apply to agreements to arbitrate contained in labor contracts), remanded on other grounds, 524 U.S. 947 (1998); Penny v. United Parcel Serv., 128 F.3d 408 (6th Cir. 1997) (holding that under Gardner-Denver that a union cannot waive a statutory right to a judicial forum prospectively on an individual's behalf); Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir.)

(holding that "the union cannot consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement"), cert. denied, 522 U.S. 912 (1997).

The Fourth Circuit Court of Appeals, relying on Gilmer and, more recently, Circuit City, has held that so long as the waiver is "clear and unmistakable," it is enforceable. In Safrit v. Cone Mills Corp., 248 F.3d 306, 308 (4th Cir. 2001), the employer agreed in the collective bargaining agreement not to discriminate against employees in protected classes, to "abide by all the requirements of Title VII," and to arbitrate any unresolved grievances arising under the CBA's non-discrimination language. The Fourth Circuit found this waiver to be "clear and unmistakable" and stated that it would be "hard to imagine a waiver that would be more definite or absolute." Id. at 308; see also Wikle v. CNA Holdings, Inc., No. 01-1119, 2001 WL 474692 (4th Cir. May 4, 2001) (FMLA was explicitly incorporated into the terms of the CBA, which provided that FMLA claims were subject to arbitration); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.) (statement in collective bargaining agreement that all disputes under arising under provision binding company to comply with anti-discrimination laws "may" be submitted to grievance procedure resulting in binding arbitration was sufficient to preclude plaintiff from bringing civil action), cert. denied, 519 U.S. 980 (1996).

The Supreme Court recently side-stepped the issue of the apparent conflict between Gardner-Denver and Gilmer in Wright v. Universal Maritime Services Corp., 119 S. Ct. 391 (1998). In that case, the Court held that the collective bargaining agreement did not contain clear and unmistakable language indicating an agreement to arbitrate individual statutory claims, and, therefore, there was no need for the Court to discuss the propriety of doing so. It remains to be seen if the Supreme Court's decision in Wright and Circuit City will lead other courts to follow the Fourth Circuit's willingness to compel arbitration of statutory claims based on agreements to arbitrate contained in collective bargaining agreements.

### B. Lower Court Cases Involving Collective Bargaining Agreements

First Circuit

- LaChance v. N.E. Publ'g, Inc., 965 F. Supp. 177, 185 (D. Mass. 1997) (held that CBA arbitration clause did not preclude ADA lawsuit where the arbitration clause only addressed claims arising from rights provided in the CBA, not statutory claims).

Second Circuit

- Rogers v. New York Univ., 220 F.3d 73 (2d Cir.) (CBA that contained a grievance/arbitration provision covering "any dispute concerning the interpretation, application, or claimed violation of this Agreement" and a general anti-discrimination clause did not bar civil action under Gardner-Denver), cert. denied, 531 U.S. 1036 (2000).

- Prince v. Coca-Cola Bottling Co. of N.Y., Inc., 37 F. Supp. 2d 289 (S.D.N.Y. 1999) (denied employer's motion to compel arbitration of Title VII sexual harassment claims

pursuant to arbitration clause in CBA. Relying on Wright, the court held that the arbitration clause providing for arbitration of "all complaints, disputes, controversies or grievances between the Company and its employees" did not constitute a clear and unmistakable waiver of employees' statutory right to a judicial forum for Title VII claims notwithstanding the fact that the CBA contained an anti-discrimination clause.)

- Zarzycki v. Hamilton Standard, No. 3:96 CV 1782, 1997 WL 380434 (D. Conn. June 12, 1997) ("Plaintiff's statutory right to be free from unlawful discrimination is independent of any contractual right plaintiff also may have had to be free from such discrimination [arising under a CBA]").

- Lynch v. Pathmark Supermarkets, 987 F. Supp. 236 (S.D.N.Y. 1997) (determination in arbitration proceeding, that former employee was not discharged for religious discrimination reasons, did not have collateral estoppel effect in subsequent suit), aff'd, 152 F.3d 919, 1998 WL 425876 (2d Cir. 1998), cert. denied, 525 U.S. 938, reh'g denied, 119 S. Ct. 610 (1998).

Fourth Circuit

- Safrit v. Cone Mills Corp., 248 F.3d 306, 308 (4th Cir. 2001) (court found that employer's agreement in the collective bargaining agreement not to discriminate against employees in protected classes, to "abide by all the requirements of Title VII," and to arbitrate any unresolved grievances arising under the CBA's non-discrimination language "clear and unmistakeable").

- Wikle v. CNA Holdings, Inc., No. 01-1119, 2001 WL 474692 (4th Cir. May 4, 2001) (FMLA was explicitly incorporated into the terms of the CBA, which provided that FMLA claims were subject to arbitration)

- Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.), cert. denied, 519 U.S. 980 (1996) (statement in collective bargaining agreement that all disputes under arising under provision binding company to comply with anti-discrimination laws "may" be submitted to grievance procedure resulting in binding arbitration was sufficient to preclude plaintiff from bringing civil action).

- Bedwell v. Mack Trucks Inc., Nos. 97-1688, 97-1689, 1999 WL 92405 (4th Cir. Feb. 24, 1999) (per curiam) (holding that the CBA that simply provided that the parties will not discriminate and will support "governmental anti-discrimination programs," even when coupled with agreement to arbitrate all employment matters, was not a clear and unmistakable waiver of employees' right to a judicial forum for ADA claims.)

- Brown v. ABF Freight Sys., Inc., 183 F.3d 319 (4th Cir. 1999) (reversed lower court ruling requiring submission of employee's federal statutory claims to arbitration because the language in the collective bargaining agreement was not "sufficiently clear and unmistakable." The CBA's anti-discrimination clause did not specifically incorporate federal anti-discrimination laws and the arbitration clause referred only to grievances

arising under the bargaining contract and "cannot be read to require arbitration of those grievances arising out of alleged statutory violations.")

- Brown v. Trans World Airlines, 127 F.3d 337(4th Cir. 1997) (holding that arbitration clause in CBA that only refers to disputes arising "under this agreement" did not bar civil action by union employees).

- Marshall v. Bell Atlantic Network Servs., 2 F. Supp. 2d 820 (E.D. Va. 1998) (holding that plaintiff not bound to resolve her ADA claim solely through the grievance and arbitration procedures set forth in CBA, where plaintiff had no opportunity to "effectively vindicate" her statutory rights since the CBA did not require the union to arbitrate and the union refused to do so.)

Fifth Circuit

- Coleman v. Houston Lighting & Power Co., 984 F. Supp. 576, 582 (S.D. Tex. 1997) (holding that employees covered by collective bargaining agreements containing arbitration clauses retain the right to pursue statutory employment discrimination claims in federal court without exhausting their contractual remedies).

- Hill v. American Nat'l Can Co./Foster Forbes Glass Div., 952 F. Supp. 398 (N.D. Tex. 1996) (holding that plaintiff is not required to exhaust his collective bargaining agreement procedures in order to bring a claim under the ADA; "[W]hen the individual needs and rights of a disabled worker [are at stake] . . . it is inappropriate to require an employee to submit to the will of his union and its agreement with the company.")

- McCormick v. El Paso Elec. Co., 996 S.W.2d 241 (Tex. Ct. App. 1999) (civil action not barred by CBS that neither mentioned the Texas Human Rights Act specifically, or incorporated it by reference into the agreement; under Wright, the waiver of a judicial forum was not "clear and unmistakable.")

Sixth Circuit

- Penny v. United Parcel Serv., 128 F.3d 408 (6th Cir. 1997) (holding that under Gardner-Denver that a union cannot waive a statutory right to a judicial forum prospectively on an individual's behalf).

- Kennedy v. Superior Printing Co., 215 F.3d 650 (6th Cir. 2000) (holding that arbitration over discharge and violation of general anti-discrimination clause of CBA did not bar ADA suit in court; the CBA did not reference the ADA and only had a general anti-discrimination provision, and under Wright did not constitute a "clear and unmistakable" waiver of the employee's right to go to court).

- Bratten v. SSI Servs., Inc., 185 F.3d 625 (6th Cir. 1999) (holding that general nondiscrimination clause in the labor agreement and agreement to submit any complaints

arising under the agreement to binding arbitration did not constitute a "clear and unmistakable" waiver of the plaintiff's right to sue).

- Dalton v. Jefferson Smurfit Corp., 979 F. Supp. 1187, 1196 (S.D. Ohio 1997) (holding that nondiscrimination clause in collective bargaining agreement governing employee did not require arbitration of employee's Title VII and § 1981 claims).

Seventh Circuit

- Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir.), cert. denied, 522 U.S. 912 (1997) (holding that "the union cannot consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement").

- Johnson v. Bodine Elec. Co., 142 F.3d 363 (7th Cir. 1998) (holding that ruling that a collective bargaining agreement "cannot be the source of consent to arbitrate an individual worker's Title VII claims.")

- Spyrnal v. Prudential Ins. Co. of Am., No. 96 C 8544, 1997 WL 534261 (N.D. Ill. Aug. 20, 1997) (holding that CBA's arbitration agreement did not bar litigation of ADA claims, even where employee signed separate agreement authorizing union to act on his behalf with the employer).

Eighth Circuit

- Varner v. National Super Mkts., Inc., 94 F.3d 1209 (8th Cir. 1996) (following Gardner-Denver and holding that "the pursuit of a claim through grievance and binding arbitration under a CBA does not preclude a civil suit under Title VII"), cert. denied, 519 U.S. 1110 (1997).

Ninth Circuit

- Doyle v. Raley's Inc., No. 97-15863, 1998 WL 697395 (9th Cir. Sept. 22, 1998) (noting that CBA provision was substantially similar to that in Gardner-Denver and therefore constituted an agreement only to arbitrate contractual rather than statutory rights).

- Araiza v. Nat'l Steel & Shipbuilding Co., 973 F. Supp. 963, 969 (S.D. Cal. 1997) (holding that CBAs cannot bind employees to arbitrate statutory claims).

- Krahel v. Owens-Brockway Glass Container, Inc., 971 F. Supp. 440 (D. Or. 1997) ("Controlling case law from the Supreme Court and this Circuit thus holds that an employee's right to a judicial forum for his or her Title VII claims cannot be waived by a binding arbitration clause inserted in a collective bargaining agreement.")

Tenth Circuit

- Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997), remanded on other grounds, 524 U.S. 947 (1998) (holding that Gilmer does not apply to agreements to arbitrate contained in labor contracts).

Eleventh Circuit

- Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519 (11th Cir. 1997) (held that the plaintiff's ADA claim was not subject to compulsory arbitration under a CBA where the CBA failed to meet the following three-part test: (1) the employee must agree individually to the contract, (2) the agreement must authorize the arbitrator to resolve federal statutory claims rather than just contract claims that involve the same facts, and (3) the employee must have the right to insist on arbitration if he does not like the resolution of the grievance process).

- Peterson v. BMI Refractories, 132 F.3d 1405 (11th Cir. 1998) (applying standard in Brisentine and concluding that there had been no individual agreement to arbitrate statutory claims and thus civil action could proceed).

## IV. IMPACT ON ABILITY OF EEOC TO BRING LAWSUITS

In July 1997, the EEOC issued a policy statement in which the agency took the position that mandatory arbitration agreements posed as a condition of employment violate the civil rights laws enforced by the EEOC and interfere with the EEOC's enforcement of those laws. The EEOC also has taken the position that it is not prevented from seeking individual relief, such as reinstatement, back pay or punitive damages, on behalf of employees who have entered into binding arbitration agreements with their employers.

In recent years, the agency has filed numerous lawsuits in federal courts seeking monetary relief in cases where the individual employee opted to arbitrate his or her claim. In effect, the EEOC has taken the position that its role in protecting the public interest, in addition to the interests of aggrieved individuals, compels it to litigate allegations of employment discrimination even in cases where the complaining party has chosen to resolve his or her dispute without litigation.

In 1998, the Second Circuit held that an arbitration agreement contained in a U-4 agreement precluded the EEOC from seeking purely monetary relief under the ADEA in federal court for employees who signed such agreements. EEOC v. Kidder, Peabody & Co., 156 F.3d 298 (2d Cir. 1998). In that case, the EEOC sought back pay and liquidated damages for nine former investment bankers at Kidder Peabody.[2] All of the investment bankers had signed U-4

[2] The EEOC also sought reinstatement of the terminated employees, but later stipulated that it no longer sought this relief when Kidder discontinued its investment banking operations.

agreements in which they agreed to submit any and all claims arising out of their employment with Kidder Peabody to binding arbitration. Relying on the Supreme Court's decision in Gilmer, the district court dismissed the action on the grounds that the arbitration agreements precluded the EEOC from pursuing back pay and liquidated damages on behalf of the individual employees. The district court held: "the clear implication of [the] Gilmer decision is that the EEOC may not seek monetary relief on behalf of claimants who have entered into valid arbitration agreements." EEOC v. Kidder, Peabody & Co., 979 F. Supp. 245, 247 (S.D.N.Y. 1997), aff'd, 156 F.3d 298 (2d Cir. 1998).

The Second Circuit affirmed the district court decision in its entirety. The court recognized the existence of two "competing public interests - - the interest in allowing the EEOC broad authority to pursue actions to eradicate and prevent employment discrimination and the interest in encouraging parties to arbitrate." Kidder, Peabody, 156 F.3d at 303. In balancing these concerns, however, the court noted that the public interest is minimal when the EEOC seeks private benefits for an individual. That minimal public interest in individual relief, together with the FAA's "liberal federal policy favoring arbitration agreements," id. at 302 (citation omitted), led the court to conclude that the EEOC cannot seek purely monetary relief for an employee who is bound by a valid arbitration agreement. Thus, the court explained that "allowing the EEOC to pursue injunctive relief in the federal forum while encouraging arbitration of the employee's claim for private remedies, strikes the right balance between [competing] interests. Further, to permit an individual, who has freely agreed to arbitrate all employment claims, to make an end run around the arbitration agreement by having the EEOC pursue back pay or liquidated damages on his or her behalf would undermine the Gilmer decision and the FAA." Id. at 303.

Both the Fourth and Eighth Circuits have followed the reasoning of the Second Circuit. See Waffle House, 193 F.3d at 812-13; Merrill Lynch, Pierce Fenner & Smith, Inc. v. Nixon, 210 F.3d 814 (8th Cir. 2000), cert. denied, 121 S. Ct. 383 (2000).

In Waffle House, the employee's job application contained a binding arbitration provision, which required him to arbitrate any dispute or claim concerning his employment, although it did not specifically refer to discrimination claims. After the employee was discharged, he filed a charge with the EEOC complaining that his discharge violated the Americans with Disabilities Act. After a finding of probable cause, the EEOC filed an enforcement action in federal court against Waffle House, seeking monetary relief (back pay, and compensatory and punitive damages), reinstatement for the discharged employee, and company-wide injunctive relief to eliminate alleged discrimination at Waffle House. In response, Waffle House filed a petition under the FAA to compel arbitration and stay the action. The Fourth Circuit held that the EEOC cannot pursue any individual remedies (including backpay, reinstatement, and compensatory and punitive damages) in court for employees who have waived their right to a judicial forum by signing an arbitration agreement. The court's reasoning is firmly based in the strong policy in favor of arbitration agreements:

> When an individual and an employer agree to submit employment disputes to arbitration, it is the federal policy to give that contract effect in order to favor the arbitration mechanism for dispute resolution. To permit the EEOC to prosecute in court [the plaintiff's] individual claim – the resolution of which he had earlier committed by contract to the arbitral forum – would significantly trample this

> strong policy favoring arbitration. Because [plaintiff's] own suit in court to enforce his ADA claim would be barred by his contract and by the federal policy embodied in the FAA, only a stronger, competing policy could justify allowing the EEOC to do for [plaintiff] what [he] could not have done himself. The EEOC's public mission to eradicate and to prevent discrimination may be such a policy in certain contexts, but, as we conclude herein, it cannot outweigh the policy favoring arbitration where the EEOC seeks relief specific to the charging party who assented to arbitrate his claims. Although the EEOC acts in the public interest, even when enforcing only the charging party's claim, the public interest aspect of such a claim is less significant than an EEOC suit seeking large-scale injunctive relief to attack discrimination more generally.

Waffle House, 193 F.3d at 812 (internal citations omitted). The court further explained how its decision enforcing the arbitration of individual claims, and limiting the EEOC's right to proceed on behalf of an individual who agreed to arbitration, struck the proper balance between the competing public and private interests:

> When the EEOC seeks "make-whole" relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed in federal court because in that circumstance, the EEOC's public interest is minimal, as the EEOC seeks primarily to vindicate private, rather than public, interests. On the other hand, when the EEOC is pursuing large-scale injunctive relief, the balance tips in favor of EEOC enforcement efforts in federal court because the public interest dominates the EEOC's action.

Id.

The Eighth Circuit likewise has followed the Second and Fourth Circuits in holding that the EEOC may not seek relief on behalf of individuals who are bound by valid arbitration agreements. Merrill Lynch, Pierce Fenner & Smith v. Nixon, 210 F.3d 814 (8th Cir.), cert. denied, 121 S. Ct. 383 (2000). In Nixon, the employee had signed a U-4 agreement that required arbitration of any claims arising out of his employment. After he was discharged, the employee submitted his claims to arbitration and alleged, among other things, that his termination violated Title VII and the state anti-discrimination statute. The arbitrator found against the employee and dismissed his claims with prejudice. During the pendency of his arbitration, however, the employee filed an administrative complaint with the Missouri Commission on Human Rights. After the arbitrator ruled against the employee, the MCHR initiated an administrative action against Merrill Lynch, asserting that it had violated the employee's rights under state law, and seeking both monetary and injunctive relief on behalf of the employee.

Merrill Lynch filed an action in federal court pursuant to the FAA, seeking to enjoin the MCHR from proceeding with its administrative action. The district court enjoined the MCHR from seeking monetary relief on behalf of the employee, but did not enjoin the MCHR from seeking injunctive relief. In deciding the appeal brought by the MCHR, the Eighth Circuit adopted the reasoning of the Second Circuit:

> We recognize that there is some tension between, on the one hand, the interest in enforceable arbitration agreements and, on the other hand, the interest in independent enforcement of anti-discrimination laws on behalf of the public by agencies such as the MCHR. We agree, however, with the approach to this difficulty that was taken in Equal Employment Opportunity Commission v. Kidder Peabody and Company, Inc., 156 F.3d 298, 302 (2d Cir. 1998), which held that in circumstances similar to ours an arbitration agreement precludes the EEOC from seeking purely monetary relief for an employee but does not preclude it from seeking injunctive relief.

Nixon, 210 F.3d at 818.

Accordingly, the Eighth Circuit affirmed the district court's order enjoining the MCHR from seeking individual monetary remedies on behalf of the employee. The court did not decide if the MCHR should have been precluded from seeking equitable relief (reinstatement) on behalf of the individual because Merrill Lynch failed to file a proper cross-appeal on this issue.

Under the reasoning followed by the Second, Fourth and Eighth Circuits, the EEOC presumably should be precluded from seeking any relief, whether monetary or equitable, on behalf of an individual who is bound by an arbitration agreement. As all these circuits have noted, the public interest in a private remedy is minimal. Thus, the EEOC should be able to pursue only class-wide injunctive relief (where the public interest is high), and not individual relief, whether monetary or equitable. Only the Fourth Circuit in Waffle House directly reached this issue, holding that the EEOC could not pursue any remedy, including backpay, reinstatement, and compensatory and punitive damages, on behalf of the individual who was bound by the agreement to arbitrate. The Second and Eighth Circuits considered only individual monetary relief, and did not address whether the EEOC could pursue individual equitable relief, such as reinstatement.

The only other circuit court to address this issue is the Sixth Circuit, which has held that an employee's signing of an arbitration agreement waiving her right to bring Title VII claims against her employer does not preclude the EEOC from pursuing her Title VII claims for monetary relief on her behalf. According to the Sixth Circuit, the broad powers granted to the EEOC by Congress to eliminate unlawful employment discrimination are separate and distinct from the individual's rights and cannot be abrogated by the FAA or an individual agreement to arbitrate. EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999).

On March 26, 2001, less than a week after its decision in Circuit City, the Supreme Court granted certiorari to review the Fourth Circuit's decision in Waffle House.

## V. NLRB POSITION ON MANDATORY ARBITRATION AGREEMENTS

Although mandatory arbitration agreements have become commonplace in non-union workplaces and courts have generally upheld valid agreements, the National Labor Relations Board ("NLRB") during the Clinton Administration signaled a fundamental objection to such ADR provisions where they require an employee to relinquish his or her unfettered right to access the NLRB's processes. Indeed, the NLRB issued complaints in a number of cases, but none of them yielded a Board decision.

Absent a Board decision, employers generally must look for guidance to a 1995 General Counsel Advice Memorandum, which provides some insight into the NLRB's position on mandatory ADR agreements. See General Counsel Advice Memorandum, Bentley's Luggage Corp., 1995 WL 912536 (1995). In that case, the employer instituted a policy requiring employees to sign a mandatory arbitration pledge as a condition of continued employment. One employee refused to sign the agreement because he viewed it as a plot to take away all of his rights as an employee. Consequently, the employee was terminated and he later filed a charge with the NLRB challenging his termination. Referring to the employer's actions as an "open attack on an employee's right to access to the Board," the General Counsel directed that a complaint should issue not only for the termination but also because the employer even maintained the agreement and insisted that employees sign it as a condition of continued employment in violation of Sections 8(a)(1) and (4) of the Act. Id. at *2.

Section 8(a)(4) of the Act provides that "[i]t shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the Act]." Like most provisions of the Act, however, the actual terms bear little resemblance to the construction given those terms. To be sure, an employee need neither file a charge nor give testimony to be protected under Section 8(a)(4) of the Act. Rather, the NLRB has adopted the expansive view that "Congress enacted Section 8(a)(4) to ensure that all persons would be 'free from coercion against reporting [possible unfair labor practices] to the Board.'" General Counsel Memorandum, 1995 WL 912536, at *6 (N.L.R.B.G.C.) (1995) (quoting from Nash v. Fla. Indus. Comm'n, 389 U.S. 235, 238 (1967)).

Section 10(a) of the Act states that "[t]he Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . [and that] [t]his power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . ." By examining the language of Section 10(a), the General Counsel concluded that the NLRB has exclusive jurisdiction over unfair labor practice adjudication, irrespective of any other dispute resolution mechanism. Thus, the General Counsel construed Sections 8(a)(4) and 10(a) to state the following rule: a mandatory arbitration provision that restrains or deters employees from exercising their statutory rights under the Act or that subordinates an employee's right to file charges with the Board to an employer's unilaterally chosen arbitration process violates the Act.

The Bentley's Luggage case ultimately settled. As part of the settlement agreement, the employer offered back pay to the terminated employee and agreed to post notices informing employees of the settlement. Significantly, the settlement agreement provided that the employer would notify employees that the arbitration pledge does not block their access to the NLRB. While the NLRB apparently remains opposed to mandatory arbitration agreements, a subsequent case in Raytheon, E-Systems shows that its opposition is probably confined to provisions that do not make it clear that an employee's access to the NLRB is not compromised by the agreement. See NLRB General Counsel Approves Settlement of Charges on Arbitration Pact, 1997 Daily Lab. Rep. (BNA) No. 39, at A-7 to A–8 (Feb. 27, 1997).

It remains to be seen whether the NLRB under the Bush Administration will continue to pursue this issue or take a contrary position.

## VI. POTENTIAL ADVANTAGES AND DISADVANTAGES OF ARBITRATION FROM AN EMPLOYER PERSPECTIVE

### A. Potential advantages

1. Reduce litigation costs
2. Reduce burden on employer
3. Speed of resolution
4. Reduce backpay exposure
5. Reduce discovery burden and costs
6. Overall dispute resolution program and speed of resolution may be viewed positively by employees
7. Arbitrators less likely than juries to have pro-employee bias
8. Avoid "runaway jury" verdicts – *The Employment Lottery*
9. Arbitrators less likely than courts to issue broad injunctive relief.
10. Adverse arbitration decisions do not establish the same precedent as adverse court decisions
11. Confidential or at least less public process
12. May diminish employee perceived need for union or outside counsel.
13. May eliminate EEOC ability to pursue remedies on behalf of individual employee.
14. May limit employee's ability to bring or participate in a class action.
15. Finality – limited appeal rights.

### B. Potential Disadvantages

1. Perceived ease of access may increase number of employee claims
2. May be considered by some employees as taking away of rights
3. Cost of set up and administration

4. Less ability to have cases dismissed at preliminary stage or before hearing

5. Arbitrators less likely to accept procedural defenses such as the statute of limitations and jurisdictional prerequisites

6. Arbitrators more willing to allow hearsay evidence and irrelevant witnesses

7. Tendency for arbitrators to "split the baby" or award something notwithstanding the law

8. Limited right to appeal bad decisions

9. Cost of defending court challenges to mandatory arbitration by employees and EEOC

## VII. INTERNET RESOURCES FOR ADR ISSUES

**A.** American Arbitration Association at www.adr.org

**B.** The Conflicts Resolution Information Source at www.crinfo.com

**C.** JAMS ADR Home Page at www.jamsadr.com//home.asp

**D.** ABA May 1995 Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship at http://www.bna.com/bnabooks/ababna/special/protocol.pdf