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ADR in Labor and Employment Law During the Past Quarter Century

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Theodore J. St. Antoine*

I. Introduction

Two events can serve as bookends for alternative dispute resolution (ADR) in labor and employment law during the past quarter century. The first was the 1991 U.S. Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.* The Court approved so-called "mandatory arbitration" by holding that an individual stockbroker employee was bound by a contract with the New York Stock Exchange to arbitrate a claim of age discrimination against his employer, rather than take the case to court. The second event, or set of events, is the current consideration by Congress of the proposed Employee Free Choice Act (EFCA) and Arbitration Fairness Act (AFA).

As introduced, EFCA would enable unions to get bargaining rights through signed authorization cards rather than a secret-ballot election and would provide for the arbitration of first-contract terms if negotiations fail to produce an agreement after four months. The AFA would amend the Federal Arbitration Act (FAA) to prohibit most pre-dispute agreements to arbitrate employment or civil rights claims. That legislation would effectively overrule *Gilmer.*

Quite appropriately, *Gilmer* is the most significant and most debated ADR decision in labor and employment law during the past quarter century. Throughout this period, developments in employment law, dealing with individual employee-employer relations, overshadowed developments in labor law, dealing with traditional union-management relations. This Article will therefore first treat emerging ADR law and

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1. 500 U.S. 20 (1991). That was not exactly a quarter century ago. But it is now commonplace for historians to mark August 1914 as the real start of the twentieth century, with the onset of the First World War. I indulge in similar flexibility in dating here. Besides, as recounted in Part II-A, infra, *Gilmer* was the culmination of nationwide legal developments going back to the 1980s. For a good overview of the ADR process, see How ADR Works (Norman Brand ed., 2002).
practice in the employment sphere and then turn to the less arresting but still noteworthy refinements of ADR in labor law.

II. ADR in Individual Employment Relations

A. 1980s’ Qualifications on Employment at Will

The 1980s saw a major revolution in employment law across this country. Initially this was a matter of judicial developments in substantive law, but eventually it would have a profound effect on ADR. The point of departure was the traditional American doctrine of “employment at will.” Under it, as callously explained in a classic nineteenth century case, employers may lawfully “dismiss their employees at will...for good cause, for no cause or even for cause morally wrong.” Except for statutory prohibitions under the civil rights laws, this right to fire arbitrarily remained pretty much the universal rule in the United States until recently. In 1959, one California court found it too hard to swallow when an employer discharged an employee for refusing to commit perjury at the employer’s behest. But that sustaining of an employee’s cause of action for unconscionable treatment was a rarity. Then, beginning in 1980, came a flood of court decisions that ultimately reached every state except Florida, Louisiana, and Rhode Island and imposed at least some limitations on the absolutist reign of at-will employment.

Three principal legal theories, with variants, came into use. Torts included discharges contrary to public policy and abusive or retaliatory discharges. Contract claims could be based on oral commitments to an employee at the time of hiring or statements of policy in per-

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sonnel manuals. The third and potentially most expansive theory of recovery for wrongful discharge was based on the implied covenant of good faith and fair dealing, but only about a dozen states have accepted it.

These newly recognized causes of action initially produced a bonanza for certain employees. Judges and juries awarded substantial damages to workers who were wrongfully discharged. For example, several studies showed that plaintiffs in California won about 67.5 percent of the discharge cases that went to juries, with the average award being around $450,000. Nationwide, single individuals received jury awards for actual and punitive damages for wrongful discharge as high as $20 million, with awards exceeding one million dollars not uncommon. Even winning was not cost-free for business. By the end of the 1980s the fees and expenses for a successful defense of a discharge case before a jury could range between $100,000 and $150,000 in major Midwestern cities, and amount to around $200,000 on the coasts.

B. Employer Reactions; Mandatory Arbitration; Gilmer

Employers took a number of steps to counter these new legal developments. More circumspect behavior would avoid most tort claims, but that was not a large problem anyway. Few employers are going to fire employees for refusing to engage in criminal conduct. Contract actions could be negated by properly drafted and conspicuous disclaimers. Employers might even be able to revoke previous promises


15. These figures are from conversations between the author and management attorneys at the 1992 Midwinter Meeting of the ABA Labor and Employment Law Section's Committee on Individual Rights and Responsibilities in the Workplace on April 8–9, 1992.

contained in personnel manuals through a reasonable notice to the workforce.\textsuperscript{17}

Many employers went one step further. They required all their employees, as a condition for getting or keeping a job, to agree that all disputes between workers and management arising out of the employment relationship, including statutory claims, would have to be resolved through arbitration systems established by the employer. The employees had to waive all right to bring any action on such claims against their employers in federal or state court. By 2001, a study for the American Arbitration Association (AAA) reported that six million employees were covered by employment arbitration plans administered by AAA, apparently all or most being of this mandatory type.\textsuperscript{18} Another study indicated that by 2002 the total number of employees covered by nonunion employment arbitration plans might be even higher than the number covered by traditional collective bargaining labor arbitration agreements.\textsuperscript{19}

As previously mentioned, the U.S. Supreme Court effectively upheld mandatory arbitration plans in the famous \textit{Gilmer} decision.\textsuperscript{20} The Court emphasized that the stockbroker employee had suffered no loss of substantive rights; it was only a change of forum.\textsuperscript{21} The stockbroker was not precluded, however, from filing a charge with the EEOC; only his own court action was barred.\textsuperscript{22} Moreover, the agreement in \textit{Gilmer}...
plainly authorized the arbitrator to handle statutory claims as well as contractual claims. Lastly, the Court held that the arbitral procedures must not impair employees' capacity to vindicate their statutory rights.23

C. The Pros and Cons of Gilmer

Gilmer touched off a roiling debate in academic circles, in various interested groups, and among employer and employee partisans. On the face of it, conditioning job rights on agreeing to a private decision-maker in an employer-created tribunal as a substitute for the judge-and-jury system ordained by Congress (or by a state legislature) would seem a grave affront to public policy. After all, the particular procedures used to enforce substantive rights, including sensitive civil rights claims, may often be almost as critical as the rights themselves. It is no wonder that several scholars, two federal agencies, and two prestigious panels—one government-sponsored and one private—registered strong opposition to mandatory arbitration of statutory employment claims.24
Both sides make other, more pragmatic arguments. An employer dealing with an individual employee is the "repeat player" against the one-timer, and arbitrators may be affected by knowing who is the much likelier source of future business.25 One reputable study indicates, however, that the greater success of the repeat player is simply the result of employer experience, not arbitrator bias.26 In any event, the repeat-player effect should diminish with the increasing growth of a plaintiffs-claimants bar. Some sizable, well-publicized jury verdicts could do considerably more, it is said, to deter workplace discrimination than any number of smaller, confidential arbitration awards.27 Yet it is widely recognized that the certainty of sanctions is usually more of a deterrent than their severity.28

A distinguished federal judge has observed that the diversion of a large amount of civil rights litigation from the courts to arbitration, with the resulting decrease in the number of published judicial opinions, could have an enervating effect on the development of legal doctrine in this area.29 But concerns that private arbitration will hinder the development of judicial doctrine in the civil rights area seem ill-founded in light of the very large federal caseload dealing with employment discrimination.30 Finally, an employer's provision for arbitration is arguably a not-so-subtle antiunion device, because a grievance and arbitration system is regarded as one of the principal benefits of unionization and collective bargaining. On the other hand, the history


recounted above indicates that employers' resort to mandatory arbitration in the 1980s was triggered far more by the size of jury verdicts and the cost of litigation than by efforts to stymie union organization.31

D. Forum Comparisons

1. Accessibility

Opponents of mandatory arbitration object to it primarily on the basis of broad principles of fairness and public policy. Apologists rely on such practical considerations as the relative ease of access to arbitration vis-à-vis the courts, and a comparison of the results in these different forums. A survey of plaintiffs' attorneys estimated that they accepted only about five percent of the individuals with employment claims who sought legal representation.32 A leading employment specialist in Detroit told me that his secretary kept an actual count; he took on one out of eighty-seven persons who requested his assistance. In a comprehensive review of empirical studies of employment arbitration, Professor Alexander Colvin of Cornell University indicated that "one of the key potential advantages of employment arbitration over litigation is that the relatively high costs of litigation inhibit access to the courts by lower to mid-income...employees."33 One study concluded that employees having less than a $60,000 annual income generally cannot afford court litigation, but arbitration remains a viable option.34 In 2007, the median income of full-time, year-round U.S. workers under 65 was $41,061.35 Arbitration would seem the most realistic recourse


One of the most cautious studies of the relative costs of arbitration and court suits concluded: “The empirical evidence suggests that arbitration may be a more accessible forum than courts for lower income employees and consumers with small claims.”

Lewis Maltby, President of the National Workrights Institute, has been an advocate of arbitration but an opponent of the mandatory variety as a matter of principle. Yet at a conference sponsored by the National Academy of Arbitrators in Chicago in 2007, he recounted his troubling experience while director of the American Civil Liberties Union’s Task Force on Civil Liberties in the Workplace. Many persons approached him with reports of wrongful treatment in their jobs. Although he concluded most of the claims were unsustainable, he believed a couple dozen or so were legitimate and should be taken to court. He placed many calls asking lawyers for assistance. Even with Maltby’s expert prescreening of the cases, he was able to find representation for only one employee. After further studying the available data, Maltby concluded that twice as many employees could afford to go to arbitration as could afford court suits.

Neither the Equal Employment Opportunity Commission (EEOC) nor a small claims court seems the likely salvation for the low-income employee. The EEOC is so underfunded and understaffed that one knowledgeable scholar has recommended, quite sensibly, that the Commission get out of the business of handling individual charges and husband its limited resources for routing out systemic unlawful practices. At best, the Commission tends to concentrate on the big case or the test case. Small-claims courts will ordinarily be no answer either. They generally are authorized only to issue damage awards in a limited amount, typically on the order of $5,000. Even more important, they customarily do not exercise the equitable jurisdiction to provide what may be most desired—an order restoring the employee’s job.

2. Outcomes

Comparing the results of employee claims pursued in arbitration with those in court immediately confronts the apples-and-oranges problem. Some early studies of arbitration awards disproportionately reflected cases involving high-level employees operating under individually negotiated contracts rather than rank-and-file workers claim-


The former fared significantly better. Professor Lisa Bingham of Indiana University found in two separate studies that employees won 68.8 percent and 61.3 percent of claims based on individual contracts but only 21.3 percent and 27.6 percent of claims based on personnel manuals. A later report on 200 American Arbitration Association arbitral awards from 1999 and 2000 showed a lower-income employee win rate of 34 percent in cases based on employer-mandated plans as against an overall win rate of 43 percent for all claims. Another comparative difficulty is summary judgment—relatively rare in arbitration but common in court litigation—and the classification of prehearing or pre-trial settlements in either forum. Professor Colvin has pointed out that since employers win the vast majority of summary judgments in federal court employment cases, and since employers naturally seek to settle the stronger employee cases during preliminary proceedings in litigation, decent arguments can be made either way about whether trial results exaggerate or depress employee win rates, at least in federal court.

Nonetheless, despite these qualifications, several empirical studies by serious scholars have shown arbitration to be surprisingly favorable to employees as compared with court litigation. For higher-paid employees, probably grieving under individual contracts, arbitral win rates in different studies ranged between about 40 percent and 69 percent. For lower-paid employees, presumably relying on handbook provisions, arbitral win rates were between about 21 percent and 40 percent. By contrast, various studies found the figures for court cases, most of which were likely to involve higher-paid employees, running between about 12 percent and 57 percent. It does not seem at all unfair for Professors David Sherwyn and Michael Heise of Cornell and Samuel Estreicher of New York University to sum up these and other empirical studies by stating that "there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration]." At worst

40. Colvin, supra note 33, at 413.
42. Hill, supra note 18, at 11, 13.
43. Colvin, supra note 33, at 417–18.
44. In addition to the authorities cited infra notes 39–41, see Eisenberg & Hill, supra note 33, at 48–49, tbl.1 (employees earning less than $60,000 a year were classified as "lower-paid"); Hoyt N. Wheeler, Brian S. Klaas & Douglas M. Mahony, Workplace Justice Without Unions 48, 54 (2004); Maltby, supra note 32, at 46, 49, 54; Maltby, supra note 38, at 108–12.
45. Sherwyn, supra note 26, at 1578.
the differences in outcomes for comparable groups of claimants appear negligible.

One qualification must be noted on the comparability of arbitration and litigation results. It seems clear that while claimants generally fare about as well (or better) in arbitration as in court, extremely large awards are more common in litigation, especially by juries.46

Another highly important fact was found in a study by Professor Theodore Eisenberg and Elizabeth Hill. They examined 215 American Arbitration Association employment arbitration cases resolved between 1999 and 2000. Only forty-two of those cases, or 19.5 percent, dealt with statutory civil rights claims.47 Other studies revealed even lower percentages of such statutory cases.48 The vast majority were based on individual contracts or personnel manuals. That sharply reduces the argument that arbitration, whether mandatory or not, is adversely affecting the enforcement of civil rights legislation. Indeed, employers' desire to impose mandatory arbitration is frequently accompanied by a willingness to grant "good cause" contractual protections, a benefit of great value to employees in employment-at-will America.

There have been few attempts to compare win rates in employment arbitration with those in union-management labor arbitration.49 Recently I reviewed the outcomes of 200 discharge grievances filed from 1999 to 2007 in one of the country's oldest and most respected union-management arbitration systems. I would call it a "gold standard" for arbitration. The issue was whether there was "just cause" or "proper cause" for the discharges under the parties' collective bargaining agreement. Employees were reinstated or received other substantial relief in only forty-six instances, or twenty-three percent of the 200 arbitrations.50 That is a lower winning

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46. Maltby, supra note 38, at 114–15, 117–18. For a serious critique of the methodology in the foregoing empirical studies, see David S. Schwartz, Mandatory Arbitration and Fairness, 84 Notre Dame L. Rev. 1247, 1283–314 (2009). But Professor Schwartz is opposed to empirical studies in this area, apparently considering mandatory arbitration inherently "unfair," and offers no systematic figures of his own based on how it actually operates.

47. Eisenberg & Hill, supra note 33, at 49.

48. Maltby, supra note 38, at 112 (finding 1.8% to 7%).

49. For a comparison of the way employment arbitrators and labor arbitrators treat hypothetical scenarios, see Lisa B. Bingham & Deborah J. Mesch, Decision Making in Employment and Labor Arbitration, 39 Indus. Rel. 671 (2000); Brian S. Klaas, Douglas Mahony & Hoyt N. Wheeler, Decision-Making about Workplace Disputes: A Policy-Capturing Study of Employment Arbitrators, Labor Arbitrators, and Jurors, 45 Indus. Rel. 68 (2006). Employment arbitrators were less likely to rule for employees than labor arbitrators. But Bingham and Mesch found no statistically significant employment-labor distinction if the occupation of the arbitrator was taken into account. Attorney arbitrators were less favorable toward employees than full-time arbitrators or arbitrators from academia.

50. The low employee success rate is probably explained by the company's acquired knowledge of arbitral standards and the union's willingness to let grievances have their
percentage than in all but one of the employment arbitration studies previously discussed.

E. Changing Attitudes

Although the Gilmer decision and the whole concept of mandatory arbitration initially evoked an academic chorus of condemnation, scholars and other disinterested observers now seem more disposed toward reformation rather than outright prohibition. But ironically the very same empirical data that may have affected this shift of attitude by showing the advantages of arbitration, even mandatory arbitration, for employees may also have caused employers to have second thoughts about the process. At a recent meeting of labor and employment lawyers in Michigan, I could not find a single top management attorney who was currently advising clients to start or retain a mandatory arbitration system. Three reasons were given: Employees win too often; it is hard to get summary judgment in arbitration; and full appellate review is not available. I still hope, however, that arbitration will prove a win-win situation. Employees, particularly lower-paid workers, would find readier access to effective relief, and employers would find lower litigation costs and no devastating jury verdicts.

F. Due Process

1. Proposals; the Due Process Protocol

By the mid-1990s, two variegated groups had responded to the spreading use of mandatory arbitration agreements by proposing very similar lists of procedural protections for employees. One body was the Commission on the Future of Worker-Management Relations, the so-called Dunlop Commission. The other was a broadly representative Task Force on Alternative Dispute Resolution in Employment, which

"day in court." Earlier studies indicated disciplinary grievants generally won in whole or in part about half the time in labor arbitrations. Bingham, supra note 41, at 10–11. See also Laura J. Cooper, Mario F. Bognanno & Stephen F. Befort, How and Why Labor Arbitrators Decide Discipline and Discharge Cases, 60 Nat'l Acad. Arb. 420 (Stephen F. Befort, Patrick Halter & Paul D. Staudohar eds., 2008).


drafted the now-famous and influential Employment Due Process Protocol. Each group called essentially for the following guarantees:

1. A jointly selected neutral arbitrator who knows the law;
2. Simple, adequate discovery;
3. Cost-sharing to ensure arbitrator neutrality;
4. Right to representation by a person of the employee’s choice;
5. Remedies equal to those provided by the law;
6. A written opinion and award, with reasons; and
7. Limited judicial review, concentrating on the law.

The Task Force that produced the Due Process Protocol, whose members were designated by a wide spectrum of organizations, was unable to reach accord on the acceptability of pre-dispute as distinguished from post-dispute agreements to arbitrate—and thus effectively on their “voluntariness”—but it did agree they should be “knowingly made.” In contrast, the more homogeneous Dunlop Commission, consisting mostly of academics and neutral persons, declared: “[A]ny choice between available methods for enforcing statutory employment rights should be left to the individual who feels wronged rather than dictated by his or her employment contract.” Significantly, however, Professor Paul Weiler of Harvard, who served as counsel to the Commission, told me he had reservations about this position on the grounds that even mandatory arbitration provided employees with access to relief they might not otherwise have to contest employment wrongdoing. The Commission itself suggested that this issue

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56. In Cole v. Burns Int’l Sec. Serv., 105 F.3d 1465 (D.C. Cir. 1997), the court required (2–1) the employer to pay all the arbitrator’s fees as a condition for enforcing an individual employee’s waiver of a judicial forum. Id. at 1468. Judge Harry Edwards, who spoke for the majority, was surely correct that the source of payment is not the key to arbitrator neutrality. Id. at 1485. Arbitrators are naturally concerned about getting their fee but ordinarily not about where it comes from. Id. Individual employees, of course, may feel more comfortable paying part of the arbitrator’s fees, fearing that whoever pays the piper may also call the tune. Cole may have gone too far, however, in insisting that the employer pay all of the arbitrator’s fee. Id. at 1484. Access to a court, at least initially, would normally not be cost-free.

57. See infra text accompanying note 122.
59. DUNLAP COMMISSION REPORT, supra note 24, at 33.
should be revisited after there was more experience with employment arbitration.60

Both the major arbitrator-designating agencies in employment arbitration, the American Arbitration Association (AAA) and JAMS (formerly the Judicial Arbitration & Mediation Services), have committed themselves to handling only cases in employer-imposed systems that ensure procedural fairness.61 A representative of the AAA was a signatory to the Due Process Protocol.

Refining or extending the work of the Dunlop Commission and the Due Process Task Force, other groups and individuals have come close to a consensus on the standards of fairness required for legitimacy in mandatory arbitration. Representative of this work were papers presented by Professors Richard A. Bales of Northern Kentucky University and Martin H. Malin of Chicago-Kent College of Law at the 2007 conference sponsored by the National Academy of Arbitrators on “Beyond the Due Process Protocol.”62 Some of the principal proposals for going beyond the Protocol include prohibitions of (1) a shortening of the applicable statutory limitations period, or at least any excessive shortening; (2) scheduling arbitration hearings at times or places that would be inconvenient for employees or their representatives or witnesses; (3) bans on class actions which would hinder employees in vindicating certain legitimate interests, such as small monetary claims that would not be worth individual pursuit; and (4) charging excessive arbitrator fees and expenses to employees, for example, amounts that would be greater than the filing fee required by the court where an action would be brought on such a claim.

2. Judicial Developments

Many courts have made constructive contributions in developing due process requirements for a valid employment arbitration system. Thus, in Cole v. Burns International Security Services,63 the District of Columbia Circuit held that a court could enforce a mandatory employment arbitration arrangement as long as it

60. Id.
62. See generally Bales, supra note 37; Malin, supra note 61, at 363. See also National Academy of Arbitrators, supra note 24. One of the foremost proponents and a principal drafter of the Due Process Protocol has contended that it was the product of a unique historical moment and reopening it for amendment could be counterproductive. See Zack, supra note 37. For a close examination of one exemplary arbitration system, see Richard A. Bales & Jason N.W. Plowman, Compulsory Arbitration as Part of a Broader Employment Dispute Resolution Process: The Anheuser-Busch Example, 6 HOFSTRA LAB. & EMP. L.J. 1 (2008).
(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators’ fees or expenses as a condition of access to the arbitration forum.64

Nonetheless, judicial decisions are in conflict and critics are skeptical whether judges alone can complete the task without legislation and greater self-regulation by the parties and designating agencies.65 In assessing the fairness of arbitration plans, courts have relied primarily on two concepts: Gilmer’s requirement that employees must be able to vindicate their statutory claims effectively and the common-law doctrine of unconscionability.66 Despite the willingness of the court in Cole to determine for itself the fairness of an arbitration system for the vindication of statutory rights, the Supreme Court in several non-employment cases has indicated that the question is generally one for the arbitrator, to be decided on a case-by-case basis.67 Courts seem more willing to deal directly with unconscionability issues in arbitration rather than leaving them to arbitrators.68

A. ARBITRATOR SELECTION

The Due Process Protocol apparently contemplates that the parties will select an arbitrator from a panel list supplied by a neutral designating agency such as the American Arbitration Association.69 One of the most pro-arbitration federal courts, the Fourth Circuit, invalidated an employer’s unilaterally established arbitral rules as “so one-sided that their only possible purpose is to undermine the neutrality of the proceeding,”70 in part because the employer was given unlimited control over the composition of the arbitration panel.

The Sixth Circuit went further in invalidating an arbitration selection procedure on the grounds the employer still had “exclusive control

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64. Id. at 1482 (emphasis removed).
65. See, e.g., Bales, supra note 37, at 319–31; 335–37; Malin, supra note 61, at 386–96. See also Bales, supra note 51, at 1069–1101.
66. Malin, supra note 61, at 368–85.
68. See, e.g., Armendariz v. Found. Health Psychcare Serv., 559 F.3d 655 (9th Cir. 2009), cert. denied, 130 S. Ct. 1133 (2010), the court of appeals held that the question of the unconscionability of an employee’s agreement to arbitrate was for the court to decide, not the arbitrator, even though the agreement had expressly assigned that issue to the arbitrator. Id. at 917.
over the pool of potential arbitrators," even though the arbitrators on the panel had to meet specified qualifications to ensure neutrality. A substantial number of existing mandatory arbitration plans do provide for the employer's initial creation of the panel from which the grievant employee is entitled to select the arbitrator. If a company, especially one creating "just cause" contractual standards for employee discipline or discharge, prescribed an appointment procedure having an objectively well-qualified employer-chosen panel but with an employee "veto" for cause, a reasonable argument can be made that a court should properly take account of all the facts in assessing its validity.

An arbitral forum was not considered neutral when a for-profit arbitrator-designating agency got forty-two percent of its business from the employer, thus creating a "symbiotic relationship." But courts have sustained similar mandatory arbitration arrangements when the employer was the source of less than one percent or an unspecified amount of the designating agency's business.

\[\text{β. Shortening Limitations Periods}\]

Short limitations periods for filing grievances, often thirty days or less, are common and accepted in unionized firms. It is important in an ongoing operation to put disputes to rest and to get on with business. At the same time, the existence of a union and a well-publicized grievance system makes it unlikely that many employees will be unaware of time limits. That is not necessarily true in nonunion establishments. Even though employer-promulgated plans usually provide fairly generous 180-day or one-year time limits on filing claims, employees may not be familiar with them. Statutes often provide even longer limitations periods.

71. McMullen v. Meijer, Inc., 355 F.3d 485, 487 (6th Cir. 2004). Although the court struck down the offending portion of the arbitration provision, it upheld the trial court's severance of the clause and its order to arbitrate, with the substitution of the American Arbitration Association's arbitrator selection procedures. McMullen v. Meijer, Inc., 166 F. App'x 164 (6th Cir. 2006). This approach, severing the invalid provision but enforcing arbitration, might appear a reasonable compromise. But it leaves the old problem that employers will have less incentive to clean up their contracts. Most employees will simply go along with the arbitration arrangement as written.


75. Elkouri & Elkouri: How Arbitration Works 217–27 (Alan Miles Ruben ed., 6th ed. 2003). Some collective bargaining agreements have no specified time limit, or only a "reasonable" one, on the filing of grievances. Id. at 218.
The Due Process Protocol does not cover this subject and the courts have dealt differently with variances between statutes and employer plans.

The Ninth Circuit may have taken the stiffest position. It held substantively unconscionable an employer-imposed one-year limitations period in a sexual harassment case because it could conflict with the continuing violation doctrine under California’s Fair Employment and Housing Act. A one-year time limit would not “unduly burden” an employee’s vindication of rights under federal civil rights legislation. A court might well feel differently about a thirty-day or sixty-day limitations period in the contract of an individual employee, even though even shorter periods are standard in collective agreements of unionized employees. Wholly apart from arbitration clauses, however, there is a considerable body of federal decisions upholding agreements for a “reasonable” shortening of the limitations periods in federal statutes or under state law.

Other courts have held that the validity of arbitration agreements shortening time limits for filing claims is a question for the arbitrator. A federal district court in Tennessee said that timeliness was a “gateway” procedural issue and not a defense against arbitration on which the court should rule. The court added: “Although the court cannot conclude, as a matter of federal arbitration law, that the ninety (90) day time limit is per se unenforceable, there are a number of legal and equitable reasons why an arbitrator might decide not to enforce the limit on the facts of this case.”


A one-year limitations period in agreement.
court also held that an arbitrator should handle the application of the American Arbitration Association’s rule, which was incorporated in the arbitration agreement, that in disputes involving statutory rights, the relevant statute’s limitations period should govern the time for arbitration filing.  

C. WAIVERS OF CLASS ACTIONS

In recent years, a burning issue has become the validity of agreements requiring the waiver of class actions, which have been imposed by business firms on employees and especially on consumers. The primary purpose is to discourage the pursuit of relatively small claims. These would not be worth the costs even of arbitration on an individual basis but might well justify a collective action. Since thousands of dollars are frequently at stake if there is a lost job, that makes individual discharge claims worthwhile and thus most of the court cases have involved consumers. Still, employees may have wage claims that are too small for pursuing individually.

Probably the most significant recent decision on the validity of class action waivers in an employee’s arbitration agreement is Gentry v. Superior Court. Gentry sued Circuit City on behalf of himself and other salaried customer service managers, alleging they had been misclassified as exempt employees not entitled to overtime pay under California’s wage and hour laws. Circuit City moved to compel arbitration. Gentry’s agreement contained a class action waiver as well as a provision allowing the employee thirty days to opt out of the arbitration arrangement. The California Supreme Court made several important rulings. First, the statutory wage and hour provisions were

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82. Blair v. Scott Specialty Gases, 283 F.3d 595, 611 (3d Cir. 2002) (arbitration agreement contained a shorter one-year limitations period; the court also cited approvingly a prior decision in which the court itself addressed the merits of a public policy claim against an arbitral provision).


not waivable. Next, the court declared that if the trial court found “a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration,...it must invalidate the class arbitration waiver.”85 Factors to consider in making that determination included “the modest size of the potential individual recovery, the potential for retaliation against members of the class, [and] the fact that absent members of the class may be ill informed about their rights.”86 But the court specifically held that not all class action waivers were invalid, thus refusing to apply a per se or bright-line rule.87 Finally, the court rejected Circuit City’s argument on the controlling importance of the thirty-day opt-out provision in negating any notion that the arbitration agreement was procedurally unconscionable. Regardless of that, the nonwaivability of the statutory wage and hour rights was held the key to resolving the validity of the class action waiver.88

Like Gentry, the First Circuit held a class action waiver unconscionable under Massachusetts law as applied to an employee alleging a violation of the overtime provisions of the Fair Labor Standards Act.89 Also like Gentry, the court emphasized that it was not declaring all such waiver clauses invalid but was only making a decision on the basis of the particular facts before it. So viewed, the clause subjected employees to “oppression and unfair surprise” because “[t]he timing, the language, and the format of the presentation of the [Dispute Resolution] Program obscured, whether intentionally or not, the waiver of class rights.”90 Citing the Supreme Court’s Bazzle decision,91 the court further stated that the waiver question would ordinarily be for the arbitrator to decide, but here the parties had agreed the court should resolve it.92

The Fifth Circuit and a few other courts still seem to believe that Supreme Court language in Gilmer calls for the routine enforcement of

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85. Id. at 568.
86. Id.
87. Id. at 567–68.
88. Id. at 570–73.
89. Skirchak v. Dynamics Research Corp., 508 F.3d 49, 59–60 (1st Cir. 2007).
90. Id. at 60.
91. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003). In Stolt-Nielsen S.A. v. AnimalFeeds International Corp., No. 08-1198 (U.S. April 27, 2010), an action against shipping companies by commercial customers, a 5–3 Supreme Court majority held that an arbitration panel had exceeded its powers under the FAA by imposing its own view of sound public policy in allowing a class action when the parties' arbitration agreement was silent on the subject. Justice Ginsburg, writing for three dissenters, emphasized that the Court had noted the parties were “sophisticated business entities” and thus “the Court apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis.” Id., slip op. at 13 (Ginsburg, J., dissenting). The availability of class actions as a due-process element in employee and consumer cases therefore seems to remain up in the air.
92. Skirchak, 508 F.3d at 56–57.
class action waivers in employment arbitration agreements.\footnote{Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 298 (5th Cir. 2004) ("[W]e reject...Appellants' claim that their inability to proceed collectively deprives them of substantive rights available under the FLSA. The Supreme Court rejected similar arguments concerning the ADEA in \textit{Gilmer}, despite the fact that the ADEA, like the FLSA, explicitly provides for class action suits.") (citing \textit{Gilmer} v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991) ("[T]he fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." (citation omitted))).} It is true that parties seeking the invalidation of these and other arbitration clauses generally bear the burden of proving that the provisions are unconscionable or impede the effective vindication of statutory rights.\footnote{Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91–92 (2000) (arbitration costs).} But the trend appears to be that, given appropriate circumstances, this burden can be borne without excessive difficulty.

\textbf{D. \textit{Limitations on Remedies}}

Nothing would seem more fundamental to \textit{Gilmer}'s thesis that mandatory arbitration merely constitutes a change of forums and not a loss of substantive statutory rights than the principle that the arbitrator must be able to provide the same remedies as a court.\footnote{See \textit{Gilmer}, 500 U.S. at 26.} Most courts agree, but they have handled the problem in different ways. The Third and Ninth Circuits have held that limitations on remedy, at least in conjunction with other unconscionable provisions, render the arbitration agreement unenforceable, and thus the claim must be litigated.\footnote{Alexander v. Anthony Int'l, L.P., 341 F.3d 256 (3d Cir. 2003); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003). California regards limitations on remedies as "invalid on their face." Gentry v. Superior Court, 165 P.3d 556, 570 (Cal. 2007) (citing Armendariz v. Found. Health Psychcare Serv, 6 P.3d 669, 683 (Cal. 2000)).} Perhaps the most common approach, taken by the District of Columbia, Third, Fifth, and Sixth Circuits, is to invalidate the limiting clause, sever it, and enforce arbitration, presumably with the arbitrator empowered to award the relief authorized by statute.\footnote{Booker v. Robert Half Int'l, Inc., 413 F.3d 77 (D.C. Cir. 2005); Spinetti v. Serv. Corp. Int'l, 324 F.3d 212 (3d Cir. 2003); Hadnot v. Bay, Ltd., 344 F.3d 474 (5th Cir. 2003); Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003). See also \textit{In re Poly-America}, L.P., 262 S.W.3d 337, 360 (Tex. 2008).} The Eighth and Eleventh Circuits have left the validity of the limitations on remedy to the arbitrator in the first instance.\footnote{Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 681 n.6 (8th Cir. 2001); Summers v. Dillards, Inc., 351 F.3d 1100 (11th Cir. 2003).}

The Seventh Circuit apparently takes another view. In a consumer case, Judge Frank Easterbrook spoke for the court in suggesting that a party could agree to waive even a right as significant as the full statutory remedy so long as there was no anti-waiver provision in the statute.\footnote{Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l, 294 F.3d 924, 928–29 (7th Cir. 2002).}
Dictum in an earlier employment case in the Seventh Circuit would seem to support that position. Judge Easterbrook's reasoning makes sense where one party in an equal bargaining relationship decides to forgo certain statutory entitlements to obtain a more preferred substitute. But when a compelled arbitration clause is coupled with a compelled surrender of substantive statutory rights and remedies, the rationale for upholding mandatory arbitration clauses dissolves. This is the quintessential situation for imposing a bright-line rule.

E. Arbitrators' Fees and Costs

A plaintiff in a civil court action has to pay only a nominal filing fee. Parties in commercial and union-management arbitrations customarily share the costs of the arbitrator. That could be prohibitively expensive for individual grievants in employment arbitrations. For that reason, the D.C. Circuit ruled in a leading case that the validity of a mandatory arbitration agreement is conditioned on the employer's paying all arbitral fees and expenses. In fact, many if not most employment arbitration plans follow that practice. But numerous arbitration agreements require the employee to pay at least part of the arbitrator's costs, and courts have had to pass on the enforceability of those provisions, or even, if severance is not allowed, on the enforceability of the arbitration agreement as a whole.

In a nonemployment case decided under the FAA, the Supreme Court held that plaintiffs bear the burden of proving that arbitration fees and costs are so high as to jeopardize their capacity to enforce statutory rights. In following that approach, lower courts have paid heed to such specific facts as the dollar costs of a particular arbitration and the financial condition of the employee involved. For example, the Sixth and Ninth Circuits have been rather generous to employees,

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100. Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) ("[P]arties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.").
103. Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003) (holding cost-splitting provision unenforceable since it would deter substantial number of potential claimants under federal statute but clause severable and arbitration enforceable); Cooper v. MRM Inv. Co., 367 F.3d 493 (6th Cir. 2004) (stating same principle on cost-splitting but clause not severable and case remanded to determine validity of cost-splitting on facts and enforceability of arbitration).
while the Fourth\textsuperscript{105} and Fifth\textsuperscript{106} Circuits have been less so. Other issues considered in these cases included whether employees' capacity to pay should be determined on an individual basis or on the basis of similarly situated persons, and whether an invalid arbitration clause is severable, leaving the remainder of the arbitration agreement enforceable, or whether an invalid clause renders the whole arbitration agreement unenforceable. In contrast to the judicial treatment of other common provisions in arbitration agreements which were discussed earlier, courts seem more willing to assess the legitimacy of cost-allocation clauses themselves, rather than refer the question to the arbitrator. Since a party starting a court suit would ordinarily have to pay some filing fee, imposing an arbitration fee in no greater amount appears a justified cost-sharing arrangement. It might also help to deter frivolous grievances.

In a 2002 study by Professors Michael LeRoy and Peter Feuille of the University of Illinois, employment arbitrators' average daily fees of $2,000 were reported to be almost three times as high as labor arbitrators' average of $700.\textsuperscript{107} One of the authors' key findings was that fifty percent of the federal appellate court decisions they examined declined to order arbitration when employees objected that cost allocations made arbitration too inaccessible.\textsuperscript{108} LeRoy and Feuille concluded that courts were especially sensitive to cost barriers to arbitration for lower-paid employees and speculated: "[W]ill expensive arbitration service providers price themselves out of a large segment of the ADR market?"\textsuperscript{109}

**F. Expanded Judicial Review; "Manifest Disregard of the Law"**

In \textit{Hall Street Associates, L.L.C. v. Mattel, Inc.},\textsuperscript{110} the Supreme Court purported to resolve a split among the circuits and held that, in an ex-
pedited review of an arbitral award under the FAA, the grounds for vacatur or modification set out in the statute are "exclusive" and may not be expanded by an agreement of the parties. Thus, such extreme misconduct as "fraud," "corruption," "evident partiality," "exceeded...powers," or denial of due process would be the only basis under the FAA for denying enforcement of an award. But the Court went on to say that it was only deciding the limits of judicial review under the FAA and was not addressing the arguable scope of review under state statutory or common law.111 Specifically, the status of an arbitrator's "manifest disregard of the law" as grounds for vacatur was left up in the air.112

Hall Street involved a landlord-tenant dispute but its holding is applicable to employment arbitration under the FAA and could, at least by analogy, be applicable to labor arbitration as well.113 Justice Souter's cautious if not ambiguous language in the majority opinion left the courts of appeals uncertain about the sweep of the decision; meanwhile, in the recent Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.,114 the Supreme Court stated: "We do not decide whether 'manifest disregard' survives our decision in Hall Street...as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth [in the FAA]."115 The uncertainty is apparent in the circuits. The Fifth Circuit seems to conclude that "manifest disregard" is no longer an independent, nonstatutory ground for vacating awards.116 The Ninth Circuit apparently reaches the same result, but by treating "manifest disregard" as simply shorthand for the FAA's statutory grounds.117 The Second Circuit may be divided. One panel appears to embrace the Ninth Circuit's portmanteau approach to "manifest disregard," but a later panel would retain it as the one nonstatutory or common law ground for vacatur.118

One scholar argues strongly that Hall Street should be read as invalidating only private efforts to expand judicial review but not ap-
propriate expansion by the courts to ensure the "integrity" of their enforcement of arbitral awards. I join those who are wary about enfeebling arbitration's many advantages by enlarging judicial review. Nonetheless, I am satisfied that the courts will find a way, using one theory or another, to prevent certain extreme results, such as an arbitrator's mangling an individual employee's claims under civil rights legislation.

G. Arbitration Fairness Act

As mentioned earlier, the proposed Arbitration Fairness Act (AFA) now before Congress would take an axe to the problem of mandatory arbitration by prohibiting all pre-dispute employment arbitration agreements. Post-dispute arbitration agreements are inherently fairer to workers than pre-dispute agreements, especially if the latter are a condition for a job. Pre-dispute agreements are usually executed by employees at the time of hiring, when they are prone to sign any document placed before them. The post-dispute agreement is more likely to be truly voluntary, since it is entered into after a particular issue has arisen, the relevant facts are mostly known, and the employee can make an informed decision about whether to arbitrate or go to court. A discharged employee has little or nothing to lose by rejecting an employer's offer of arbitration.

Yet the AFA's solution to the problem seems short-sighted and too heavy-handed. Management representatives reported to the Dunlop Commission that employers would generally not be willing to enter into post-dispute arbitration agreements. A spokesperson for the American Arbitration Association testified before Congress that "based on many years of experience... very few parties will agree to

315 F. App'x 327, 330 (2d Cir. 2009) (recognizing "manifest disregard" as sole nonstatutory grounds for vacatur).


121. Courts have been less deferential in dealing with arbitral awards applying civil rights statutes, like Title VII and § 1981. See, e.g., Hance v. Norfolk S. Ry. Co., 571 F.3d 511, 519 (6th Cir. 2009) ("[A] federal court should not consider an arbitrator's decision binding in a discrimination suit, because to do so would 'unnecessarily limit[] the plaintiff's opportunity to vindicate his statutory and constitutional rights.'") (quoting Becton v. Detroit Terminal of Consol. Freightways, 687 F.2d 140, 142 (6th Cir. 1982)).

122. See supra notes 3 and 4 and accompanying text. The AFA would also apply to disputes involving civil rights, consumers, and franchisees. H.R. 1020, 111th Cong. § 2 (2009); S. 931, 111th Cong. § 2 (2009).

arbitration post-dispute."124 Employers will wait out most smaller claims, assuming employees will not be able to pursue them in court. Conversely, employees and their lawyers are unlikely to agree to arbitrate the big case rather than get it before a judge and jury. Viewed realistically, pre-dispute agreements to arbitrate, when neither party knows what the future holds, may be the most viable option for both sides.125 The empirical studies discussed earlier support that conclusion.

The National Academy of Arbitrators is composed of about 630 of the leading labor arbitrators in the United States and Canada. To preserve neutrality, the Academy's long-standing policy is not to take "any official position on the question of whether there should or should not be statutory regulation of voluntary labor dispute arbitration," but still "indicate its judgment of the desirable content of regulatory statutes."126 Thus, at its most recent national meeting in October 2009, the Academy's Board of Governors declined to express any opinion on whether the AFA should or should not prohibit pre-dispute arbitration agreements or other mandatory arbitration arrangements. Nonetheless, the Board recommended that at least any legally permissible form of mandatory arbitration should include a comprehensive set of due process protections for covered employees. The Academy would expressly exclude from these statutory mandates arbitration provisions contained in collective bargaining agreements and arbitration agreements that are individually and freely negotiated, such as those with a top business executive or network TV anchor.127

III. ADR in Union-Management Labor Relations

Over the last quarter century, developments in ADR in traditional union-management relations have been less dramatic than in individual employment relations. Still, refinements in ADR in labor law have been significant.


125. For an elaboration of this position, see *Estreicher,* supra note 33, at 563–64 (2001).


127. The author chaired the committee reporting on this subject to the Academy's Board of Governors. For a range of other views, see *Arbitration–Congress Considers Bill to Invalidate Pre-Dispute Arbitration Clauses for Consumers, Employees, and Franchisees Arbitration Fairness Act of 2007,* S. 1782, 111th Cong. (2007), 121 Harv. L. Rev. 2262 (2008).
A. Reaffirmation of the Steelworkers Trilogy

In the hotly contested field of labor law, with clashes often reflected in closely divided Supreme Court decisions, arbitration was the sector in which the Court achieved the greatest unanimity. Arbitration also was the area in which unions and employees fared the best. Yet employers could find this a blessing in disguise, saving them the time and expense of extended court litigation. In *AT&T Technologies, Inc. v. Communications Workers*, the Court reaffirmed and refined four principles set forth in the famed 1960 *Steelworkers Trilogy* concerning the judicial enforcement of an executory agreement to arbitrate:

- Arbitration is a matter of contract and a party need not arbitrate unless it has so agreed.
- The court, not the arbitrator, is to decide whether a party has agreed to arbitrate, unless the parties clearly provide otherwise.
- The arbitrator, not the court, is to decide the claim under the collective bargaining agreement, even if the claim appears frivolous to the court.
- If the contract contains an arbitration clause, there is a presumption of arbitrability. Arbitration should not be denied unless the clause cannot be interpreted as covering the dispute. Doubts are resolved in favor of coverage.

Some parties, most often employers, resist these standards in seemingly extreme situations. That is understandable, especially from a partisan perspective, but both logic and policy are on the side of the Court. A typical arbitration clause covers “all disputes arising under the contract,” with rare exclusions, and is not limited to “meritorious” or “nonfrivolous” claims. And, as a practical matter, even the arbitration of frivolous claims may serve a therapeutic function, clearing the air and letting the parties get on with their business.

B. “Public Policy” Challenges

One of the most controversial issues of recent years has been the authority of a court to set aside an arbitration award on the grounds it violates “public policy.” In *United Paperworkers International Union v.*

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129. *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960). The first two cases dealt with the enforcement of an agreement to arbitrate; *Enterprise* dealt with the enforcement of an arbitral award once issued. Generally, *Enterprise* held that a court should not review the merits of an award and should confine itself to such questions as whether there was any fraud or corruption, denial of due process, or exceeding of the arbitrator's commission.
Misco, Inc., the Fifth Circuit had refused to enforce an arbitrator's reinstatement of an employee whose job was operating a dangerous paper-cutting machine and whose car had been found to contain marijuana while in the company parking lot. The Supreme Court reversed, declaring that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." The Court naturally recognized the general common-law doctrine that a contract will not be enforced if it violates the law or public policy. But it cautioned that there must be "some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'

Some lower courts still didn't seem to "get it." The Supreme Court had to reinforce the lesson in Eastern Associated Coal Corp. v. United Mine Workers District 17. This time an arbitrator had ordered the reinstatement of a truck driver who had twice tested positive for marijuana. The arbitrator substituted a three-month suspension for the discharge, however, and the employee had to undergo drug treatment and testing and accept "last chance" terms with the reinstatement. The employer argued that the award was contrary to public policy, but the Court disagreed. It first emphasized that the award should be treated as the equivalent of an agreement by the parties on the meaning of "just cause." It then applied Misco, pointing out that the relevant federal statute and Department of Transportation regulations contained both antidrug and rehabilitation provisions for safety-sensitive positions but nothing that would specifically prohibit the grievant's reemployment. Justices Scalia and Thomas, concurring, would have been even more deferential. They would enforce an agreement or award unless it violated some positive law, not just a "public policy.'

With a unanimous Supreme Court sustaining the award in Eastern Associated Coal, and with two of the most conservative Justices its most ardent champions, the final stake ought to have been driven through the heart of nebulous public policy challenges to arbitration. But the objectors have shown remarkable resilience over the years, and there is still available the claim that an award violates enacted law or clear public policy, or does not "draw its essence" from the col-

131. Id. at 38.
133. 531 U.S. 57 (2000).
134. Id. at 68.
lective bargaining agreement, or that the arbitrator has attempted to “dispense his own brand of industrial justice.”

C. Legal Grounds for Vacatur; “Manifest Disregard of the Law”

In addition to efforts to overturn arbitral awards on broad public policy grounds, challenges are frequently mounted on the theory that enforcing the award would violate the law or that the arbitrator acted in “manifest disregard of the law.” The latest developments concerning the general principles in the latter area have been treated in Part II-F-2-f, supra. “Manifest disregard” does not refer to an arbitrator’s simple mistake of law; it is akin to an outrageous or defiant refusal to accept a known legal dictate.

The Ninth Circuit vacated an arbitral award that conflicted with an applicable National Labor Relations Board (NLRB) decision. The Sixth Circuit, however, upheld an award interpreting a union-company neutrality agreement to restrict the employer’s antiunion speech during an organizing campaign, despite the company’s reliance on the guarantee of free speech in section 8(c) of the National Labor Relations Act. A number of courts have sustained awards against claims the arbitrator had violated public policy on safety or ruled in manifest disregard of public safety.

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137. Cal. Pac. Med. Ctr. v. SEIU, 300 F. App’x 471 (9th Cir. 2008) (arbitrator’s decision based in part on finding that the parties had stipulated to a bargaining unit, even though the NLRB previously found that the parties had not stipulated to a bargaining unit).
139. See, e.g., Columbia Gas of Ohio v. Util. Workers Union, 329 F. App’x 1 (6th Cir. 2009) (award reinstated service technician in a pipeline project who circumvented inspection of his repair work); Clear Channel Outdoor, Inc. v. Int’l Unions of Painters & Allied Trades, Local 770, 558 F.3d 670 (7th Cir. 2009) (award reduced discharge to suspension for worker who violated an Occupational Safety & Health Administration regulation by failing to wear body harness while working on billboard); Virginia Mason Hosp. v. Wash. State Nurses Ass’n, 511 F.3d 908 (9th Cir. 2007) (award prohibited hospital from unilaterally implementing mandatory flu immunization for nurses); Local 97, IBEW v. Niagara Mohawk Power Corp., 196 F.3d 117 (2d Cir. 1999) (award reinstated nuclear
Several decisions have dealt with arbitration awards that potentially conflict with the public policy against racial or sexual harassment in the workplace. At least prior to *Eastern Associated Coal*, the courts of appeals were divided on enforcing the reinstatement of employees guilty of harassment of co-workers, even if the award substituted a substantial suspension or loss of back pay for the discharge. More recently, courts have emphasized that a reinstatement award for harassers does not necessarily offend public policy, since the policy does not require every harasser to be fired. Reinstatements with lesser penalties than discharge were thus upheld.

D. Contractual Grounds for Vacatur

The Sixth Circuit has conveniently set forth a summary of the circumstances in which it will vacate an arbitral award for a conflict with the terms of the collective bargaining agreement:

1. an award conflicts with express terms of the collective bargaining agreement;
2. an award imposes additional requirements that are not expressly provided in the agreement;
3. an award is without rational support or cannot be rationally derived from the terms of the agreement; and
4. an award is based on general considerations of fairness and equity instead of the precise terms of the agreement.

The D.C. Circuit appears to look at the matter in quite a different way, however, stating: “An arbitration award, as a conceptual matter, is to be ‘treated as though it were a written stipulation by the parties setting forth their own definitive construction of the contract.’”

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power plant employee who responded late to fire alarm and later lied about it). *See also* Extendicare Health Serv. v. Dist. 1199P, SEIU, No. 06-4768, 2007 WL 3121341 (3d Cir. Oct. 26, 2007) (award reinstated employee at personal care home despite state statute prohibiting the hiring or retaining of a person with theft-related offenses).

140. Compare Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436 (3d Cir. 1992) (vacating award), and Newsday, Inc. v. Long Island Typographical Union, No. 915, 915 F.2d 840 (2d Cir. 1990) (same), with Chrysler Motors Corp. v. Int'l Union, Allied Indus. Workers, 959 F.2d 685 (7th Cir. 1992) (enforcing award).

141. *See, e.g.*, Way Bakery v. Truck Drivers Local 164, 363 F.3d 590 (6th Cir. 2004); Weber Aircraft Inc. v. Gen. Warehousemen & Helpers Union Local 767, 253 F.3d 821 (5th Cir. 2001); Westvaco Corp. v. United Paperworkers Int'l Union Local 767, 171 F.3d 971 (4th Cir. 1999).


approach takes the parties at their word. Nearly all labor contracts provide that the arbitrator’s award shall be “final and binding.” Absent fraud or other misconduct (or maybe temporary insanity) on the arbitrator’s part, that should be the end of the inquiry. Under this view, an arbitrator’s “erroneous” interpretation of a collective agreement is a contradiction in terms. For enforcement purposes, the award is the contract.

Since Misco and Eastern Associated Coal, courts have generally gone a long way in deferring to arbitrators’ reading of a labor agreement. Thus, courts have held arbitrators could infer a “just cause” requirement for discipline from a seniority clause and from industrial “common law” and could apply progressive discipline principles under a provision that simply allowed discharge for “proper cause.” An arbitrator was entitled to find that strikers were “actively employed” for bonus purposes. But an arbitrator may also properly construe terms like “work stoppage” against employee interests. A court sustained an award that a company could discharge a driver who failed to deliver thirty-seven packages over the span of two days. Arbitrators may be supported when they depart from the literal language of an agreement; they also can be supported when they stick to it doggedly. One arbitrator was upheld when he read the contract as requiring an employer to have reasonable cause to believe an employee was under the influence of drugs at the very moment he was asked to take a test.

Despite all this, courts are not totally immune from the itch to do good and to fix the perceived deficiencies of other decision-makers. One court used a “zipper clause” as a basis for vacating an arbitral award that relied on past practice in ordering a company to pay driversalespeople at a commission rate higher than that in a newly negotiated contract. Most often courts find support for vacatur in the Supreme Court’s broad language that an award is valid only if it “draws its essence from the collective bargaining agreement” and that an arbitrator “does not sit to dispense his own brand of industrial justice.” Yet sometimes arbitrators and courts have simply emphasized different

144. SFIC Prop., Inc. v. Int’l Ass’n of Machinists, Local Lodge 311, 103 F.3d 923 (9th Cir. 1996).
147. Ramos-Santiago v. United Parcel Serv., 524 F.3d 120 (1st Cir. 2008).
148. Int’l Truck & Engine Corp. v. United Steelworkers, Local 9740, 294 F.3d 860 (7th Cir. 2002).
149. Anheuser-Busch, Inc. v. Beer Drivers Local 744, 280 F.3d 1133 (7th Cir. 2002).
parts of the contract or have looked at the facts differently. On the other hand, an arbitrator who avowedly “interpolates” contract terms into an agreement containing the usual provision forbidding additions, subtractions, or other changes in the parties’ contract is almost asking for vacatur and will likely get it. Similarly, arbitrators themselves can open the door to vacatur through indiscreet language that enables courts to exercise oversight power in the “very limited circumstances” where arbitrators have “exceeded their authority.”

E. “External Law” in Arbitration

One of the titanic debates among labor arbitrators, which began in the 1960s and continued well into the 1990s, may have turned out to be a tempest in a teapot. Major adversaries were Professor Bernard Meltzer of the University of Chicago and Robert Howlett, a leading practitioner and public official. Meltzer believed that arbitrators faced with a conflict between the contract they were construing and positive law should respect the contract and ignore the law. He emphasized that a collective agreement was the source of the arbitrators’ authority and they had no basis for going beyond it. Howlett believed arbitrators should give primacy to the law because agreements implicitly incorporate all applicable law and the parties want a “final and binding” resolution of their dispute. The Supreme Court seemed to side with Meltzer. In the Steelworkers Trilogy it stated that an arbitrator who based his award on his “view of the requirements of enacted legislation” would have “exceeded the scope of the submission.” Moreover, as a practical matter, it is not always that easy to discern what “the law” is. Nevertheless, instances where there is an irreconcilable conflict between the provisions of a labor contract and the dictates of the law

151. See, e.g., Int’l Paper Co. v. United Paperworkers Int’l Union, 215 F.3d 815 (8th Cir. 2000) (vacating award prohibiting subcontracting, one judge dissenting); U.S. Postal Serv. v. Am. Postal Workers Union, 204 F.3d 523 (4th Cir. 2000) (vacating award regarding separation of probationary employee, one judge dissenting).
152. IBEW, Local 175 v. Thomas & Betts Corp., 182 F.3d 469, 471–72 (6th Cir. 1999) (vacating award reinstating employee who failed to notify company within contractually required three days of medical reason for absence).
153. See, e.g., 187 Concourse Assoc. v. Fishman, 399 F.3d 524 (2d Cir. 2005) (arbitrator found employer “had no option but to terminate” employee in altercation with supervisor but still reinstated employee); Salem Hosp. v. Mass. Nurses Ass’n, 449 F.3d 234 (1st Cir. 2006) (arbitrator declared clause on assigning nurses was “not subject to interpretation” because it had only one possible meaning; court found another meaning reasonable).
156. See, e.g., Int’l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), which overturned the holdings of six courts of appeals in over thirty cases and the dicta of two others in significant rulings concerning the legitimacy of seniority systems under Title VII of the 1964 Civil Rights Act.
are probably quite rare. Parties can usually be presumed to want the arbitrator to interpret their contract so as to comply with the law and keep the award from being vacated. By the end of the twentieth century, arbitrators were in the regular business of interpreting civil rights statutes. That was often because collective agreements had expressly incorporated the statutes by reference, or had borrowed statutory language in a way that invited such treatment. In any event, the end result was that one scholar asked, not unfairly, whether it was time to declare Howlett the winner of the great debate.\footnote{157. Martin H. Malin, Revisiting the Meltzer-Howlett Debate on External Law in Labor Arbitration: Is It Time for Courts to Declare Howlett the Winner? 24 LAB. LAW. 1 (2008). In a 2004 survey of National Academy members, about a 2–1 majority said they would follow the contract rather than the law in the event of an irreconcilable conflict. But almost sixty percent also stated they would not order a party to violate external law. That was the position of a third debater, Richard Mittenthal. See Theodore J. St. Antoine, External Law in Arbitration: Hard-Boiled, Soft-Boiled, and Sunny-Side Up, 57 NAT'L ACADEMY OF ADR. 185, 189–90 (Charles J. Coleman ed., 2005).}

\section*{F. Arbitrators’ Rulings on Civil Rights}

As discussed earlier, the Supreme Court decided in the leading \textit{Gilmer} case that an employer and an individual nonunion employee could agree that all employment disputes, including statutory civil rights claims, would be resolved through arbitration, not court actions.\footnote{158. See supra notes 1 and 20 and accompanying text.} Previously, the Court had seemed to take a different approach in collective bargaining situations, holding in \textit{Alexander v. Gardner-Denver Co.} that an adverse arbitration award did not preclude a black grievant from bringing a court suit on his racial discrimination claim.\footnote{159. 415 U.S. 36, 59 (1974).} The \textit{Gilmer} Court reasoned that there, unlike \textit{Gardner-Denver}, the parties’ contract authorized the arbitrator to apply the relevant statute. Recently, in \textit{14 Penn Plaza LLC v. Pyett},\footnote{160. 129 S. Ct. 1456 (2009). See also Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 82 (1998). Presumably employees can still file charges with EEOC. See supra note 22.} the Court effectively reversed direction from \textit{Gardner-Denver} and held that a union, by “clear and unmistakable” language, could waive unionized employees’ rights to bring statutory discrimination claims and require them to arbitrate instead. Justices Stevens, Souter, Ginsburg, and Breyer dissented.

\textit{Pyett} created a storm of legal controversy, but in practice it may turn out to be a dud. Language like that in the \textit{14 Penn Plaza} contract is extremely rare. Leading union lawyers insist that few if any other labor organizations will adopt it. Management’s position is uncertain. On the merits, however, if an isolated and vulnerable individual, like the employee in \textit{Gilmer}, can waive statutory procedural rights, it is hard to see why a union, on a much more equivalent bargaining level with management, cannot do the same. My one qualification is that...
the union should only be able to waive the employees’ right to sue the employer—not the union itself. The latter would appear a clear conflict of interest. In acting on behalf of employees, a union of course is subject to the duty of fair representation.161 It must treat all the employees it represents fairly and without discrimination. Anyone with any experience knows that most unions take this duty very seriously, if only for fear of the consequences of being hauled before unfriendly judges and juries. Thus, for all the misgivings about Pyett, it may prove in the end to be of little moment. Even if that is not so, it is unlikely to become the damaging blow to unionized workers that some have predicted.

G. Extent of Arbitration Practice

Despite the nosedive in union density since the 1950s, from approximately thirty-five percent to twelve percent, or around one-third of what it had been,162 the decline in the number of annual labor arbitration awards has followed a different pattern. Of course the workforce has been growing steadily, so that the absolute number of unionized workers has only fallen from 16.8 million in the mid-1950s to 15.3 million today, and actually peaked at more than 22 million (by one count) in the late 1970s.163 That historical trend correlates better, though by no means exactly, with the rise and fall of the arbitration caseload of the American Arbitration Association and the Federal Mediation and Conciliation Service (FMCS):164

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<th>Year</th>
<th>AAA</th>
<th>FMCS</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>3,837</td>
<td>2,840</td>
<td>6,677</td>
</tr>
<tr>
<td>1975</td>
<td>3,784</td>
<td>4,484</td>
<td>8,268</td>
</tr>
<tr>
<td>1980</td>
<td>7,382</td>
<td>7,539</td>
<td>14,921</td>
</tr>
<tr>
<td>1985</td>
<td>6,563</td>
<td>4,406</td>
<td>10,969</td>
</tr>
<tr>
<td>1994</td>
<td>5,112</td>
<td>4,949</td>
<td>10,061</td>
</tr>
<tr>
<td>2003</td>
<td>3,769</td>
<td>2,746</td>
<td>6,515</td>
</tr>
<tr>
<td>2008</td>
<td>2,936</td>
<td>2,066</td>
<td>5,002</td>
</tr>
</tbody>
</table>

162. See supra note 31.
Professors Dennis Nolan and Roger Abrams have calculated that the AAA and FMCS account for a little more than a fifth of the arbitration total.\(^{165}\) If that is so, there were no more than 25,000 labor arbitration awards in 2008. If it is also true that as many as 4,000–5,000 persons in this country style themselves “arbitrators,” the pickings are slim for the vast majority.\(^{166}\) In a 1987 survey, ten percent of the arbitrators decided almost fifty percent of the cases, while the twenty-five percent with the fewest appointments decided only two percent.\(^{167}\)

**H. Interest Arbitration and EFCA**

The familiar form of grievance, or “rights,” arbitration consists of a third-party neutral interpreting and applying the terms of an existing contract between the parties. By contrast, in “interest” arbitration, the neutral (or a neutral chair with co-panelists from each of the parties) sets some or all of the terms of a future contract.

1. **Background**\(^{168}\)

Once the nearly universal view among union and management representatives and labor relations experts was that interest arbitration, especially government-imposed compulsory arbitration, was antithetical to free collective bargaining. That view was already eroding in the public sector more than twenty-five years ago. By 1975, about twenty states, including Michigan, New York, Ohio, Pennsylvania, and Wisconsin, had adopted mandatory interest arbitration in bargaining impasses for some groups of public employees. Police and firefighters are the most common, but school teachers, transit workers, and others are sometimes covered. The Federal Service Impasse Panel handles interest arbitration for federal employees.\(^{169}\)

Initially, interest arbitrators were authorized to prescribe what provisions they considered appropriate within the ranges of the parties'
offers and demands. Later, influenced by the success of Major League Baseball's last-best-offer arbitration in getting players and clubs to settle their disputes, a number of states opted for final-offer arbitration. Arbitrators had to choose one party's proposal or the other's. There were several variations. Instead of requiring arbitrators to select one party's whole package, they might be allowed to pick issue-by-issue. Or the final-offer approach would be limited to "economic" issues and arbitrators could tinker with the noneconomic items.

Most statutes establishing interest arbitration provide certain criteria to govern decision-making. These customarily include the employer's ability to pay, cost-of-living changes, and comparable contracts in comparable communities or among comparable groups of employees. In my experience, except in extreme cases, ability to pay and cost of living tend to cancel each other out, leaving comparability as the predominant factor.

During the last quarter century, an important development in interest arbitration occurred in the private sector. Major steel companies and the Steelworkers negotiated agreements in 1993 for interest arbitration if they reached impasses during contract reopeners. Interest arbitrations took place in 1996 for Bethlehem Steel, Inland Steel, and National Steel against the background of a considerably depressed industry. The companies substantially won all three cases.

2. EFCA's First-Contract Arbitration

If enacted, the proposed Employee Free Choice Act (EFCA) will have the most significant impact in history on the use of interest arbitration in the private sector. Section 3 would amend the National Labor Relations Act by adding a new section 8(h), which would provide for interest arbitration in first-contract negotiations if the parties could not reach agreement within 120 days, including a thirty-day mediation period. The Federal Mediation and Conciliation Service (FMCS) would be responsible for the implementing regulations. The resulting contract would be binding for two years unless the parties agreed to earlier changes. The starting point for proponents is that only about thirty-nine percent of the unions winning NLRB representation elections are able to get a collective contract within one year.

170. See supra notes 2–3. A more publicized and even more controversial part of the bill, which would have enabled unions to obtain certification through card checks rather than secret-ballot elections, was apparently doomed because of the opposition of moderate Democrats. See Steven Greenhouse, Democrats Drop Key Part of Bill to Assist Unions, N.Y. Times, July 17, 2009, at A1.

Ronald Hoh, an arbitrator and mediator with extensive service in state public employment relations boards, has drawn on Canadian and American experience in dealing with various objections to EFCA’s provisions on interest arbitration. Major opposing arguments are (1) interest arbitration is a disincentive to voluntary agreement; (2) it would result in higher wages and benefits; (3) EFCA establishes no criteria for interest arbitration awards; (4) EFCA sets no minimum qualifications for interest arbitrators and provides no procedures for their selection; and (5) EFCA does not address strikes and lockouts.

Hoh answers that (1) with sufficient mediation efforts, states currently having interest arbitration find resort to it ranges between only two percent and ten percent of disputes; (2) interest arbitrators try to set the contract terms the parties themselves would have reached and do not break new ground; (3) either Congress or the FMCS could easily add standards for contract terms; (4) the FMCS should create a more limited roster of interest arbitrators with specified qualifications; and (5) the statute or implementing regulations should prohibit strikes and lockouts from the time of a union’s certification until the issuance of an interest arbitration award.

Nearly all of Hoh’s comments and recommendations have merit, subject to possible qualifications. The total package of EFCA’s arbitration provisions, along with Hoh’s modifications, may cut too much against the American grain. Free, voluntary collective bargaining, with all its accoutrements, is a proven institution. If it turns out that the wholesale imposition of interest arbitration produces the same sort of political backlash as was triggered by the card check proposal, I could imagine some refining of the coverage. The start might be confining mandatory interest arbitration to those industries where strikes are unfeasible, either because they are too disruptive of our complex, interrelated economy or because they are too ineffective for employees. Nationwide transportation and communications generally are prime examples. Next, Hoh is probably correct that interest arbitration statutes work best when strikes and lockouts are forbidden. But before the arbitration procedure is actually invoked, I question whether parties in the private sector should be prevented from using their customary eco-

onomic weapons, including strikes and lockouts. Finally, constitutional questions can be raised about EFCA, but I believe those have been answered convincingly.\footnote{See Fisk, supra note 172, at 82–93. Cf. David Broderdorf, Overcoming the First Contract Hurdle: Finding a Role for Mandatory Interest Arbitration in the Private Sector, 23 Lab. Law. 323, 335–37 (2008).}

IV. Mediation

It is almost shameful to treat a subject as large and important as labor and employment mediation in hardly more than a footnote. Indeed, a leading text on ADR devotes close to a third of its pages to mediation.\footnote{How ADR Works, supra note 1, at 113–457.} And mediation—the use of a neutral third party to assist disputants in reaching a voluntary resolution of their differences—has become increasingly of great practical significance in the settling of labor and employment disputes.\footnote{Mediation of labor and employment disputes has grown increasingly popular over the last quarter century, and now constitutes one of the largest growing segments of mediation practice. Kimberly E. Kovach, Mediation in a Nutshell 279–81 (2003); Vivian Berger, Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment, 5 U. Pa. J. Lab. & Emp. L. 487, 507–13 (2003). A short history of mediation from ancient times through the twentieth century, in labor and other contexts, is found in Kovach, supra at 16–34. For a discussion of court-ordered mediation and legislatively mandated mediation, see id. at 96–107. See generally James J. Alfini et al., Mediation Theory and Practice (2d ed. 2006); Charles B. Craver, Effective Legal Negotiation and Settlement (5th ed. 2005); Gary Friedman & Jack Himmelstein, Challenging Conflict: Mediation Through Understanding (2008). See also Uniform Law Commissioners, A Few Facts About the Uniform Mediation Act (2001) (2003), www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp (last visited May 9, 2010) (UMA is primarily concerned with privilege, confidentiality, and mediators’ reports; it has been enacted in eleven states).} Nonetheless, in terms of legal regulation, the action over the past quarter century has been in arbitration, not in mediation.

All that could change drastically if either or both the proposed AFA and EFCA are enacted. The AFA’s prohibition of mandatory arbitration would presumably not affect an employer’s imposition of mandatory mediation, at least as a prerequisite to a court suit as distinguished from the filing of charges with an administrative agency like the EEOC. One highly knowledgeable expert, experienced in labor relations as practitioner, academic, arbitrator, and federal judge, has commented that mediation, even mandatory mediation, presents almost none of the problems associated with mandatory arbitration.\footnote{Edwards, supra note 29, at 309–10. See also Sherwyn, supra note 26, at 1581–91 (urging further study of the performance of in-house ADR systems as compared with arbitration or court trial).} In mediation, of course, the neutral can at most recommend solutions, not order them. The disputing parties remain in control of the ultimate disposition.
If EFCA's interest arbitration provision is adopted, there will be another key new function for mediation. Before the compulsory arbitration process commences, there will be at least thirty days of required mediation under the auspices of the FMCS. At this point, one can only speculate what this might mean in quantitative terms. Qualitatively, it would have to mean a significant, systematic, and perhaps unprecedented peacetime role for the federal government in the collective bargaining process in the American private sector.

V. Conclusion

For some of us, the debate over employer-imposed mandatory employment arbitration turns on practical results, not abstract principles. In theory, it is wrong to require employees to surrender legislatively-created procedures for enforcing substantive statutory rights as the price for getting or keeping a job. But in actual operation, mandatory arbitration may be the best solution for both employers and employees. It enables employees, especially the majority who are lower-paid workers, the most realistic access to a forum to pursue their rights. And there is no showing that employees fare less well on the average in arbitration than in court. At the same time employers save sizable litigation costs and the risk of the occasional devastating jury award. At least in actions for vacatur under the FAA, the parties cannot expand the scope of judicial review beyond the statutory criteria.

In traditional labor arbitration between unions and employers, the major development of the last quarter century has been a continuing narrowing by the U.S. Supreme Court of the grounds for judicial review of arbitral awards. "Public policy" as a basis for vacating an award must be "well defined" and not some judge's sweeping notion of the public good. In non-union employment arbitration, "manifest disregard of the law" may now be no more than shorthand for the statutory grounds in the FAA. The likelihood, however, is that courts will not abdicate responsibility for setting aside awards in accordance with judicially created standards to avoid a serious miscarriage of justice, such as an arbitrator's erroneous denial of an individual's statutory civil rights claim.

Mediation has not been the subject of extensive legal developments in the last quarter century. But this more modest, less controversial technique for dispute resolution has grown considerably and could become much more prominent in the years ahead.