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Ensuring Enforceability & Fairness in the Arbitration of Employment Disputes

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ENSURING ENFORCEABILITY & FAIRNESS IN THE ARBITRATION OF EMPLOYMENT DISPUTES

TABLE OF CONTENTS

I. Overview

II. Formation of the Agreement ........................................... 10
   A. Assent by current employees
   B. Ability to Opt Out
   C. Binding New Employees
   D. Employer Discretion may undermine agreement
   E. Knowing Agreement

III. Conscionability of the Agreement ............................... 26

IV. Fairness of Arbitration ............................................. 33
   A. Bias of Arbitrators
   B. Bias of the Process
   C. Relief Available
   D. Assessment of Costs

V. Effect of Arbitration on Litigation ................................. 74

VI. Judicial Review of Arbitration Awards .......................... 78
   A. Public Policy Considerations
   B. Disregard of Law

VII. Conclusion & Recommendations ................................. 93

ABSTRACT

Private arbitration of employment law claims has become common in recent years. The Supreme Court has shown a strong preference for requiring that an employee pursue an employment claim through an arbitration program rather than seeking to enforce his or her rights in court. At the same time, legislation has been introduced to try to protect the rights of employees who, without an arbitration program in place, would have the opportunity to assert their statutory rights in court. This article explores what safeguards should be in place to assure that employers can rely on the enforceability of an arbitration program because that program provides employees with a fair process in which to assert their claims. The article reviews numerous court decisions as well as guidelines and requirements developed by several arbitration services to advise what an enforceable arbitration program would look like.
ENSURING ENFORCEABILITY & FAIRNESS IN THE ARBITRATION OF EMPLOYMENT DISPUTES

Stacy A. Hickox

Employers continue to turn to arbitration as a means to resolve issues arising in the employment relationship. At the same time, concerns have been expressed about the fairness of requiring employees to rely on arbitrators to enforce their statutory rights. This concern has resulted in the introduction of bills in the U.S. House and Senate to limit the enforceability of “pre-dispute” arbitration agreements in the employment setting.1 The bills state that no predispute arbitration agreement would be enforceable if it requires arbitration of an employment dispute or a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.

These arbitration bills have support based on concerns about the current use of arbitration to resolve both employment and consumer disputes. The sponsor of the Senate Bill, Russ Feingold, has expressed concern that the use of mandatory arbitration in employment and consumer disputes has been ‘slowly eroding the constitutional rights of Americans.”

The findings underlying the bills support some regulation of arbitration:

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

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

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

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

1 H.R. 3010 and Senate Bill 1782.
A representative of the National Employment Lawyers Association (NELA) characterized the current system of arbitration as “separate and very unequal.”

At the same time, proponents of arbitration have spoken out against the bills. The executive director of the Council for Employment Law Equity (CELE), an attorney who represents management, called mandatory employment arbitration “a useful, fair and productive fixture on our American employment landscape.” He believes that the bills would have “far-reaching and disastrous impacts on American jurisprudence and American society.”

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

A representative of Public Justice testified at the Senate hearing against “palliative” approaches that would allow mandatory arbitration under some restrictions to make it more equitable. He called arbitration “largely a system above and beyond the law.” Yet the AAA suggested at the House hearing on Bill 3010 that Congress should enact “due process safeguards” to apply to mandatory arbitration. The AAA has adopted due process protocols for
the arbitration of employment disputes. These include the right to have counsel present and the right to participate with only reasonable costs, as well barring limitations on remedies. An AAA representative suggested at the hearing that by codifying their standards, fairness in employment arbitration would no longer be voluntary.

I. Overview

Concerns about the fairness of some arbitration programs are supported by the court decisions which have refused to enforce certain mandates to arbitrate rather than litigate statutory claims. Typically these decisions result from an employee’s pursuit of a statutory claim despite the existence of an arbitration agreement with his or her employer. This article explores what safeguards should be required, rather than suggested, based on guidance from the AAA and other organizations or arbitrators and on the decisions of the federal courts which have reviewed arbitration agreements and decisions.

The U.S. Supreme Court has shown significant support for arbitration as an alternative to litigation of employment law disputes. In applying the Federal Arbitration Act (FAA), the Court has held that its purpose is “‘to reverse the longstanding judicial hostility to arbitration agreements … and to place them on the same footing as other contracts.’”

To achieve this purpose, the Court has supported “rigorous enforcement” of agreements to arbitrate to give effect to the contractual rights and expectations of the parties.

The Supreme Court’s generally favorable view toward the use of arbitration has been applied to employment disputes. Employment discrimination claims of all kinds, as well as other


statutory claims, are arbitrable. In ordering the arbitration of a claim arising under the Age Discrimination in Employment Act, the Supreme Court found no reason to treat civil rights statutes any differently than other important statutes that may be enforced under arbitration agreements. The Court stressed that pre-dispute arbitration clauses should be enforced unless the employee shows that Congress specifically intended to preclude arbitration. Since that decision, courts have routinely endorsed the arbitration of discrimination claims.

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

Despite this preference for arbitration, arbitration agreements are not always valid. In assessing whether an arbitration agreement or clause is enforceable, courts “apply ordinary state-

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5 Gilmer, 500 U.S. at 26-35.
7 See Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361, 364-65 (7th Cir. 1999).
9 Colvin, supra note 7, at 590.
law principles that govern the formation of contracts.” A contractual clause is unenforceable if it is both procedurally and substantively unconscionable. Courts must also determine whether the arbitration process affords the employee sufficient opportunity to assert the statutory rights that could otherwise pursue in court, based on the fairness of the process.

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

The FAA does not, however, includes standards to ensure the conscionability and fairness of the arbitration proceedings. Federal courts have considered issues of fairness in addition to issues of unconscionability. After the Gilmer Court gave its general approval of arbitration of employment disputes, the District of Columbia Circuit Court set up guidelines for creating an arbitration agreement that would be fair, and therefore enforceable. According to that court, an

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10 Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 (9th Cir. 2002).
13 Intergen v. Grina, 344 F.3d 134, 142 (1st Cir. 2003).
agreement to arbitrate employment-related statutory claims would be fair if it provides the following:

1) adequate discovery
2) requirement of a written award
3) access to all types of relief that would be available in court
4) no requirement that employees pay unreasonable costs, any arbitrator fees or expenses as a condition of access to the arbitral forum\textsuperscript{15}

Commentators have recognized that “infusing arbitration with due process protections undeniably will influence the public’s perception of the process.”\textsuperscript{16} Drafters of a protocol on arbitration of employment disputes hoped that by "specifying clear and stringent quality standards for arbitration," the protocol would help "overcome[] the high level of skepticism and criticism" associated with some arbitration arrangements.\textsuperscript{17} Adherence to certain standards of fairness might allow employees to see “the benefits [arbitration] provides to the claimant, the most important of which may be that it is an accessible process in which to seek redress for an employer's violation of the anti-discrimination laws.”\textsuperscript{18} This includes providing claimants with what they want most in a dispute resolution process: the opportunity to "tell their side of the story."\textsuperscript{19}


\textsuperscript{16} Margaret M. Harding, The Limits of the Due Process Protocols, 19 Ohio St. J. on Disp. Resol. 369, 397 (2004).

\textsuperscript{17} Id. at 397.

\textsuperscript{18} Id.

\textsuperscript{19} Id.
Some hope that employment arbitration evolves into a “vehicle that provides an efficient, cost-effective method for resolving employees' statutory claims.”\(^{20}\) Under this vision, employers benefit from lower litigation costs and avoid exposure to costly jury awards.\(^{21}\) Employees would also benefit from arbitration if it is less expensive than litigation and provides a more accessible forum capable of being used for claims that might otherwise not have justified the expense of litigation.\(^{22}\) The goal would be a system that provides more immediate and therefore more effective remedies; and, due to its procedural simplicity, ensures that the employee's case will be adjudicated on the merits rather than resolved on a motion.\(^{23}\)

Even though the Supreme Court limited the avoidance of arbitration based on the costs of the process, an employee may not be compelled to arbitrate in a forum that does not allow that employee to effectively vindicate her statutory rights.\(^{24}\) In other words, the arbitration arrangement may change the forum but not the underlying statutory law.\(^{25}\) The party resisting arbitration bears a heavy burden of persuasion and the inquiry is focused on the particular case,

\(^{20}\) Martin H. Malin, Ethical Concerns in Drafting Employment Arbitration Agreements after Circuit City and Green Tree, 41 Brandeis L. J. 779, 786-87 (2003).

\(^{21}\) Id. at 786-87.

\(^{22}\) Id. at 787.

\(^{23}\) Id.

\(^{24}\) Id. at 792.

\(^{25}\) Id.
rather than systemically. Under such an approach, the party resisting arbitration will almost always lose.\textsuperscript{26}

Even so, an arbitration plan that is not drafted carefully can subject the employer to needless litigation to decide whether the employee has separate statutory rights to be enforced in court. An employer could ignore this risk of additional litigation by using arbitration as a process to force claims by employees into a forum that will be sympathetic to the employer's plight and hostile to employees. Such an approach, however, may lead to an arbitration agreement that undermines the overall legal framework by stacking the deck in the employer's favor.\textsuperscript{27}

Instead, the employer can think of arbitration as a system that substitutes a less formal, less expensive and less time consuming process for litigation while maintaining the integrity of the underlying statutory regulatory framework.\textsuperscript{28} Even though the arbitration system could lead to an increase in claims since the system will be more accessible to employees than the courts, this increase is likely to be offset by reduced litigation expenses and by arbitration's elimination of the employer's exposure to outlier jury awards. In addition, as a private forum, arbitration may also shield the employer from adverse publicity. Under this approach, the employer adopts

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\textsuperscript{26} Id. at 793.

\textsuperscript{27} Malin, supra note 20, at 814.

\textsuperscript{28} Id.
a process that is fair and even handed. This article will provide advice on how to achieve that result.

II. Formation of the Agreement

An employer may not be able to compel arbitration of an employment dispute without valid assent to an arbitration program by its employees. Since the Supreme Court’s decision in Gilmer, numerous federal district courts have addressed the legitimacy of an agreement to arbitrate employment disputes. Employees may argue that no agreement existed to arbitrate a dispute, based on the circumstances surrounding their hiring or the implementation of the arbitration program. Enforcement may be more difficult when the employer implements an arbitration program after the employee with a dispute has been hired.

One researcher found that since Gilmer, the argument that the employee never agreed to arbitration was effective for employees in 32.1 percent of the district court cases surveyed. Employees were remarkably successful at the appellate level on the issue of whether an agreement existed, prevailing in nine of fifteen cases post- Gilmer. Some courts found that an agreement was unenforceable because the arbitration procedures were too indefinite-and therefore, illusory.

Assent by current employees

A reviewing court must determine whether the employer and employee have agreed to submit the employee’s claim to arbitration. Section 3 of the Federal Arbitration Act, requires

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29 Id. at 815.

arbitration agreements to be written, but does not require them to be signed. Therefore, written acceptance of employer's policies is not a statutory prerequisite to enforceability.

An employee may agree to the arbitration of employment disputes by continuing his or her employment after the implementation of the arbitration program. Such an agreement was found where an at-will employee continued in her job past the effective date of her employer's arbitration program. This arbitration program brochure provided expressly that employees agreed to submit claims to arbitration by remaining employed after effective date of program. The validity of the agreement to arbitrate was supported by state law holding that at-will employees give adequate consideration for employer promises that modify or supplant an at-will employment relationship by remaining on job.

An arbitration agreement has been enforced despite the lack of an employee's signature on the arbitration agreement, which waived her right to bring discrimination claims in court. The agreement was enforced because it provided that her continued employment constituted assent. In support of its enforcement of the agreement, the employee was an educated managerial employee capable of understanding the agreement, and she had ample time to consult an attorney or decide not to waive her rights. Under the FAA, agreements to arbitrate need only

31 Nguyen v. City of Cleveland, 312 F.3d 243 (6th Cir. 2002).

32 Tinder v. Pinkerton Security, 305 F.3d 728 (7th Cir. 2002).

33 305 F.3d at 730. See also, Oblix Inc. v. Winiecki, 374 F.3d 488 (7th Cir. 2004)(agreement to arbitrate was supported by consideration of employee's salary).

be written, not signed. The court relied in part on state law, under which continued employment can constitute acceptance.

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

An employee’s recollection about the arbitration program is not considered essential to its enforcement. One employee was compelled to arbitrate her Title VII claim, despite her failure to recall seeing or reviewing the arbitration program brochure that the employer alleged was included with her paycheck. Enforcement was justified by the program’s feature in an internal monthly magazine, and because it was referenced in a poster for display in all work sites, and was described in a payroll stuffer.

An employer may not be able to enforce an agreement to arbitrate without evidence of an enforceable agreement. One agreement was not enforced where the employer had not authenticated documents that allegedly created such an agreement, and the employment application signed by the employee contained only a one-sided promise by her to arbitrate employment disputes without any reciprocal agreement or other consideration by employer. A

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35 Id. See also Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005)(lack of employee’s signature on written dispute resolution policy did not preclude it from being “agreement in writing”).

36 305 F.3d at 730-31. See also, Trogden v. Pinkerton’s Inc., No. 4:02-cv-90494, 92 FEP Cases 298 (S.D. Iowa May 8, 2003)(employee bound to arbitrate by continuing employment after she received arbitration provision in employee handbook).

promise to employ her at will was not sufficient consideration for the arbitration agreement, and an acknowledgment that she agreed to the terms of the dispute-resolution handbook does not show that she agreed to terms of dispute-resolution program.\(^{38}\)

An employer's failure to show that the material terms of its dispute resolution plan were communicated to its employees could preclude the introduction of the plan from constituting an effective offer under state law.\(^{39}\) The employer must establish that it provided the plan to its employees, and that the employee trying to avoid the plan actually received it. Even though a plan may be described on the employer’s website, the employer must establish that the employees knew of its availability there and had access to computers. In the alternative, the employer could show that employee received a hard copy of at least a summary of the plan. Without such communication to employees, an employee’s continued employment after the adoption of the plan cannot constitute assent to the plan.

A training session at the time an arbitration plan is introduced can help establish an agreement to arbitrate. Such training should document the distribution of the written plan, or at least a summary of it.\(^{40}\) In addition, the official who conducts the training session should explain the working of the plan and employees' rights. The trainer should also cover other material terms, such as the fact that the employer deems continued employment to constitute acceptance of the plan.

An employee may argue that he or she is not be bound by an agreement to arbitrate if he or she did not actually agree to have employment disputes go first to arbitration. Yet assent can

\(^{38}\) Id.


\(^{40}\) 173 F. Supp. 2d at 912.
be based on an employees’ acknowledgement of the employer’s use of the arbitration process. For example, an employee assented to be bound by the terms of her employer’s arbitration agreement by signing an “Acknowledgement of Receipt of Rules for Arbitration.”\textsuperscript{41} That acknowledgement, stating that employee agreed to provisions of the arbitration process by accepting and continuing employment with company, notified the employee that she would be bound to arbitrate through her continuation of her employment.\textsuperscript{42}

An employee may assent to an employer’s requirement of arbitration of employment disputes, based on his failure to opt out of program.\textsuperscript{43} One employee was bound to arbitrate claims even though he did not affirmatively opt in, where he signed an acknowledgment form that set out in writing the significance of his failure to opt out and described in detail the mechanism by which he could express his disagreement.\textsuperscript{44} The parties had come to an agreement to arbitrate employment disputes since his inaction was indistinguishable from overt acceptance.\textsuperscript{45}

Employees were bound by arbitration provisions where they were given sufficient notice that their continued employment, as clearly stated in agreements, constituted acceptance of

\textsuperscript{41} \textit{May v. Higbee Co.}, 372 F3d 757 (5th Cir. 2004).

\textsuperscript{42} \textit{Id.} See also \textit{Tinder v. Pinkerton Security}, 305 F.3d 728, 730-34 (7th Cir. 2002)( employee bound after signing acknowledgment form indicating receipt of an employee handbook and remaining employed following her receipt of a payroll stuffer that instituted a mandatory arbitration program).

\textsuperscript{43} \textit{Circuit City Stores Inc. v. Najd}, 294 F.3d 1104 (9th Cir. 2002).

\textsuperscript{44} \textit{Id.}

\textsuperscript{45} \textit{Id.}
arbitration under state law. Employees who denied knowing about the agreement before its implementation or contended that they were unqualified to assess its legal effect and were not given time to consult an attorney were still bound, where the agreements were mailed to employees' home addresses about two weeks before the effective date, notices concerning implementation were posted on workplace bulletin boards, and the agreements and accompanying documents were posted on company's intranet and distributed via e-mail.

**Ability to Opt Out**

An agreement to arbitrate will more likely be binding on a current employee, if he or she had a meaningful opportunity to opt out of the arbitration provision when signing the agreement, and still preserve his or her job. Yet even with that ability, unequal bargaining power after the time of hire excused an employee from the restrictions of an agreement to arbitrate disputes. This arbitration plan took effect three months after it was announced, regardless of whether an employee liked it. An employee's only option was to leave and work somewhere else. The court refused to bind the employee where the employer has “overwhelming bargaining power.”

Similarly, a manager for a multi-store, multi-state home improvement supply store chain established that an arbitration clause in his employment agreement was procedurally

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47 See, e.g., *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002) (upholding agreement).

48 *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007).

49 Id.
unconscionable and therefore unenforceable.\textsuperscript{50} Given the manager’s relative lack of bargaining power, subject to very different financial pressures than the employer, the agreement was unenforceable where the employee was told he could either sign agreement as it stood, or be replaced by younger employee who would cost employer less.\textsuperscript{51} The employer failed to show that arbitration clauses were so common in employment agreements generally, or in home improvement supply store management agreements specifically, that the manager would likely have encountered similar terms from any other party interested in comparable transaction.\textsuperscript{52}

**Binding new employees**

For new employees, the agreement to arbitrate may be easier to require. At least one federal appellate court has concluded that an employer does not engage in illegal retaliation by refusing to hire an applicant who refuses to sign such an agreement to arbitrate arbitration disputes.\textsuperscript{53} The applicant could not reasonably have believed that employer’s arbitration policy was an unlawful employment practice, and, therefore his refusal to sign agreement was not protected opposition conduct. When hearing the issue a second time, the court noted that if an employer can compel its employees to submit all claims arising out of their employment to arbitration, no retaliation would be involved in an employer’s exercise of such a right, because an employee opposing such a practice would not be engaged in any protected activity.\textsuperscript{54}

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\textsuperscript{50} Faber v. Menard Inc., 267 F.Supp.2d 961 (N.D. Iowa 2003).

\textsuperscript{51} Id.

\textsuperscript{52} Id.

\textsuperscript{53} EEOC v. Luce, et al., 345 F.3d 742 (9th Cir. 2003).

\textsuperscript{54} Id.
An employee who was “a highly educated managerial employee was capable of understanding the terms of the agreement.”\textsuperscript{55} However, this reliance on the ability of the employee to comprehend the agreement does not necessarily mean that less well-educated employees could void an arbitration agreement.\textsuperscript{56} One district court recognized that most applicants for employment, whether well-educated or not, will not reject an employment offer based on a concern about having to arbitrate a dispute which has not arisen.\textsuperscript{57} Even so, to avoid the arbitration agreement, the employee must come forward with specific evidence that the agreement to arbitrate was not voluntary.\textsuperscript{58}

Even for new hires, however, employers need to be sure that an enforceable agreement has been created. An agreement may not be enforceable if it is with a company that provided arbitration services, and the employer was only a third-party beneficiary of that agreement.\textsuperscript{59} The employer's promise of employment to induce the applicant to sign the agreement did not create an enforceable contract between the employee and the employer where the only consideration for the agreement from the arbitration company was to provide the arbitration forum.\textsuperscript{60} In addition, the agreement provided no details about the forum or the standards by which the arbitration company should abide, making the agreement vague as to that company’s obligation, and the agreement did not limit the company's ability to amend its procedures.

\textsuperscript{55}Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 668 (6th Cir. 2003).
\textsuperscript{56}Shadeh v. Circuit City Stores, 334 F. Supp. 2d 938 (W.D. KY 2004).
\textsuperscript{57}334 F. Supp. 2d at 941.
\textsuperscript{58}Id.
\textsuperscript{59}Penn v. Ryan's Family Steak Houses Inc., 269 F.3d 753 (7th Cir. 2001).
\textsuperscript{60}Id.
Agreement via Handbook

Generally, where an arbitration program included in an employee handbook policy applies to the employer as well as the employee, courts have found enough consideration to form a contract. However, where handbook promises were vague, or changeable only by employer prerogative, courts have ruled these to be illusory agreements.  

For example, a program developed by General Dynamics was unenforceable even though it was included in a personnel handbook. The reviewing court might have enforced the agreement if a reasonable employee would have known, given prior dealings between the company and its work force, that personnel handbooks operated as the functional equivalents of contracts. Then the introduction of a new policy by reissuing the handbook might have alerted such an employee that the handbook contained legally binding terms. Without such a past practice, the company's promulgation of a new handbook, without more, did not support a finding of adequate notice.

An employee handbook may not be sufficient to show that continued employment creates an agreement to arbitrate employment disputes, without an express agreement to arbitrate. One federal court reviewed an employer's "employee solution program booklet," which required employees to arbitrate claims against the employer, and found that the employee’s continued employment could not be viewed as consideration for the agreement to arbitrate unless her employer made a promise in return.

\[\text{LeRoy, supra note 30, at 304-05.}\]
\[\text{Campbell v. General Dynamics Gov't Systems Corp., 407 F.3d 546 (1st Cir. 2005).}\]
\[\text{Snow v. BE&K Construction Co., 126 F. Supp. 2d 5 (D. Me. 2001).}\]
No mutual agreement could be found where the booklet specifically stated that it did not affect any other terms or nature of the employee's performance, that it was not an employee agreement, and that the employer reserved the right to modify or discontinue the program at any time; this disclaimer suggested to the court that the employer's implied promise was merely illusory, and an illusory promise is not consideration for an agreement to arbitrate. The court also expressed doubts about basing an individual contract on the employee’s continuing to work for his employer when such a unilateral contract, not negotiated or signed by employee, was to be used by the employer to impede employees from seeking a judicial forum for the resolution of statutory civil rights claims.

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

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

66 Id. See also Phox, 230 F. Supp. 2d at 1282 (No meeting of minds where employee did not sign or initial page of employee handbook containing arbitration clause and signed form acknowledging receipt of handbook without knowing it contained arbitration clause).
Even if the employee had received the e-mail and the booklet, he would not be compelled
to arbitrate his discrimination claims, where the e-mail did not clearly advise him that arbitration
was mandatory, and it failed to expressly state that he was waiving right to jury trial or notify
him that his continued employment constituted acceptance of binding arbitration terms.\footnote{Id.}
Because the booklet was ambiguous and inconsistent, he could have read the arbitration language
as offering only a permissive alternative to litigation.

**Employer Discretion May Undermine Agreement**

An agreement to arbitrate must bind both the employer and the employee to be enforceable. Arbitration plans may lose their enforceability if they provide too much discretion
to the employer or the arbitrator. For example, employees whose arbitration agreement required
that all employment claims be arbitrated but gave their employer unilateral power to modify its
terms and states that it is not a contract were not required to arbitrate their claims.\footnote{Gourley v. Yellow Transportation LLC, 178 F. Supp. 2d 1196 (D. Colo. 2001).} Even though
the agreement may have recited sufficient consideration for the employees' promise to arbitrate,
the fact that employees were irretrievably bound to its terms while the employer was bound to
nothing rendered the agreement illusory and thus non-existent.

Discretion for the arbitrator may also undermine the agreement. One agreement gave too much discretion to the arbitrating agency under the Arbitration Agreement used by the employer.
The employer had a separate agreement with the agency “to arbitrate and resolve any and all
employment-related disputes between the Company's employees (and job applicants) and the

\begin{footnotes}
\item[67] Id.
\end{footnotes}
Company.” Even after the agency amended its rules, it still had the right to modify or amend the rules after the claimant signed the Arbitration Agreement. The agreement was unenforceable because the agency had the right to eliminate the rule that purported to give the claimant the right to enforce the rules and procedures that existed at the time that he or she executed the agreement.

An employer's written dispute resolution policy that it can unilaterally modify was enforceable, despite the employee’s contention that employer's modification power renders its promise illusory. The agreement was enforceable in part because the employer could only modify the policy after giving notice to its employees. Moreover, the version of the policy in effect at the time a claim was received governed that claim.

As with an express agreement to arbitrate, an arbitration program contained in a handbook may only be enforceable if the employer is also bound to it. An agreement was not enforceable against an employee where an employer reserved the right in numerous provisions, including the arbitration clause itself, to modify or cancel provisions of employee handbook at its sole discretion. Even if an employer did not exercise its right to revise or cancel the arbitration agreement before its employee filed suit, it had the unilateral right to do so at time that the employee signed the employee acknowledgment form. The employer's “promise of employment” was not sufficient consideration to bind its former employee to the arbitration program, since such a promise was illusory. Since the employee was at-will, the employer could

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70 Caley, 428 F.3d at 1364-66.
71 Phox, 230 F. Supp. 2d at 1282.
have discharged her at very minute that she signed form acknowledging receipt of employee handbook.

**Knowing agreement**

In addition to showing that an agreement was reached, an employer must show that the employee entered into the agreement to arbitrate knowingly to enforce that agreement. For example, an employee was not bound to arbitration on a sexual discrimination claim because those employees had not knowingly entered into the agreement to arbitrate employment disputes.\(^\text{72}\) The employees, when applying for the positions of sales representatives with the employer, were required to sign forms containing agreements to arbitrate any dispute, claim or controversy required to be arbitrated under the rules of any organization with which the employees registered. The employees were not bound to that agreement where arbitration was never mentioned when they signed the forms, and they were never given a copy of the manual which contained the actual terms of the arbitration agreement.\(^\text{73}\)

Like the inability to opt out, the inability of an employee to reject an arbitration program show a lack of agreement. Where an employee never said anything to his employer or signed anything to indicate acceptance of his employer's newly imposed dispute-resolution policy, which required employees to arbitrate all job-related claims, the employee did not enter into an “agreement” with the employer to arbitrate his employment discrimination claims.\(^\text{74}\)

\(^{72}\) Prudential Insurance Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994).

\(^{73}\) Lai, 42 F.3d at 1301.

\(^{74}\) Bailey v. FNMA, 209 F.3d 740 (D.C. Cir. 2000).
An employee’s failure to reject a proposal to arbitrate, without more, does not necessarily evidence the employee’s assent to be bound to arbitration. The employer presented the policy as a “condition of employment,” but there was some question as to whether a current employee could be terminated for refusing to accept a new arbitration policy. Therefore, the employee had reason to assume that his job was not in jeopardy under existing law, and he signaled nothing when he remained in employer's employ.

Like the decision in Bailey, employees who were discharged for refusing to sign a new employee handbook that included a compulsory-arbitration provision regarding employment-discrimination claims did not have an objectively reasonable belief that such a provision was an unlawful employment practice. The employees’ refusal to sign that handbook did not constitute protected activity for the purpose of establishing a prima facie case of retaliation. Simply because an agreement may be unenforceable or even illegal does not mean that employers that require employees to sign such agreements as condition of employment violate federal discrimination statutes.

To ensure that employees have entered into an enforceable agreement to arbitrate, the employer should elicit an affirmation that he or she had read the notice regarding the implementation of the arbitration program. An arbitration agreement was not be enforced where the employee maintained that he neither read the transmittals nor learned of the purported waiver of his right to litigate until the employer tried to shunt his claims to arbitration. Under the totality of the circumstances, the employer must show that its communication would have

75 Weeks v. Harden Manufacturing Corp., 291 F.3d 1307 (11th Cir. 2002).
76 Campbell, 407 F.3d at 554-55.
77 Id.
provided a reasonably prudent employee notice of the waiver, based on the method of communication, the workplace context, and the content of the communication.\textsuperscript{78}

A mass e-mail to employees could be an effective way to communicate about a new arbitration program, if the e-mail was straightforward, with an explicit delineation of the arbitration agreement.\textsuperscript{79} The content of the notice to employees should provide fair warning that showing up for work the next day would result in a waiver of important rights.\textsuperscript{80} Moreover, an e-mail announcement may not produce an enforceable arbitration agreement if it downplays the obligations set forth in the Arbitration Policy. Such notice should include the crucial fact that, as a matter of law, the regimen would become an employee's exclusive remedy for employment-related claims.

E-mail notice may be more appropriate where e-mails are a preferred method of communication to handle personnel matters. To rely on this method of communication, the employer would need to identify other instances in which the company relied upon either an e-mail or an intranet posting to introduce a contractual term that was to become a condition of continued employment. In addition, the employer should require a response to the e-mail.

State courts have enforced arbitration agreements where the employer fully informed employees about the terms of the agreement. For example, Anheuser-Busch was able to enforce its arbitration agreement where the policy explained that “by continuing or accepting an offer of employment” with Anheuser-Busch, all employees to whom the policy was applicable “agree as

\textsuperscript{78} 16 AD Cases at 1368.

\textsuperscript{79} Id. at 1369.

\textsuperscript{80} Id.
a condition of employment to submit all covered claims to the dispute resolution program.”

A letter, handbook, and explanatory materials explaining the terms of the agreement, posters explaining the program, along with a brief presentation of the new program for employees, helped make the agreement enforceable. After receiving this information, employees became bound by signing an “Employee Acknowledgment and Understanding” form showing their understanding of the terms of the program.

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

III. Conscionability of the Agreement

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

The doctrine of unconscionability involves both “procedural” and “substantive” elements. “Procedural unconscionability” pertains to the process by which an agreement is reached and the form of an agreement. Procedural unconscionability may be shown if the agreement constitutes

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82 E. Allan Farnsworth, Contracts §4.28 (2d ed. 1990).
Contracts of adhesion typically are prepared by a party with excessive bargaining power, who then presents the agreement to the other party for signature on a take-it-or-leave-it basis.

Generally, a contract is not unconscionable merely because the parties to it are unequal in bargaining position. The party challenging an agreement to arbitrate must also establish “substantive unconscionability.” Such an agreement includes terms that unreasonably favor one party, and to which the disfavored party does not truly assent.

Gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may show that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent to the unfair terms. Therefore, a finding of unconscionability requires two things: contractual terms that are unreasonably favorable to the drafter and no meaningful choice on the part of the other party regarding acceptance of the provisions.

One examination of cases challenging arbitration agreements has shown that in 2002-2003, litigants raised issues of unconscionability in 235 cases, and courts found contracts or clauses to be unconscionable in 100 of those cases, or 42.5%. Of those 235 cases, 161, or 68.5%, involved agreements to arbitrate various types of disputes. Significantly, courts found

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84 Restatement (Second) of Contracts, supra, §208 cmt. d; see also, e.g., Gilmer, 500 U.S. at 33.
85 Harris, 183 F.3d at 181.
87 Bensalem Township v. Int'l Surplus Lines Ins. Co., 38 F.3d 1303, 1312 (3d Cir. 1994); see also, e.g., Seus, 146 F.3d at 184.
that 50.3% of the arbitration agreements are unconscionable, as opposed to 25.6% of other types of contracts.  

Agreement to Arbitrate by Applicants

Applicants who agree to arbitration will often be bound by that agreement later on. Often courts will find that such an agreement is not a contract of adhesion, even though the agreement was a “take-it-or-leave-it” standardized form prepared by employer, and employee had to sign it to get job.  

An employee seeking to void the agreement would need to present evidence that she was unable to find suitable employment if she refused to sign agreement, or that the parties’ relative bargaining positions were otherwise significantly uneven.

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


89 Cooper v. MRM Investment Co., 367 F.3d 493 (6th Cir. 2004).

90 Id.

91 Id.

92 Id.
Unequal Bargaining Power

An employee may not always be bound by an arbitration agreement presented during the application process. For example, an arbitration agreement that was part of a 12-page application packet was not enforced, even though it notified the applicant that he or she was required to complete and sign the “Job Application Agreement to Arbitration of Employment-Related Disputes” to be considered for a position.93

The time-limited context in which applicants were presented with the Arbitration Agreement, combined with the managers’ provision of misleading information about the agreement, was found to be problematic, especially where many of the applicants had not completed high school and/or were desperate for the low-wage jobs being offered.94 The agreements were also problematic because they explicitly reserve the private arbitration company’s right to modify or amend the rules from time to time, without providing employees the right to insist on the rules in effect at the time that they executed their respective agreements.95

Similarly, an arbitration agreement was not enforced although signed by two long-time heavy-equipment operators who had equivalent of seventh- and fifth-grade educations.96 Those employees had very narrow options for other employment and the international corporation

94 Id.
95 Id. See also Circuit City Stores Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002 ) (agreement was contract of adhesion as a standard-form contract drafted by employer with which had superior bargaining power).
which employed them clearly possessed more bargaining power than those operators. With no ability to negotiate, the employees could avoid the arbitration agreement.

A bald allegation of unequal bargaining power alone does not demonstrate unconscionability. One arbitration agreement was enforced because the employee failed to show that she would be unable to find suitable employment elsewhere, given her “age, education, intelligence, business acumen and experience, and relative bargaining power.” That employee’s sophistication and experience with the company made it unlikely that she could establish unequal bargaining power.

An award may be enforced even if an employer failed to provide the employee with the rules that list claims that would be arbitrated, where the employee failed to fully read and question the form containing the agreement to arbitrate before signing it. The burden is on the employee to have his concerns addressed before signing, particularly where the form advised him in bold capital letters to read it carefully. Since this employee did not claim that he could not understand the form, as he held an MBA, mere inequality in bargaining power was not alone sufficient to hold the clause unenforceable.

97 Seawright, 101 FEP at 1823.
98 Id.
99 Cooper, 367 F.3d at 504.
100 Gold v. Deutsche Aktiengesellschaft, 365 F. 3d 144 (2d Cir. 2004).
101 Id., See also Caley, 428 F.3d at 1371-72 (no disparity in bargaining power, where terms of policy were clear and were presented to employees with cover letter reflecting importance of policy, and its terms were not oppressive).
One agreement was enforced where the employee seeking to avoid arbitration was a sophisticated, educated, and experienced businesswoman. Her characteristics undermined her contention that she did not understand its contents, evidenced by her writing on the agreement that she did not understand one clause. Allegations that she signed the agreement so that she would not lose her job, that no employer representative reviewed handbook with her, that she was not informed that she had right to negotiate terms or could consult with attorney, and that she was not familiar at time that she signed agreement with term “at-will employee” did not make the agreement unenforceable.

**Inequality of benefit**

An arbitration agreement may also be invalidated because it benefits the employer more than employees. This is similar to the mutuality requirement for finding an enforceable agreement to arbitrate. An arbitration agreement was substantively unconscionable because it compelled the arbitration of claims that employees were most likely to bring against the employer, but exempted from arbitration claims that an employer was most likely to bring against employees.\(^\text{102}\)

Not all claims of unequal benefit are successful. One agreement to arbitrate was enforced where it was binding on both the employer and employee, even though the employer retained the right to terminate the agreement with 90 days notice.\(^\text{103}\) Similarly, a court enforced an

\(^{102}\) Ferguson v. Countrywide Credit Industries Inc., 298 F.3d 778 (9\textsuperscript{th} Cir. 2002).

\(^{103}\) Seawright, 101 FEP at 1823.
employer's dispute resolution plan despite its reservation in employer of the power to amend or discontinue the plan.\textsuperscript{104}

Arbitration agreements signed at the time of hire are not necessarily unfair or the product of overreaching. Courts may be reluctant to find that an agreement is unconscionable since “employees fare well in arbitration with their employers—better by some standards than employees who litigate, as the lower total expenses of arbitration make it feasible to pursue smaller grievances and leave more available for compensatory awards.” \textsuperscript{105}

Employees may attempt to avoid an arbitration agreement if it was not imposed on all employees in a fair way. One agreement to arbitrate was enforced despite the claim of the employee that she signed the agreement under duress.\textsuperscript{106} The employee was required to sign the agreement within days of a co-worker's arbitration case in which she was to testify. The employee was not singled out - the employee handbook containing the arbitration provision was distributed nation-wide to all of the employer's offices and had nothing to do with her testimony in co-worker's case. In addition, the employee was given two days to look at the handbook and could consult attorney.

Issues of conscionability will vary by state. However, certain factors remain constant:

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

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

\textsuperscript{104} Owen v. MBPXL Corp., 173 F. Supp. 2d 905 (N.D. Iowa 2001).

\textsuperscript{105} Oblix, Inc. v. Winiecki, 374 F.3d 488, 491 (7th Cir. 2004). See also Seus, 146 F.3d at 184 (rejecting argument that agreement was a contract of adhesion due to disparity in bargaining power); Rosenberg, 170 F.3d at 17 (same).

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

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

IV. Fairness of Arbitration

Second only to unconscionability, employees rely on the alleged unfairness of the arbitration process in seeking to avoid unfavorable results of that process. Two main reasons to challenge the fairness of the arbitration program have been the fairness of the process itself and the alleged bias of the arbitrators.

One indication of dissatisfaction with the arbitration process is the rate of appeal to the courts. In one study, union grievance procedures had the highest percentage of decisions successfully appealed at 17.3% (successful appeals as percentage of disciplinary decisions). Other nonunion procedures have the lowest percentage at 2.7%. In the middle are nonunion procedures involving mandatory arbitration at 11.1% and peer review at 9.9%. 107

Since the creation of the Employment Protocol, its principles and standards have been adopted by major arbitration service providers. 108 One study compared employment arbitration results at the AAA before and after the AAA's incorporation of the principles of the Employment Protocol in its rules governing employment arbitration. These researchers found that "employers arbitrating pursuant to an adhesive arbitration clause in a personnel manual after the Due Process Protocol have less success than before the Due Process Protocol." That finding led them to

107 Colvin, supra note 9, at 592.

conclude that self-regulation of arbitration through the adoption of the Employment Protocol "is making a difference in employment arbitration."\textsuperscript{109}

Despite the adoption of these principles by major arbitration service providers, individual neutrals have failed to commit to the protocols, perhaps due to what has been termed the "assurance problem." Individual firms may refuse to commit to a set of standards not because they have calculated that the benefits they will receive from not following the standards will be greater than the benefits from following the standards, but "because [they are] unable to obtain the necessary assurance that other firms will contribute their fair share."\textsuperscript{110}

Even if all working arbitrators agreed to follow the protocols, there is nothing in the protocols to provide assurance that those individuals and firms do, in fact, what they promise. There is a lack of monitoring devices to compel compliance even by those who have agreed to be bound by the protocols. Lack of such review may make a firm reluctant to comply and be put at a disadvantage when others in the industry are not being held to their promises. "Individuals frequently are willing to forgo immediate returns in order to gain larger joint benefits when they observe many others following the same strategy." Without monitoring, it is impossible to "observe" other individual neutrals following the protocols.\textsuperscript{111}

Some court decisions reviewing arbitration agreements have relied on the standards found in the protocol. One arbitration program used by Hooters did not comply with the standards articulated in the Employment Protocol, and was found to be unconscionable and a

\textsuperscript{109}Id. at 415-16.

\textsuperscript{110}Id. at 423.

\textsuperscript{111}Id.
violation of public policy. The plaintiff compared the rules of the arbitration scheme that plaintiff was required to follow to the standards contained in the Employment Protocol and in the rules of certain arbitration service providers.

That comparison led the employee’s experts to conclude that they would refuse to arbitrate the discrimination claim under the rules applicable in plaintiff’s arbitration agreement. Although the court did not specifically hold that Hooters’ arbitration rules were void simply because they failed to comply with the Employment Protocol, the standards set forth in the Employment Protocol provided a benchmark for the court in determining the appropriate rules for the conduct of an arbitration.

Bias of Arbitrators

The Gilmer Court rested its preference for arbitration in part on its disagreement with the presumption that parties and the arbitral body conducting arbitration proceeding will be unable or unwilling to retain impartial arbitrators. Bias was not a concern for the Gilmer Court since the New York Stock Exchange arbitration rules provided protections against biased panels. The court also relied on the Federal Arbitration Act provision that courts may overturn arbitration decisions if there is evidence of partiality or corruption in arbitrators.

Since Gilmer, some circuit courts have expressed concern about an arbitrator’s neutrality, recognizing that the specific arbitral forum must allow for the effective vindication of that claim. The court reviewing the arbitration process used by Hooters found that it ensured a

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113 Harding, supra note 16, at 410.
biased decision maker. In this process, the employee and Hooters each selected an arbitrator, and those two arbitrators selected a third. Bias was inherent in the selection process because the employee's arbitrator and the third arbitrator could only be selected from a list of arbitrators created exclusively by Hooters, giving Hooters control over the entire panel and placing no limits on whom Hooters could put on the list, including its own managers.

The bias of arbitrators was also a concern in a more recent court decision reviewing the Ryan’s arbitration procedure. The arbitral forum was not neutral and, therefore, the agreements were unenforceable. The “adjudicators” were selected from three separate selection pools to preside over the arbitration hearing, consisting of 1) supervisors and managers from another EDSI signatory company; 2) employees from another signatory; and 3) attorneys, retired judges, and other “competent legal professional persons not associated with either party.” EDSI was a for-profit business, and Ryan's annual fee accounted for over 42% of EDSI's gross income in 2002. Given these findings, the court concluded that EDSI was biased in favor of Ryan's and other employers because it has a financial interest in maintaining its arbitration service contracts with employers. Given EDSI's role in determining the pool of potential arbitrators, any such bias rendered the arbitral forum fundamentally unfair.

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116 Id. at 938-39.
117 Walker, 400 F.3d at 382-83.
118 Id. at 314 (citing Cole, 105 F.3d at 1482 (statutory rights include access to a neutral forum) and McMullen, supra, 355 F.3d at 493-94 (striking down arbitration scheme where employer had exclusive control over selection of arbitrator pool).
Bias against employees and applicants can be significantly enhanced by the lack of any criteria governing the employees of signatory companies who are eligible to serve as adjudicators. The selection procedure lacked minimum educational requirements, potential arbitrators did not need to have any relevant experience as an adjudicator, and there was no explicit requirement that they be unbiased. Similarly, the rules did not require that the legal professionals possess either substantive or procedural knowledge of dispute resolution or of the employment law issues involved in the arbitration.

Beyond this lack of requirement for qualifications, the bias was exacerbated by the lack of a protocol governing the selection of potential arbitrators from the three pools. Members of the supervisor and employee pools were chosen by the small number of employers who, like Ryan's, had signed alternative dispute resolution agreements with EDSI, rather than being randomly selected. In addition, the rules failed to prevent a supervisor of a signatory company from sitting on an adjudication panel with a non-supervisory employee from the same company. Also, the procedure failed to prohibit a signatory company from discussing the arbitration process or specific claims with its employee adjudicators or from attempting to improperly influence its employee adjudicators.

Like the Ryan’s process, an arbitration agreement drafted by a union-employer and entered into by employee as condition of employment was unconscionable because it placed control over selection of arbitrator in the hands of the union. The program required the employee and the union to engage in the alternate-strike method of choosing an arbitrator from a list of prospective arbitrators provided by union, with no specified constraints. The program also

119 Id.
120 Murray v. United Food and Commercial Workers Local 400, 289 F. 3d 297 (4th Cir. 2002).
denied the arbitrator any authority to alter, change, or diminish any power granted to the union president by the union’s bylaws. The court refused to salvage the agreement by construing it to require that the union president provide a neutral list of arbitrators, where the agreement made no reference to any selection rules.

The tide may be turning against invalidating arbitration programs based on alleged bias of the arbitrator. The Supreme Court’s decision in Green Tree has made it clear that courts should not presume, absent concrete proof to the contrary, that arbitration systems will be unfair or biased. In the case of costs in a consumer arbitration situation, the court concluded that the mere possibility of a party to the arbitration agreement incurring prohibitive costs is too speculative to invalidate an arbitration agreement where the agreement was silent on the subject of arbitration costs.

In line with the reasoning in Green Tree, but in contrast to the biased selection procedures outlined above, one selection process used was not unconscionable, against public policy, discriminatory on basis of national origin or race, or a blatant attempt to rig the pool. The process was fair since each side played an equal role in that process and many potential arbitrators met that provision. The court refused to presume that the parties would be unable or unwilling to retain competent, conscientious, and impartial arbitrators. Similarly, two courts have enforced the Ryan's arbitration system since the Supreme Court’s decision in Green Tree.

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121 Green Tree, 531 U.S. at 84.
122 Id.
123 Parilla v. IAP Worldwide Servs. VI Inc, 368 F.3d 269 (3d Cir. 2004).
124 Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943 (8th Cir. 2001); Penn v. Ryan’s Family Steak Houses, Inc., 269 F.3d 753 (7th Cir. 2001).
A district court in Kentucky upheld a program even though it expressed concern that under the agreement to arbitrate, arbitrators may not have had the appearance of fairness and impartiality. There, the employer designed the arbitration system and had designated the administrators of it. Under the circumstances of “captive” arbitration system, the court could not ignore the possibility that the arbitrators could be partial to those who retained the power to affect their continued employment. The court noted that these circumstances might give a claimant, despite all the outward procedural protections, some concern about fairness.

In upholding this arbitration program, the court relied on other courts’ conclusions that such agreements are generally permissible in such circumstances.

Some commentators have noted the advantage enjoyed by employers which comes not from the selection procedure, but their status as “repeat players.” Employers who participate in arbitration more than once do better in arbitration than single use employers. Employers may also have an advantage from being able to compile information about potential arbitrators and their prior rulings. Some of this effect may also help employers to succeed in litigation as well.


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

Bias of arbitrators may be avoidable by following the process used by the major arbitrator agencies. For example, JAMS submits a list of five neutral arbitrators to each party, with a description of their background and experience.\textsuperscript{129} Then each party can strike up to two names off the list. The arbitrator selected then has the burden of making any required disclosures. Similarly, the National Academy of Arbitrators (NAA) suggests that arbitrators disclose any past or present involvement or relationship with the parties, counsel or potential witnesses.\textsuperscript{130} The NAA also states in its policy that an arbitrator should decline to hear a case absent clear evidence that the selection process was “fundamentally fair.” The policy statement does not define what processes would be considered fair.

**Bias of the Process**

The Supreme Court warned against the waiver of employees’ statutory rights in *Alexander v. Gardner-Denver*, in part based on the nature of the arbitration process itself.\textsuperscript{131} That court recognized that the fact-finding process in arbitration usually was not equivalent to judicial fact-finding. In addition, court noted that the record of the arbitration proceedings is not as complete as a judicial transcript.\textsuperscript{132}


\textsuperscript{131} 415 U.S. 36, 42-44 (1974).

\textsuperscript{132} Id.
In arbitration, information gathering may be hampered because the usual rules of evidence do not apply.\textsuperscript{133} In addition, the rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.\textsuperscript{134} Moreover, arbitrators typically have no obligation to give their reasons for an award.\textsuperscript{135}

The informality of arbitral procedure enables it to function as an “efficient, inexpensive, and expeditious means for dispute resolution.”\textsuperscript{136} This same characteristic made arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts, at least back in 1974. The Court also noted that judicial enforcement of such a standard “would almost require courts to make de novo determinations of the employees’ claims.”

Some courts still raise concerns about the adequacy of the arbitration process to vindicate employees’ statutory rights. For example, the Second Circuit, refused to compel arbitration where the employer imposed on its employees an agreement which limited the arbitration hearing to one or two days, absent unusual circumstances.\textsuperscript{137}

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

\textsuperscript{133} Id.
\textsuperscript{134} Id. at 45.
\textsuperscript{135} Id. at 45.
\textsuperscript{136} Id.
\textsuperscript{137} Brooks v. Travelers Insurance Co., 297 F.3d 167 (2d Cir. 2002).
from changing that allocation. Finally, it provided for a one year limitations period, a period considerably shorter than that provided under several employment statutes.

**Discovery**

By the time it reached its decision in *Gilmer*, the Supreme Court was less concerned with these informalities than the Court had expressed in *Gardner-Denver*. The Court noted that the lack of extensive discovery allowed in arbitration did not establish the impropriety of compulsory arbitration for Age Discrimination in Employment Act (ADEA) claims. It was unlikely, according to the Court, that age discrimination claims would require more extensive discovery than other claims that had been found to be arbitrable. In addition, the Court was satisfied with the New York Stock Exchange discovery proceedings, which allowed for document production, information requests, depositions, and subpoenas.

Limitations on discovery were concerning for the Sixth Circuit in reviewing the Ryan’s arbitration procedure. The Ryan’s process allowed “just one deposition as of right and additional depositions only at the discretion of the (arguably biased) panel, with the express policy that depositions ‘are not encouraged and shall be granted in extraordinary fact situations only for good cause shown.’” Limited discovery, controlled by a potentially biased arbitration panel, created unfairness to claimants. The court was most concerned that the potentially biased arbitration panel controlled how much discovery the employee could have.

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138 500 U.S. at 26-35.

139 *Walker*, 400 F.3d at 383.

140 *Id.*

141 *Id.* See also *Ferguson v. Countrywide Credit Industries Inc.*, 298 F.3d 778, 783-84 (9th Cir. 2002)( limitation on discovery showed pattern of giving the employer undue advantage).
In contrast, another court enforced an agreement to arbitrate which did not guarantee broad discovery. The applicable commercial arbitration rules left the decision about which discovery tools to use, and in what manner, to the discretion of the arbitrator. The silence of the commercial rules on the details of available discovery or other procedural questions did not alone invalidate the agreement.

Like the decision of the D.C. Circuit, a provision of an employer's mandatory dispute resolution program that limited discovery did not make the program unenforceable. Discovery was limited to “essential and relative documents and witnesses,” as opposed to documents that appeared reasonably calculated to lead to discovery of admissible evidence. The program was upheld because the limited discovery had not been shown to be insufficient. The court noted that the employee traded judicial procedures and the opportunity for review for simplicity, informality, and expedition of arbitration.

Similarly, the Pep Boys arbitration process was enforced by another court, even though it limited discovery by each party to only one individual and any expert witness designated by other party. The court did not find the process to be too biased to arbitrate employees' FLSA rights.

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143 **Id.** (citing **Green Tree**, 531 U.S. at 92). See also, **Johnson v. Long John Silver's Restaurants Inc.**, 320 F.Supp.2d 656 (M.D. Tenn. 2004)(arbitration agreement enforceable where discovery was under arbitrator’s discretion, unclear how arbitrator would apply clause); **Caley**, 438 F.3d at 1371-72 (limitations on discovery part of inherent trade-off involved in arbitration process).

144 **Maples v. Sterling Inc.**, No. 01-1359, 88 FEP Cases 1672, 1677 (W.D. Tenn. April 23, 2002).

145 **Id.**

146 **Id.**

wage claims, despite their contention that this provision was lopsided because the employer only needed to depose individual employees, while employees needed to depose numerous managers and other supervisory personnel to prove their claims. The process was adequate in part because the rules provided for exceptions to this limitation on discovery when necessary.

Arbitration may be more efficient by limiting the sometimes lengthy and litigious period of discovery associated with federal litigation. At the same time, employees’ pursuit of their claims might be impeded by an inability to gather information prior to the arbitration hearing. One California court recognized this concern but refused to find that the arbitration agreement was unconscionable. Under its use of AAA rules, the arbitrator could limit discovery and relax evidentiary rules regarding witness testimony. The court accepted the AAA rules’ provision for discovery necessary to “full and fair exploration of the issues in dispute.”

Under the JAMS rules, the parties have an obligation to “cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information relevant to the dispute or claim immediately after commencement of the Arbitration.” The initial exchange of information begins within 21 days after receipt of pleadings or notices of claims. The parties have a continuing obligation to provide information to the other side. Documents that were not exchanged cannot be considered by the arbitrator, unless agreed by the parties or “upon a showing of good cause.”

arbitration clause providing for only one deposition on each side, since arbitrator could afford more discovery if appropriate).


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

The NAA has warned that an arbitrator should be wary of accepting a case where the documents defining his or her authority and scope of jurisdiction restrict the ability to control the proceeding, such as unfair limitations on discovery or on the production of documents or witnesses. More specifically, the policy states that “adequate but limited pre-trial discovery is to be encouraged,” and employees and their representatives “should have access to all information reasonably relevant” to the arbitration. This policy echoes the recommendation of the 1995 Task Force on Alternative Dispute Resolution in Employment. The NAA suggests that an arbitrator should ensure that he or she has the authority to make the necessary directions to ensure procedural fairness.

Some circuit courts have followed the NAA’s warnings and imposed some procedural requirements. For example, an agreement signed by a discrimination claimant that required employees, but not employers, to arbitrate employment disputes in accordance with certain rules

\[^{150}\text{Id.}\]


and procedures was found to be excessively one-sided. The agreement was unconscionable under state law, in part because it gave the employer the unilateral right to terminate or modify the agreement.

**Sufficiency of Hearing**

Some arbitration programs may not withstand judicial scrutiny if they do not provide an adequate opportunity for an employee to present his or her claim. One court refused to compel arbitration in part because the agreement limited the arbitration hearing to one or two days, absent unusual circumstances. Similarly, a district court held that an arbitration agreement was found to be unenforceable based on a clause that limits hearings to two days. Those employees argued that two days would be an impossible period of time in which to present their case.

The process becomes more concerning where it favors one party over another. For example, the Hooters process was disallowed in part because it required employees to file a notice of the particulars of their claims, a list of all fact witnesses, along with a summary of their knowledge, while the company was required to do none of these. Moreover, Hooters could expand the scope of arbitration to any matter, but the employee could only arbitrate matters asserted in the notice of their claim. Bias was also shown by the limitation that Hooters, but not the employee, could create a record or transcript of the proceeding. Hooters also retained the sole

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153 *Al-Safin v. Circuit City Stores*, 394 F. 3d 1254 (9th Cir. 2005).

154 *Brooks*, 297 F.3d at 171.


156 *Hooters*, 173 F.3d at 938-39.
right to cancel the arbitration agreement or bring suit in court to vacate or modify the arbitration award. Finally, the company could unilaterally modify the rules at any time without notice to the employee, even in the middle of an arbitration hearing.\footnote{157}

**Shortened Statute of Limitations**

Courts are sometimes reluctant to enforce arbitration agreements when the process shortens the time in which an employee may file a claim to some amount of time less than allowed under the applicable statute. Since the Circuit City decision, employers sometimes include strict time limits for filing a claim. In two of six cases where these limits were shorter than provided by statute, courts ruled for employees.\footnote{158}

A plan which provided that mediation was a mandatory prerequisite to arbitration provided that if the claim was not filed within a year of when it should have been discovered, it was lost.\footnote{159} The Ninth Circuit held that the one-year universal limitation period was substantively unconscionable when it forced an employee to arbitrate employment-related statutory claims.\footnote{160}

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

\footnote{157}Id. But see Moorning-Brown v. Bear, Stearns, No. 99 CV 4130 (GBD), 95 FEP Cases 110 (S.D.N.Y. January 5, 2005)(arbitrators' failure to record telephone pre-hearing conferences did not by itself establish misconduct on their part).

\footnote{158}LeRoy, supra note 32, at 310.

\footnote{159}Davis v. O'Melveny & Myers, 485 F. 3d 1066, 1073-74 (9th Cir. 2007).

\footnote{160}Id.
claim is based or waive that claim was substantively unconscionable. The 30-day notice provision was clearly unreasonable and unduly favored the employer, because it provided insufficient time to bring a well-supported claim. The time limit also prevented an employee from invoking continuing violation and tolling doctrines, and did not require the employer to provide written notice of the claim to the employee within the same time period.

**Form of Decision**

Employees may challenge the fairness of the arbitration process based on the failure of arbitrators to issue written decisions. The *Gilmer* Court specifically addressed concerns that arbitrators often will not issue written opinions, potentially resulting in a lack of public knowledge of employers’ discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law. However, the Court did not resolve this specific concern because the New York Stock Exchange (NYSE) rules, under which *Gilmer* was required to arbitrate, provided that all arbitration awards be in writing. In addition, the rules required that the awards contain the names of the parties, a summary of the issues in controversy, and a description of the award issued.


162 Id.

163 Id. See also Alexander, 341 F.3d at 263-64 (requirement that employees present claims within 30 days of the event found to be substantively unconscionable where state law allowed longer limitations periods and 30 days was insufficient time to bring a well-supported claim); Nyulassy v. Lockheed Martin Corp., 120 Cal.App.4th 1267 (Cal. Ct. App. 6th Dist. 2004)(refusing to enforce 180-day limitations period on all claims).

164 500 U.S. at 27.

165 Id. See 2 N.Y.S.E. Guide Para.2627(a), (e), p. 4321 (Rule 627(a), (e)). In addition, the award decisions are made available to the public. See id., at Para.2627(f), p. 4322 (Rule 627(f)).
Although courts may not often review the arbitrator’s decision making process, outstanding deficiencies in the process may warrant reversal of the award. One award by a joint grievance panel was not enforced because the panel failed to interpret one agreement in question and instead, construed the master contract in a one-sentence, conclusory opinion that it reached after deliberating for only few minutes.\textsuperscript{166}

In arbitrations under a collective bargaining agreement, the arbitrator is not necessarily required to write a decision stating the reasons for the award.\textsuperscript{167} If an opinion is written, “mere ambiguity” which permits the inference that the arbitrator may have exceeded his authority is not sufficient reason for refusing to enforce the award.\textsuperscript{168} If the arbitrator has provided no explanation for the award, courts may make inferences from the record to address an allegation of manifest disregard of the law.\textsuperscript{169} If a basis for the arbitrator's decision can be inferred from the facts on the record, the award typically will be confirmed.\textsuperscript{170}

An award may be upheld based on its conformity to the requirements of the arbitration agreement, even if it does not satisfy basic requirements of a sufficient award. For example, one district court upheld an arbitrator's award that denied a postal worker's discharge grievance, even though the arbitrator summarily found that grievance would not have been successful on either

\textsuperscript{167} See, e.g., Enter. Wheel & Car, 363 U.S. at 598; Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998).
\textsuperscript{168} Enter. Wheel & Car, 363 U.S. at 598.
\textsuperscript{169} See, e.g., Wallace v. Buttar, 378 F. 3d 182, 192–93 (2d Cir. 2004); Willemijn, 103 F.3d at 12-13.
\textsuperscript{170} Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512, 516 (2d Cir. 1991).
due process grounds or on its merits.\textsuperscript{171} The arbitrator was fully informed of parties' position, and was well aware of applicable standards for just-cause discharge under collective-bargaining agreement and that employer had acted within its contractual rights.\textsuperscript{172} The request to overturn the award was denied because the worker offered no evidence that the contract required the arbitrator to give a detailed explanation, or evidence that her just-cause determination was irrational or in conflict with the contract's terms.\textsuperscript{173}

The NAA has stated that the arbitrator should provide a written opinion and award.\textsuperscript{174} This opinion should recite the facts and reasoning for any conclusions made. The NAA also suggests that the arbitrator identify and deal with all statutory, common law or contractual issues raised. Similarly, JAMS also requires that an award include a “concise written statement of the reasons for the Award, stating the essential findings and conclusions on which the award is based.”\textsuperscript{175} In determining the merits, “the arbitrator shall be guided by the rules of law agreed upon by the parties,” or without such an agreement, “the arbitrator will be guided by the law or the rules of law that the arbitrator deems to be most appropriate.”\textsuperscript{176}


\textsuperscript{172} \textit{Id}.

\textsuperscript{173} \textit{Id}.


\textsuperscript{175} JAMS Employment Arbitration Rules and Procedures.

\textsuperscript{176} \textit{Id}.
One court considered this line of reasoning before it upheld an arbitrator’s decision.\footnote{Moorning-Brown v. Bear, Stearns, No. 99 CV 4130 (GBD), 95 FEP Cases 110, 112-14 (S.D.N.Y. January 5, 2005).} The discharged employee alleged that his claims of discrimination, retaliation, and related state claims submitted to arbitration could be litigated in court because the arbitration panel failed to issue a decision setting forth its reasons for the award. The failure to issue an opinion suggested that the panel manifestly disregarded the law and that the panel was biased against the discharged employee.\footnote{Id.} However, because the panel was not required to provide explanation of its award, the court held that the arbitral award had to be confirmed if even a barely colorable justification for it can be found. Since the employee did not identify any specific law that the panel disregarded, the reviewing court decided that it could not examine the evidentiary record, other than to discern whether colorable basis existed for award.

The form of the award may affect its enforceability. In light of strong evidence that an employee was dismissed because of his age, the Second Circuit found that the arbitration panel ignored the law or the evidence or both.\footnote{Id. at 201 (citing George Nicolau, Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners, 1 U. Pa. J. Lab. & Emp. L. 175, 183 (1998)).} Since the arbitrators did not explain their award and the evidence suggested that there was discrimination, the court considered the panel’s failure to explain the award in refusing to enforce the award. Unfortunately, the court noted that the arbitrators were expressly advised that they are not required to follow the law and need not give reasons for their determination.\footnote{Id., 148 F.3d at 201-203}
Relief Available

The Supreme Court’s reliance on arbitration as a valid alternative forum to pursue statutory rights of employee rests in large part on the availability of the same relief as would be available in court. The Supreme Court approved the arbitration of an age discrimination claim in *Gilmer* in part because those arbitrators had the power to fashion equitable relief.\(^{181}\) The NYSE rules applicable to that arbitration did not restrict the types of relief an arbitrator could award, but merely refer to “damages and/or other relief.”\(^{182}\)

Since its decision in *Gilmer*, the Court has held generally that procedural questions “which grow out of the dispute and bear on its final disposition” are presumptively for the arbitrator, not a judge, to decide.\(^{183}\) More specifically, despite plaintiffs’ allegations that the limited remedies in an agreement to arbitrate were inconsistent with their federal statutory rights, the court may still compel arbitration.\(^{184}\) The *PacifiCare* Court declined to construe the arbitration agreement and determine in advance whether the bar on punitive damages prohibited treble damages, refusing to speculate that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt.\(^{185}\) The Court compelled arbitration, and expected the arbitrator to decide whether the agreement barred treble damages.

\(^{181}\) 500 U.S. at 26-35.

\(^{182}\) 2 N.Y.S.E. Guide Para.2627(e), p. 4321 (Rule 627(e)).


\(^{185}\) 538 U.S. at 406-07.
which were available under federal law. Arbitration was compelled because “we do not know how the arbitrator will construe the remedial limitations.”

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

More specifically, the NAA policy states that “[r]emedies should be consistent with the statutory, common law or contractual rights being applied and with remedies a party would have received has the case been tried in court,” which could be more beneficial than contractual remedies. This authority should include allowance for the award of attorney’s fees as a remedy, “in accordance with applicable law or in the interests of justice.” The NAA suggests that if the remedial authority is unfairly restricted, the arbitrator should not agree to the appointment. Specific limitations on remedies under an arbitration agreement may cause more concern for a court asked to enforce that agreement. Under the AAA’s rules, an arbitrator “may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that

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186 Id. See also, Johnson v. Long John Silver’s Restaurants Inc., 320 F. Supp. 2d 656 (M.D. Tenn. 2004)(court does not have authority to decide whether contract permits class arbitrations).


would have been available to the parties had the matter been heard in court."\(^{189}\) The JAMS rules include similar language.\(^{190}\) According to JAMS, the written Award also must include a statement regarding the relief awarded for each claim.

Since the Supreme Court’s decision in Gilmer, the adequacy of arbitral remedy has been raised by employees in ten district cases and prevailed three times in post-Gilmer decisions.\(^{191}\) Some arbitration agreements expressly limited the arbitrator’s remedial authority by curtailing statutory damages that the law permits as a recovery to a successful complainant, while others challenged the customary practice of denying attorneys’ fees to prevailing complainants, a tendency that contrasted with the approach taken by most courts.

Some courts may leave it to the arbitrator to decide if any restrictions on his or her authority render the process invalid. Even before the Supreme Court’s decision in Green Tree, the Third Circuit had held that the validity of shortened limitations periods and limitations on remedies was for the arbitrator to decide.\(^{192}\) Similarly, a former employee’s claims for alleged violations of federal, state and city law were stayed pending arbitration, despite her contentions that arbitration clause was unconscionable.\(^{193}\) The reviewing court refused to consider the employee’s argument that any recovery from an arbitrator would inevitably be smaller because the issue of arbitration clause's enforceability rests exclusively with arbitrator. The arbitration clause explicitly provided that the arbitrator had exclusive jurisdiction to resolve any dispute as

\(^{189}\) Available at www.adr.org.

\(^{190}\) JAMS Employment Arbitration Rules and Procedures.

\(^{191}\) LeRoy, supra note 30, at 306-07.

\(^{192}\) See Great W. Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir. 1997).

to whether “all or any part of this Agreement is void or voidable.” In addition, the employee offered no basis for assuming that any damage recovery would be more limited in arbitration.

**Injunctive Relief**

As part of their claims, employees often seek injunctive relief, such as an order to reinstate or to stop discriminating. Injunctive relief may be more limited in the arbitration process. In appropriate circumstances, a court may order the enforcement of a prior arbitration award as a means of resolving a subsequent labor dispute. A court will only do so, however, when an employee can justify bypassing the normal grievance procedures. Such enforcement is available only if the award was intended to have prospective effect, and “it is beyond argument that there is no material factual difference between the new dispute and the one decided in the prior arbitration.” Without such narrow circumstances, the reviewing court will require the parties to proceed anew through the contract grievance procedure. If the employee fails to show a new and identical dispute, a court will not enforce the previous arbitration award.

The limitations of traditional arbitration as a source of future relief is illustrated by the case of an arbitration award which found that a hospital's staffing of nurses on a particular floor violated the labor contract's nursing standards provision. The union attempted to bypass the

194 7 WH Cases2d at 1609.
195 **Id.** See also Shore v. Groom Law Group, 877 A.2d 86 (D.C.Ct. App. 2005) (award enforced despite lack of award for attorneys' fees and lost wages).
196 See, e.g., Boston Shipping, 659 F.2d at 4.
197 **Id.**
199 Massachusetts Nurses Ass'n v. North Adams Reg’l Hosp., 461 F.3d 1195, 1197-99 (1st Cir. 2006).
contractual grievance procedure and obtain direct judicial relief for subsequent alleged violations of the same contract provision by a public hospital. The cease and desist order in the first arbitration award was meant to be prospective, and the new allegations involved the same floor. However, the court sent the union back to the grievance procedure rather than enforcing the first arbitration award, based on the passage of 3 years and the complex variables involved with hospital staffing.\textsuperscript{200} In part because the hospital had begun making systemic changes that could affect those variables, the union failed to show that there was no material factual difference between the new dispute and the one decided in the prior arbitration.\textsuperscript{201}

An arbitrator may also feel limited in his or her ability to order reinstatement of an employee under certain circumstances. For example, an arbitrator properly found that a discharged employee's subsequent retirement rendered reinstatement beyond the arbitrator’s authority.\textsuperscript{202} The arbitrator had found that the employee had been unjustly discharged, but the appropriate remedy could not include reinstatement since the employee had retired and consequently withdrawn from the bargaining unit. The employee had argued that the arbitrator’s failure to reinstate her was a violation of law or public policy.

**Punitive Damages**

One specific limitation that can undermine the viability of an arbitration program is a limitation on an arbitrator’s authority to award punitive damages.\textsuperscript{203} This issue has not been heard before.

\textsuperscript{200} \textit{Id.}

\textsuperscript{201} \textit{Id.}

\textsuperscript{202} \textit{In re Auto Workers Local 2350 v. California State Employees’ Ass’n}, No. S-05-1327 WBS EFB, 180 LRRM 3009, 3010-12 (E.D. Cal. October 12, 2006).
by the Supreme Court, although it has indicated that the parties' agreement as to punitive damages in an arbitration agreement is generally enforceable. Several courts have ruled that agreements prohibiting or limiting the award of punitive damages in arbitration are enforceable. In contrast, the Ninth Circuit and several state courts have ruled that limitation of punitive damages in arbitration agreements is unconscionable.

Appellate courts have followed the Supreme Court’s PacifiCare reasoning. The arbitration of FLSA claims was compelled even though the arbitration procedure’s terms and remedial limitations appeared to be facially inconsistent with the FLSA statutory claims being asserted. Rejecting any appearance of judicial hostility to arbitration, the court wanted the arbitrator to have an opportunity to protect the statutory rights of the claimants, because the parties had conferred on the arbitrator the authority to decide statutory claims. The court assumed that an arbitrator has the authority to enforce substantive statutory rights, even if those rights are in conflict with contractual limitations in the agreement that would otherwise apply. The Eighth Circuit had previously suggested that it might uphold limitations on remedies, such as a clause limiting punitive damages to $5,000.

The unavailability of statutory damages in arbitration has caused concern for some courts. For example, one agreement was not enforced due to its failure to provide for all remedies available in a judicial forum. The agreement specifically limited available remedies to “actual direct damages” and expressly precluded parties from seeking “punitive, exemplary,

203 Randall, supra note 88, at 211.
204 Bailey v. Ameriquest Mortgage Co., 346 F.3d 821 (8th Cir. 2003).
205 Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 681 n.6 (8th Cir. 2001).
indirect, special, consequential or incidental damages."207 Those remedies were inadequate where the state statute which the employees sought to enforce provided for statutory penalties against employers that violated the act and punitive damages for an employee who could prove a retaliatory discharge claim. State courts have similarly severed unconscionable limitations on damages found in agreements to arbitrate employment disputes.208

Class Actions

The preference for arbitration expressed in Circuit City has been extended to class actions. This extension of the obligation to arbitrate to cover claims of class members raises serious questions about the statutory rights of those class members. If treated as a class action, the arbitrator need not make any finding as to whether the individual class members assented to arbitration or whether the arbitration agreement was conscionable for them.

The Fourth Circuit recently upheld the arbitration of FLSA claims on behalf of a class despite these questions.209 That court allowed the arbitration of claims of a class of managers seeking coverage by the FLSA despite the FLSA’s "opt-in" class provision, providing that “[n]o employee shall be a party plaintiff to any . . . action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”210

207 Id.

208 Zuver v. Airtouch Communications Inc., 153 Wash.2d 293 (Wash. 2004)(severing waiver of all rights to recover punitive or exemplary damages).


Instead of requiring the arbitrator to apply this provision, the court upheld the arbitrator’s application of the "opt-out" provision of the AAA Class Rules. This application bound class members to the arbitrator’s decision unless they affirmatively opted out of the class.

Similarly, another appellate court enforced the employer’s agreement to arbitrate as a bar to statutory rights brought as a class action, finding that the employees’ class and individual discrimination claims against their employer are subject, under Georgia law, to mandatory dispute resolution policy and its modifications.211 The agreement to arbitrate was enforced despite contentions that policy was substantively unconscionable in part because it prohibited class actions, where fact that certain litigation devices may not be available in arbitration was found to be “part and parcel” of arbitration’s ability to offer simplicity, informality, and expedition.212

Arbitration agreements that deny class action relief appear to be an increasing subject of litigation, especially when the substantive claim involves the FLSA.213 One researcher found that a majority of courts have concluded that arbitration of a class’s claims does not impair the rights of employees.214 These courts take support from dicta in Gilmer’s which states that "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."

211 438 F.3d at 1371-72.
212 Id.
213 LeRoy, supra note 30, at 320.
214 Id.
Assessment of Costs

Like limitations on remedies, the burden of arbitration costs and attorney’s fees could infringe on an employee’s right to proceed with a statutory-based claim. Under JAMS rules, the award of the arbitrator may allocate arbitration fees and arbitrator compensation and expenses, unless such an allocation is expressly prohibited by the parties’ agreement or by applicable law.\textsuperscript{215} The Award may also allocate attorneys’ fees and expenses and interest if provided by the parties’ agreement or allowed by applicable law.

Unless the parties have agreed to a different allocation, each party pays its pro-rata share of JAMS fees and expenses. Fees and expenses must be deposited prior to the hearing. JAMS rules indicate that if the arbitration arises from an agreement that is required as a condition of employment, the employee may only be required to pay the initial JAMS case management fee. But JAMS does not preclude an employee from contributing to administrative and arbitrator fees and expenses.

On the issue of fees, the Task Force on Alternative Dispute Resolution in Employment recommended that an employer reimburse an employee for at least a portion of his or her attorney’s fees, and stated that an arbitrator “should have the authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law or in the interests of justice.”\textsuperscript{216}

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

\textsuperscript{215} JAMS Employment Arbitration Rules and Procedures.

\textsuperscript{216} Due Process Protocol for Mediation and Arbitration of Statutory Employment Disputes.
even filing a case.”

Similarly, the National Consumer Law Center concluded that “high arbitration costs favor companies and hurt consumers by deterring valid claims.”

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

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

The cost-allocation issue may have changed after Gilmer. Only one case presented the issue before 1991, but forty cases were observed in the post-Gilmer period. Eight of these cases


218 Id. at 730.

219 Id. at 733.

220 Id. at 734.

(twenty percent) favored employees. After Circuit City, cost-shifting remained an effective issue for employees, succeeding in five of twenty-one cases, or 23.8% of the time.

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

The Supreme Court's decision in Green Tree may show that access to courts jurisprudence turns on constitutional issues and the ability of a government institution to pass some of its costs onto litigants; its arbitration holdings focus on protection of statutory rights and the legitimacy of private agreements which may interfere with Congressional objectives. Nonetheless, the Court's willingness to inquire into a party's financial situation to evaluate access to an arbitral forum (with the possible result that the party may then utilize the courts), but not to the judicial system, suggests a bias against arbitration.

Cost Sharing

Opinions differ as whether an arbitration agreement validly can require or allow an arbitrator to place some or even all of the costs of arbitration on the employee. The Supreme

222 LeRoi, supra note 30, at 306

223 Green Tree, 531 U.S. at 84-86.

224 Id.

Court has shaped the parameters of this discussion in a case which upheld arbitration of a consumer’s claim. Where a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.\textsuperscript{226} Some showing of individualized prohibitive expense is necessary to invalidate an arbitration agreement, but did not decide how detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence.\textsuperscript{227}

In contrast to the support of arbitrator discretion in \textit{Green Tree}, some lower courts have expressed concern about the issue of fees and costs for employees who are parties to arbitration agreements. The Circuit Court for District of Columbia raised the issue of costs in holding that an arbitration agreement which required an employee to pay for an arbitrator would “undermine Congress’\textquoteleft s intent to prevent employees who are seeking to vindicate statutory rights.”\textsuperscript{228} The \textit{Cole} court suggested that employers should bear all the costs of arbitration except for a reasonable “cost of filing fees and other administrative expenses.”

More recently, the same court refused to vacate an arbitration award which held an employee responsible for nearly $8,400 in forum fees, even though she prevailed in part on the merits.\textsuperscript{229} That arbitration panel did not manifestly disregard the law by ordering a female former employee who prevailed on one common-law claim but not on her statutory claims to pay

\begin{footnotesize}
\textsuperscript{226} \textit{Green Tree}, 531 U.S. at 84-86.

\textsuperscript{227} \textit{Id}.

\textsuperscript{228} \textit{Cole}, 105 F.3d at 1479-81.

\textsuperscript{229} \textit{LaPrade}, 246 F.3d at 705.
\end{footnotesize}
12 percent of arbitral forum fees. The court relied on the substantial possibility that entire assessment against her covered only costs associated with her non-statutory claims and the potential that the fees may have included expenses beyond the arbitrator’s fee. Similarly, the same court has refused to extend the Cole reasoning to cases involving non-statutory state law.

Not all courts are willing to impose significant costs on employees when an arbitrator hears a statutory employment claim. Several courts have held that a cost-sharing provision denies an employee from having an “accessible forum” for vindicating statutory rights. One court specifically found that a cost-sharing provision would deny a plaintiff from having an “accessible forum” for enforcing statutory rights.

A provision of an arbitration agreement requiring each party to pay its own costs and attorneys’ fees was invalidated, regardless of the outcome of the arbitration. The provision ran counter to the provisions of Title VII and ADEA permitting an award of fees and costs to a prevailing party. The agreement was unenforceable because it precluded the arbitrator from awarding fees to a prevailing employee. The requirement that the agreement must be read in manner consistent with federal law did not make the agreement enforceable, since the agreement

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230 Id.
233 Shankle, 163 F.3d at 1233.
235 Id.

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also stated: “[i]n the event of any inconsistency between this Agreement and the statutes … the terms of this Agreement shall apply.” The Seventh Circuit has reached a similar conclusion regarding an employee’s ability to recover attorney’s fees if she prevails.237

A second court has held that an employer could not require the arbitration of an employee’s claim in part because the arbitration agreement required that the employee pay a filing fee of up to $125 and to share equally with employer all the other costs besides the costs of the first hearing day.238 The possibility that an employee could be required to pay thousands of dollars in arbitration costs made the agreement to arbitrate unenforceable.239

Some courts take more of a case-by-case approach when reviewing cost-splitting provisions.240 This may be the more common approach.241 For example, one court considered the amount of money that would ultimately be paid by the claimant, and the fact that the overall cost of arbitration would be equal to or less than the cost of litigation in court.242 In finding that the fee-splitting provision did not automatically render the arbitration agreement unenforceable, the court considered in part whether the expected cost differential between arbitration and court

236 Id.

237 McCaskill v. SCI Management Corp., 298 F.3d 677, 679 (7th Cir. 2002) (arbitration agreement that prohibits recovery of attorneys’ fees regardless of outcome is unenforceable).

238 Ferguson, 298 F.3d at 782-83.

239 Id.

240 See Blair v. Scott Specialty Gases, 283 F.3d 595 (3d Cir. 2002) (remanding case to allow discovery on the estimated costs and the plaintiff’s ability to pay).


litigation was so substantial as to deter an employee’s filing of a claim. The court focused on the amount of money that claimant would ultimately pay.

The actual amount of costs that could be imposed on an employee may not be significant enough to undermine the agreement to arbitrate. For example, a district court in Pennsylvania held that an employee could be compelled to arbitrate his discrimination claim even though the arbitration agreement required that he incur certain costs and fees. The court relied on the limited expenses he would absolutely incur: his $140 share of initial arbitration filing fee, which was $110 less than he spent initiating civil action. The other costs and expenses that he could incur were “wholly speculative.”

Similarly, Circuit City’s arbitration program was upheld after the agreement no longer required a substantial up-front payment within three months, which was likely to deter a potential claimant. Moreover, the employee was not automatically obligated to pay a share of the arbitration costs – only when so ordered by the arbitrator. The agreement was also viable because a claimant's fee exposure was limited to the greater of $500 or three percent of his most recent salary. These costs were seen as inexcessive where the normal costs in civil litigation, including deposition originals can easily exceed that amount. Thus, the employee’s theoretical exposure to costs under the arbitration agreement was no greater than, and perhaps less than, potential civil litigation costs in the event of an unsuccessful result.


Employee’s Ability to Pay

The issue of cost assessment may be influenced by the employee’s ability to pay, which is not considered in a court action. One appellate court has enforced arbitration agreements despite employees’ claims that the possibility of a large assessment arising from the arbitration of their claims prevented them from attempting to vindicate their rights.245 One employee was unsuccessful in showing that the arbitrator inappropriately concluded that she was financially able to pay any assessment, where the panel could reasonably view that the evidence presented by that employee was an incomplete portrait of her financial resources.246

The amount of set costs relative to the employee’s ability to pay may be considered. A provision in an arbitration agreement that required the discharged employee to pay an initial, non-refundable filing fee of $500 to the AAA, an additional filing fee of $2,750, a case-filing fee of $1,000, an additional charge of $150 for each day of hearing, and half of the cost of arbitrator would deny an employee an opportunity to vindicate her statutory rights.247 The court considered the employee’s period of unemployment which followed her dismissal, as well as the difference between her earnings and her expenses, in finding that the cost-shifting provision interfered with her statutory rights.248

245 LaPrade, 246 F.3d at 705-6; Bradford, 238 F.3d at 552-54; Adkins v. Labor Ready Inc., 303 F.3d 496 (4th Cir. 2002)(ignoring claim that arbitration costs were anticipated to be high compared to the relatively small amounts expected to be recovered for each individual claimant).

246 LaPrade, 246 F.3d at 705-6.

247 Spinetti, 304 F.3d at 216-17.

248 See also Clary v. The Stanley Works, No. 03-1168-JTM, 8 WH Cases2d 1649, 1655 (D. Kan. 2003)(factual issue as to whether costs of travel and arbitrator selection are prohibitive to preclude employee's access to arbitral forum).
Another arbitration agreement that required the parties to bear their own costs and expenses, including arbitrator fees and attorneys' fees, was found to be substantively unconscionable as to two discharged heavy-equipment operators. The agreement was extremely one-sided and unreasonably favored the large multinational employer, in part because the state law provided that a court “shall award reasonable attorneys' fees and costs to prevailing plaintiff.”

That agreement also was one-sided because the employer did not accept any general restriction of relief for any arbitration claim it might assert against its employees. The provision was concerning where the rates of prospective arbitrators ranged from $800 to $1,000 per day, and the employees’ status as discharged refinery workers would not permit them to meet this financial burden. Therefore, they were effectively denied recompense for employer's alleged misconduct, and the employer never indicated that it would pay for arbitration fees and costs.

More than a bald allegation regarding the impact of costs on the employee may be necessary to avoid arbitration. For example, one court refused to allow an employee to avoid arbitration based on his contention that he could not afford to pay the anticipated costs of arbitration. The contention was insufficient where it was “based on conjecture as to amount of those costs” because costs would depend on his financial situation and outcome of case. The court then refused to invalidate the arbitration agreement in advance of arbitration. A possibility

\[249\] Alexander, 341 F.3d at 260.
\[250\] Id. See also Ball v. SFX Broadcasting Inc., 165 F. Supp. 2d 230 (N.D.N.Y. 2001)(agreement unenforceable if employee may be responsible for significant arbitrators' fees or other costs that would not be incurred in judicial forum); Gourley v. Yellow Transportation LLC, 178 F. Supp. 2d 1196 (D. Colo. 2001)(arbitration agreement requiring employees to share costs of arbitration is unenforceable against four employees who could not afford costs).
that the employee could be required to pay a share of arbitration costs, including part of arbitrator's fee, was not sufficient reason to invalidate the arbitration clause. Such arbitration-related expenses were deemed to be acceptable so long as they did not render the arbitral forum inaccessible to a statutory claimant.

Similarly, a former employee's claims for alleged violations of federal and state law were stayed pending arbitration, despite her contentions that arbitration clause was unconscionable. The employee failed to establish that fees she would have to pay for arbitration effectively would deny her adequate and accessible substitute forum" in which to resolve her statutory rights, much less that it renders entire agreement to arbitrate unenforceable.

Relying on the Fourth Circuit’s order to arbitrate an ADEA claim in Bradford, the court focused on 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.” The employee failed to make such a particularized showing, having failed to submit any proof as to her ability to pay or proffered any evidence regarding her expected costs in litigation for purposes of analyzing the cost differential between arbitration and litigation.

Loser pays

Some arbitration agreements may require that either an employer or an employee pay the costs of the other side if they are unsuccessful in the arbitration. At first glance, such a provision appears to be in conflict with the Supreme Court’s position in Christiansburg Garment Co. v. EEOC, where it held that Title VII's provision for awarding costs and attorney fees to the

253 Id.
prevailing party only allowed a prevailing defendant to be awarded attorney fees where the plaintiff's law suit was frivolous.\textsuperscript{254} The Court reasoned that to allow the routine award of attorney fees to prevailing defendants would undermine Title VII by deterring plaintiffs from bringing claims.

Some circuit courts have followed this logic in refusing to enforce arbitration agreements which allow an arbitrator to require that an employee pays the employer’s attorney’s fees if the employee’s claim is unsuccessful. A loser-pays provision was not enforced by the Sixth Circuit because the costs were so high that they would deter an employee who sought to pursue a sexual harassment action against her employer or similarly situated employees from exercising their right to arbitrate.\textsuperscript{255}

The Sixth Circuit’s refusal to enforce an agreement to arbitrate was based on the costs under AAA rules prevailing on the date that the employer filed its motion to compel her to arbitrate the claim, as well as the employee's out-of-pocket costs. That agreement to arbitrate was not enforced based on the possibility of an award of fees and expenses by the arbitrator to the employee, where the agreement did not state that the cost provision could be severed. The Eleventh Circuit has reached a similar conclusion with respect to equal sharing of the costs of arbitration and all fees imposed by an arbitrator.\textsuperscript{256}

In a sexual harassment claim, the Seventh Circuit refused to compel arbitration under an arbitration agreement that mandated each party to pay its own attorneys' fees regardless of

\textsuperscript{254} 434 U.S. 412, 416-17 (1978).

\textsuperscript{255} Cooper v. MRM Investment Co., 367 F.3d 493, 504-6 (6th Cir. 2004).

\textsuperscript{256} See Perez v. Globe Airport Security Services Inc., 253 F.3d 1280 (11th Cir. 2001)(provision stating that costs of arbitration and fees imposed by arbitrator shall be shared equally by employee and employer not enforced).
outcome. The mandate prevented the claimant from effectively vindicating her rights in arbitral forum by preemptively denying her remedies authorized by Title VII and was thus unenforceable. The employer had argued that the provision regulated only what the employee was responsible for paying and not what she may be awarded and that it is thus possible for the arbitrator to award her attorneys' fees consistent with the agreement so long as she uses such award to pay her attorneys.

As in other circuits, an arbitration agreement provision that “other than arbitrator's fees and expenses, each party shall bear its own costs and expenses, including attorney's fees” was found to be substantively unconscionable. Application of this provision to an employee's discrimination claims arising under both Title VII and Virgin Island statutes was inappropriate where federal law ordinarily allows prevailing plaintiffs to recover their attorneys' fees. On remand, the lower court concluded that the provision makes the arbitral forum prohibitively expensive for the employee. The prospect that the employee could pay the entire amount of the expenses could chill her willingness to bring the claim.

Some courts have upheld provisions in arbitration agreements that appear to have been designed to deter employees from pressing claims. The Eleventh Circuit, relying on Green Tree, has enforced an arbitration agreement that contained "loser pays" provisions. That court

257 McCaskill v. SCI Management Corp. 285 F.3d 623, 625-26 (7th Cir. 2002).


259 Id.

260 See Musnick, 325 F.3d at 1259-60. See also Manuel v. Honda R & D Ams., Inc., 175 F. Supp. 2d 987 (S.D. Ohio 2001) (enforcing arbitration provision that imposed arbitrator's fees and other costs on losing party).
required a plaintiff to arbitrate a Title VII claim pursuant to an arbitration agreement that
provided for the award to costs and attorney fees to the prevailing party.

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

Some courts do not automatically disallow an arbitration agreement under which
employees must pay their own costs and attorney's fees and half of costs of arbitrator. Where
there was assent, clear notice, and no unfair surprise, mere inequality in bargaining power did not
make the agreement automatically unconscionable. One employee had to meet the high
threshold of proving that the provision prevents him from raising his claims against the employer
under the ADEA and state law. To avoid the cost provision in the agreement, the employee

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262 Faber v. Menard Inc., 367 F.3d 1048, 1051-52 (8th Cir. 2004).
would need to provide evidence to estimate the length of the arbitration and corresponding amount of arbitrators' fees, as well as evidence of his particular financial situation.\textsuperscript{263}

Some courts will not resolve the issue of cost and fee assessment until the case has been heard by the arbitrator. For example, a federal district court in Tennessee refused to determine whether the fee-shifting provisions in the arbitration agreement would allow for effective vindication of the employee’s rights.\textsuperscript{264} The discovery and fee-shifting clauses provided for arbitrator discretion, and it was unclear how an arbitrator would apply these clauses. Therefore, the court declined to decide whether the agreement was unenforceable.

By ensuring the impartiality of the arbitrator and the thoroughness of the process, employers can better ensure that the results of arbitration will be enforceable in court. In addition, employers should ensure that the arbitration program provides employees with substantially similar remedies and allocation costs as they would experience in court. By structuring the arbitration process in this way, employees will be significantly limited in their ability to relitigate a claim in court after completing the arbitration process.

\section*{V. Effect of Fair Arbitration on Litigation}

If an employer establishes that the employee has agreed to arbitration and that process is fair, that employee’s litigation in court will at least be stayed until the arbitration has been

\textsuperscript{263} See also Wilks, 241 F. Supp. 2d at 864-65 (in FLSA claim, enforce arbitration agreement under which employee's share of arbitration filing fee limited to $125, employer pays all of arbitrator's compensation).

completed in accordance with the terms of the agreement. Some courts will dismiss the employee’s claim rather than issue a stay. The Green Tree decision suggests that a district court’s order compelling arbitration and dismissing all other claims is ‘final’ and therefore appealable. Several courts have held that a district court's decision to dismiss the action without prejudice and order the parties to arbitrate was a final, appealable decision in accordance with Green Tree.

Bar of Judicial Relief for Statutory Claims

Most employers adopt an arbitration program to avoid litigation in federal court. At the same time, if the program is not carefully constructed, the employee may still be free to litigate an employment law claim despite the existence of an arbitration program. Litigation in federal court may not be the most attractive option for employees. Although the Equal Employment Opportunity Commission (EEOC) has initial jurisdiction of most employment discrimination claims, it sues on less than one percent of all complaints. For the tens of thousands of complainants not represented by the EEOC, plaintiff lawyers take just five percent of these employment discrimination complaints. Even if an employee succeeds in finding legal representation, he or she faces the congestion of court dockets.


266 Choice Hotels Intern., Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709-10 (4th Cir. 2001); Green v. Ameritech Corp., 200 F.3d 967, 973 (6th Cir. 2000)(dismiss case when all of the issues raised in the district court must be submitted to arbitration).

267 Interactive Flight Technologies, Inc. v. Swissair Swiss Air Transport Co., 249 F.3d 1177 (9th Cir. 2001); Employers Insurance of Wausau v. Bright Metal Specialties, Inc., 251 F.3d 1316 (11th Cir. 2001); Blair v. Scott Specialty Gases, 283 F3d 595 (3d Cir. 2002).

268 LeRoy, supra note 30, at 298.
It is estimated that less than five percent of civil complainants have their case go to trial and result in a verdict.\textsuperscript{269} A typical employment lawsuit takes more than two years to reach this terminal point, and costs the parties over $50,000. Then, federal appeals courts reverse forty-four percent of cases won by employees.

In contrast to federal litigation, complainants in a study of AAA cases from 1993-1995 won sixty-three percent of their cases. A sample of arbitration cases reviewed in the federal courts since the decision in \textit{Circuit City} contained sixty-nine decisions [fifty-four district and fifteen appellate cases]. District court enforcement was essentially unchanged before and after \textit{Circuit City}, at sixty-seven percent. The rate slightly declined for court decisions that allowed employees to proceed with lawsuits (dismissal of arbitration fell from twenty-eight percent to twenty-four percent). In apparent response to \textit{Circuit City}, appellate courts registered a sharp gain in enforcement rulings (from forty-nine percent to seventy-three percent). However, this finding is based on a very small sub-sample of fifteen cases. Three cases (twenty percent) denied arbitration.\textsuperscript{270}

The U.S. Supreme Court had held that an employee's rights under Title VII are not susceptible to prospective waiver.\textsuperscript{271} Yet in \textit{Circuit City Stores, Inc. v. Adams}, that same Court held that the FAA applies to most arbitration agreements.\textsuperscript{272} Federal statutory claims may be the

\textsuperscript{269} \textit{Id.}
\textsuperscript{270} LeRoy, \textit{supra} note 30, at 299.
\textsuperscript{272} 532 U.S. 105 (2001).
subject of arbitration agreements enforceable pursuant to the FAA, because the agreement only
determines the choice of forum.\textsuperscript{273}

One researcher has found that the waiver issue has enabled employees in seven of thirty-
two post-Gilmer decisions (21.9 percent) to avoid arbitration. The waiver argument was
effective when courts used the knowing and voluntary standard. This finding may seem to be at
odds with Gilmer, insofar as the Court rejected the plaintiff's waiver argument. Cases since that
decision seem to distinguish the fact that Gilmer was an experienced businessman.\textsuperscript{274}

Arbitration agreements have been enforced, and litigation in federal court blocked, under
an agreement providing that “any dispute or controversy arising out of or relating to any
interpretation, construction, performance or breach of this Agreement, shall be resolved
exclusively by binding arbitration.”\textsuperscript{275}

Some conflicts still exist among the circuits. While some courts have enforced
agreements to arbitrate federal statutory claim,\textsuperscript{276} the Ninth Circuit has held that employment
rights under the FLSA and California's Labor Code are “public rights.”\textsuperscript{277} An arbitration

\textsuperscript{274} LeRoy, \textit{supra} note 30, at 305.
\textsuperscript{275} Oblix, 374 F.3d at 450-51. See also, \textit{Butler Manufacturing Co. v. Steelworkers}, 336 F.3d 629
(7th Cir. 2003)(arbitrator had authority to hear FMLA claim under contractual provision that
assured equal employment opportunity “in accordance with the provisions of law”).
\textsuperscript{276} Adkins v. Labor Ready, Inc., 303 F.3d 496, 506 (4th Cir. 2002) (FLSA claims may be
resolved in mandatory arbitration); \textit{Kramer v. Smith Barney}, 80 F.3d 1080, 1084 (5th Cir. 1996)
(ERISA claims arbitrable).
\textsuperscript{277} See, e.g., Albertson's, Inc. v. United Food & Commercial Workers Union, 157 F.3d 758, 761
(9th Cir. 1998).
program’s all-inclusive bar to such administrative actions was contrary to federal and state precedent.⁷⁷ Most courts, however, require that an employee rely on arbitration to resolve even statutory claims, as long as the agreement to arbitrate is conscionable and the process is fair.

VI. Judicial Review of Arbitration Awards

Assuming that an arbitration agreement passes the tests of conscionability and fairness, the question remains as to the scope of a court’s review of an arbitration award. Section 2 of the FAA states that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁷⁹ The Supreme Court has long established a practice of limiting the review of arbitration decisions on the merits.⁸⁰ In 1987, the Supreme Court reaffirmed this practice in United Paperworkers International Union, AFL-CIO v. Misco.⁸¹ Under that decision, a reviewing court does not have the authority to overturn an arbitration award by

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⁷⁷ Davis, 485 F.3d at 1078-80.


⁸⁰ United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)(order arbitration unless clause is not susceptible of interpretation that covers asserted dispute); United Steelworkers v. American Manufacturing Co., 363 U.S. 564, 568 (1960)(if collective bargaining agreement provided that dispute should be submitted to arbitration, underlying question of contract interpretation is for the arbitrator); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960)(refusal of courts to review merits of an arbitration award is the proper because federal policy of settling labor disputes by arbitration would otherwise be undermined).

asserting a public policy without substantiating its existence within existing laws and legal precedents as a “well defined and dominant” policy as opposed to a “general consideration of supposed public interests,” 282

second-guessing the arbitrator’s fact-finding, particularly insofar as the conclusion that the asserted public policy would be violated by the employee’s reinstatement depends on drawing factual inferences not made by the arbitrator, 283 or

second-guessing the arbitrator’s reasonable construction of the “just cause” clause, and of the rules of evidence and procedure appropriate to a “just cause” determination, under the collective-bargaining agreement. 284

Any public policy relied upon to overturn an arbitration award must be “explicit,” “well defined,” and “dominant,” and must be ascertained by reference to the laws and legal precedents, not from general considerations of supposed public interests. 285 A reviewing court must determine “whether the award itself, as contrasted with the reasoning that underlies the award, ‘create[s] [an] explicit conflict with other laws and legal precedents’ and thus clearly violates an identifiable public policy.” 286

Following its decision in Misco, the Supreme Court reaffirmed its commitment to arbitration in its Gilmer decision. 287 There, the court held that an employee with a claim arising under the ADEA would first need to arbitrate that claim before a court could review it. 288

282 Id.

283 Id.

284 Id.

285 Id.

286 Misco, 484 U.S. at 43.

287 500 U.S. at 26-35.

288 Id. Numerous courts have determined that the Gilmer holding is equally applicable to Title VII proceedings. See, e.g., Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482,
the Gilmer Court made no specific findings regarding the ability of arbitrators to interpret statutory protections for employees. The Court only noted that an individual ADEA claimant subject to an arbitration agreement would still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.

Again in 2001, the Supreme Court took the position that federal courts’ review of labor-arbitration decisions is “very limited.” If the arbitrator was “even arguably construing or applying the contract,” the award would be enforced. Only “when the arbitrator strays from interpretation and application,” “effectively ‘dispens[ing] his own brand of industrial justice,’ ” is the decision “unenforceable.” An arbitrator’s “improvident, even silly, fact finding” does not provide a basis for a reviewing court to refuse to enforce the award. At the same time, Circuit Courts reviewing arbitration awards have recognized some nonstatutory bases upon which a reviewing court may vacate an arbitrator’s award, including where the awards are "completely irrational," "arbitrary and capricious," or contrary to an explicit public policy.

1487 (10th Cir. 1994); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700 (11th Cir. 1992); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992).


290 Id. at 509.

291 Id.

292 Id.

293 Hoffman v. Cargill Inc., 236 F.3d 458, 461 (8th Cir. 2001).


295 Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 481 F.3d 813, 819 (D.C. Cir. 2007); Twin Cities Galleries, LLC v. Media Arts Group, Inc. 476 F.3d 598, 600 (8th Cir. 2007).
Public Policy Considerations

Despite the strong deference to the decisions of arbitrators, the Supreme Court will sometimes delve into a deeper evaluation of the award based on public policy. For example, the Court reviewed the reinstatement of an employee by an arbitrator under the exception that makes unenforceable “a collective bargaining agreement that is contrary to public policy.” 296 The Court considered the public policy against drug use by employees in safety-sensitive transportation positions, as embodied in Omnibus Transportation Employee Testing Act and its implementing regulations.

The Court made a determination that the act and its implementing regulations’ policy favoring rehabilitation of employees who use drugs supported the award. The award was upheld because it was consistent with the statutory rules requiring completion of substance-abuse treatment before returning to work and with act’s driving-license suspension requirements and its rehabilitative concerns. In enforcing the award, the Supreme Court also considered that neither Congress nor secretary of transportation had mandated discharge of a worker who twice tests positive for drugs.

The court’s role has been defined as determining “whether the remedy imposed [by the arbitration award] can be fairly and unequivocally shown to violate a well-established public

policy. “297 Focusing on the award and the remedy imposed is the proper “result-oriented approach” the court should take with respect to testing arbitration decisions with public policy. 298

As in the Mine Workers’ case, lower courts have been reluctant to overturn arbitrator’s decisions on public policy grounds. For example, one district court upheld an arbitration award requiring that an employer reinstate a male employee who had been discharged following incident that allegedly constituted “unacceptable and inappropriate harassment of a female office employee.” 299 Despite the recognized strong public policy against sexual harassment that encourages employers to punish inappropriate workplace behavior before it becomes legally actionable, the court upheld the arbitrator’s decision that there was no violation of the employer’s anti-harassment policy.

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


298 Id.

299 Just Born Inc. v. Local 6, No. 02-2626, 90 FEP Cases 1290, 1293-95 (E.D. Pa. December 12, 2002).

Comment [jj56]: Defined EEOC but never EEO, not to my knowledge.
An arbitration award to reinstate an employee who has engaged in offensive behavior will typically be enforced unless the agreement to reinstate violates some public policy. For example, an arbitrator’s award that reinstated a white employee who had been discharged for making a racially offensive remark to a black co-worker was enforced. Even though the employer’s equal employment opportunity policy permitted the employer to discharge the employee, the award did not violate any public policy against discrimination.

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

Public policy may not be strong enough to justify overturning an arbitrator’s award. An employer failed in its appeal of an arbitration award ordering the reinstatement of a violent employee based on the Occupational Safety and Health provision that “[e]ach employer … shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his

300 Tamko v. Roofing Products Inc. v. Local 10711 United Steelworkers of America, 265 F.3d 1064, 1064 (11th Cir. 2001)(upholding arbitration award which reinstated a white employee who had made a single racially offensive comment). See also GITS Manufacturing Co. v. Local 281, 261 F. Supp. 2d 1089 (S.D. Iowa 2003)(enforcing arbitration award reinstating white employee who referred to black employee as “nigger”).

301 Way Bakery v. Truck Drivers Local 164, 363 F.3d 590, 592-93 (6th Cir. 2004).

302 Id.
employees.\textsuperscript{303} The reviewing court found that the policy articulated in OSHA’s general duty clause was insufficiently explicit, well-defined, and dominant.\textsuperscript{304} Similarly, the criminal provision prohibiting the handling of explosive materials by any individual under indictment for a felony, did not bar the employee’s reinstatement because the criminal provision was not implicated by his job duties.\textsuperscript{305}

An employee may also try to rely on public policy to support his rights asserted in arbitration. A pilot was successful both in arbitration and with the reviewing court after he was discharged for refusing to fly a plane because he believed that it would force him to violate a Federal Aviation Administration regulation.\textsuperscript{306} The arbitrator acted within its authority when it recognized an illegality exception to the general rule that an employee first must obey an objectionable order and grieve it later. Even though its arbitrators had the authority to look beyond vague contractual provisions, the public policy standards cited by the airline were not specific, explicit, or well-defined in statute or regulation. Rather, the pilot’s reinstatement was consistent with the FAA’s regulation that the pilot thought he would be violating.

\textsuperscript{303} Independent Chemical Corp. v. Local 807, No. 05-CV-1987 (DLI)(JMA), 179 LRRM 2664, 2668-70 (E.D.N.Y. April 21, 2006).

\textsuperscript{304} Id.

\textsuperscript{305} Id. See also Louis J. Kennedy Trucking Co. v. Teamsters Local 701, No. 05-6005 (JLL), 182 LRRM 2984 (D.N.J. September 17, 2007)(allowing reinstatement of driver with road rage despite federal motor carrier safety regulation prohibiting employer from allowing disqualified drivers to operate commercial vehicles).

Disregard of Law

Like the public policy basis for overturning arbitration awards, arbitration awards can be vacated if they are in “manifest disregard of the law.” 307 More than 30 years ago, the Gardner-Denver Court questioned arbitrators’ competence to decide legal issues. That Court noted that “the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.” 308

Yet in Gilmer, a different Supreme Court stressed that “[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” 309 Even the Cole decision stresses the procedural protections rather than the ability of arbitrators to address and resolve legal questions. 310

Conversely, the availability of judicial review has been used to support an arbitration order even where the process may lack procedural protections for the complaining employee. Courts have specifically held that if there be any procedural inadequacies or unfairness in the application of the arbitration rules in a specific case, judicial review will be available. 311 With the availability of judicial review, one appellate court upheld a trial court’s refusal to permit a

308 Gardner-Denver, 415 U.S. at 57.
309 Gilmer, 500 U.S. at 26-35.
310 105 F.3d at 1486.
311 Seus, 146 F.3d at 185.
deposition of the National Association of Securities Dealers (“NASD”) prior to ordering submission of the dispute to arbitration.  

**Limited Grounds for Reversal**

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

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

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

3) the arbitrator did not arguably construe or apply the contract, in resolving legal or factual disputes.

Serious errors, as well as improvident or silly errors, were not reason to overturn an arbitration award.

In that case, the arbitrator appropriately interpreted the agreement since he quoted from and analyzed the pertinent provisions of the agreement, and at no point did he “say anything indicating that he was doing anything other than trying to reach a good-faith interpretation of the contract.” The arbitrator’s interpretation was not “so untethered from the agreement that it casts doubt on whether he was engaged in interpretation, as opposed to the implementation of his

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312 146 F.3d at 185.

313 *Michigan Family Rest, Inc. v. SEIU Local 517M*, 475 F.3d 746 (6th Cir. 2007).

314 475 F.3d at 750-52.
own brand of industrial justice.”  The court had originally overturned the arbitrator’s award because the arbitrator exceeded his authority by imposing an “additional requirement” not expressly provided in labor contract when he required that any cost-of-living increase provided to nonunion employees must be provided to union employees.  Note that no statutory rights were asserted by the employees seeking the cost of living increase.

Since that decision, the Sixth Circuit has again enforced an arbitration award under the more lax review standard. The court once again held that if an arbitrator appeared to be engaged in interpretation of a collective bargaining agreement, the court must enforce the award. The arbitrator’s decision adequately quoted and applied pertinent provisions of the collective bargaining agreements, and performed a “good faith interpretation of those agreements.”

Clearly, under this standard, arbitrators have a wide range of latitude in interpreting contractual rights of employees.

The Second Circuit has also limited judicial review on statutory grounds. In 1989, that court stated that “[m]anifest disregard of the law . . . refers to error which was obvious and capable of being readily and instantly perceived by average person [who] qualifies to serve as

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315 Id.  See also Hotflame Gas Co. v. Teamsters Local 328, No. 2:06-CV-145, 182 LRRM 2088, 2090 (W.D. Mich. April 4, 2007)(Court should uphold award so long as it would be legally plausible to argue that the award’s outcome is based on an interpretation of the CBA).


317 Id.  See also Dobson Industrial Inc. v. Iron Workers Local 25, No. 06-1023, 181 LRRM 3295 (6th Cir. June 5, 2007)(district court correctly sustained the arbitrator’s decision, which was “arguably construing” the agreement); Poland Spring Corp. v. UFCW Local 1445, 314 F.3d 29 (1st Cir. 2002)(arbitrator could not reduce the discipline for insubordination provided for in CBA).
arbitrator. “Further, “the doctrine implies that arbitrator appreciates existence of clearly governing legal principle but decides to ignore or pay no attention to it.”

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

(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and

(2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.

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

The Ninth Circuit takes a more interventionist view. Under its review of arbitration awards, legally dispositive facts may be so firmly established that an arbitrator cannot fail to recognize them without manifestly disregarding the law. Under that standard for review, the

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318 Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Intern., Ltd., 888 F.2d 260 (2d Cir. 1989).

319 DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821 (2d Cir. 1997).

320 Porzig, v. Dresdner, Kleinwort, Benson, North America, LLC, 497 F.3d 133, 135-36 (2d Cir. 2007).

321 See, e.g., Tanoma Min. Co., Inc. v. Local Union No. 1269, United Mine Workers of America, 896 F.2d 745, 749 (3d Cir. 1990).


323 American Postal Workers Union v. United States Postal Serv., 682 F.2d 1280, 1284-86 (9th Cir. 1982).
court refused to enforce an arbitration decision requiring the Postal Service to reinstate a former employee who had participated in an illegal strike for approximately two hours.\textsuperscript{324} Given those undisputed facts, a conclusion that the employee did not strike would constitute manifest disregard of the law.\textsuperscript{325} Yet even that court has not established an independent "manifest disregard of the facts" ground for vacatur, and does not permit a reviewing court to reexamine the "ultimate weight of [the] evidence".\textsuperscript{326}

Despite the relatively lax attitude of most courts, the EEOC continues to take the position that agreements to arbitrate statutory claims are unenforceable.\textsuperscript{327} The EEOC has stated that arbitration that is not knowing and voluntary deprives individuals of substantial rights provided by Congress, especially where the procedures are unfair and specifically designed not to safeguard statutory rights.\textsuperscript{328} The EEOC's objections to the procedures include the fact that arbitration is not governed by the statutory requirements and standards of Title VII and is conducted by arbitrators given no training and possessing no expertise in employment law.\textsuperscript{329}

Compared to the extensive litigation surrounding the procedural protections afforded by an arbitration program, it is difficult to locate judicial decisions which overturn an arbitration

\textsuperscript{324} Id. at 1283.

\textsuperscript{325} Id. at 1284.

\textsuperscript{326} See, e.g., Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1026 (9th Cir. 1991).

\textsuperscript{327} See, e.g., Duffield v. Robertson Stephens & Co., No. C-95-0109-EFL (N.D. Cal.) (amicus brief filed by EEOC); Cosgrove v. Shearson Lehman Bros., No. 95-3432 (6th Cir.) (amicus brief filed by EEOC).


\textsuperscript{329} Id.
award on legal grounds. This level of review does sometimes result in a court’s refusal to enforce an arbitrator’s award. An arbitration award denying the claims of an employee was enforced, for example, where a reviewing court was inclined to find that arbitrators manifestly disregarded the law or the evidence under the ADEA. As a consequence, the reviewing court reversed the dismissal of the discrimination complaint filed in the district court by the employee, because there is no enforceable award to bar the suit on res judicata principles.

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

Similarly, without any explanation in the award, there may be no arguable or plausible basis for the arbitration panel to rule against an employee. One reviewing court found that an

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330 Halligan 148 F.3d at 201-3.

331 Id.

332 Montes v. Shearson Lehman Brothers, Inc., 128 F. 3d 1456, 1459-60 (11th Cir. 1997).

333 Id. See also Ace Electrical Contractors v. Electrical Workers IBEW Local 292, 414 F.3d 896, 899-900 (8th Cir. 2005)(reversing arbitration decision that contract’s age-ratio provisions were enforceable, applying Minnesota’s Human Rights Act).

employee was entitled to payment of his wages under state law or the contract.\textsuperscript{335} Therefore, the panel's denial of wages was made in manifest disregard of the law.\textsuperscript{336}

Often, even if the applicable statute is considered, the reviewing court will affirm the arbitrator’s award. For example, the Third Circuit affirmed an arbitrator’s award finding that a postal employee was discharged for just cause after allegedly filing an application for workers' compensation benefits that falsely claimed that she suffered a work-related knee injury.\textsuperscript{337} The award was enforced even though, at time of rendering award, the arbitrator was aware of fact that Office of Workers' Compensation Programs (“OWCP”) had granted the employee her workers’ compensation benefits, after reversing its prior finding that employee had not suffered work-related injury. The Court held that the OWCP's factual conclusions did not bind the arbitrator, even though the state statute stated that an action of OWCP in allowing or denying payment is “final and conclusive for all purposes and with respect to all questions of law and fact.”\textsuperscript{338}

An arbitrator’s reliance on federal law provided the reviewing court with grounds for enforcing his award in favor of an employee who had taken leave covered by the FMLA. The arbitrator properly interpreted the FMLA in determining that the employee was wrongfully discharged for absences covered under act, despite his failure to make explicit how the parties' agreement or submissions authorized him to consider the FMLA.\textsuperscript{339} According to that court, an

\begin{comment}[jj64]: Defined earlier in paper.
\end{comment}

\textsuperscript{335} \textit{Id.}

\textsuperscript{336} \textit{Id.} (contrasting \textit{U.S. Energy Corp. v. Nukem, Inc.}, 400 F.3d 822, 831 (10th Cir. 2005) (remanded where two reasonable alternative interpretations of arbitration award were possible).

\textsuperscript{337} \textit{Letter Carriers v. U.S. Postal Service}, 272 F. 3d 182, 185-87 (3d Cir. 2001).

\textsuperscript{338} \textit{Id.}

\textsuperscript{339} \textit{Butler Manufacturing Co. v. Steelworkers}, 336 F. 3d 629, 632-33 (7th Cir. 2003).
arbitral decision constitutes manifest disregard of law only when it orders parties to violate law.\textsuperscript{340} Any alleged misunderstanding of the FMLA by the arbitrator was not considered relevant because the employer agreed to resolve disputes by arbitration.\textsuperscript{341} Rejecting the employer’s argument that the arbitrator lacked authority to interpret the FMLA, the court held that it must enforce the arbitral award “[s]o long as the [arbitrator’s] interpretation can in some rational manner be derived from the agreement, viewed in the light of its language, its context, and other indicia of the parties’ intention.”\textsuperscript{342}

In contrast with the Seventh Circuit’s affirmation of an arbitrator’s award which failed to apply the FMLA, a district court overturned an arbitration award even if the arbitrator appeared to be relying on statutory protection for an employee. Without any consideration of an employee’s possible protection under the FMLA the arbitrator’s award in favor of an employee was overturned by the reviewing court.\textsuperscript{343}

This arbitrator exceeded his authority when, after finding that the employer had just cause to discharge an employee for his extended absence from work without required documentation, he ordered the employee’s reinstatement on the basis that his physician’s post-discharge letter was satisfactory evidence of an acceptable reason for the absence. The court reversed the arbitration award because the employee had several opportunities to provide documentation before he was discharged. Regardless of any statutory protections that might have supported the

\textsuperscript{340} Id.
\textsuperscript{341} Id. (party willingly and without reservation allows an issue to be submitted to arbitration).
\textsuperscript{342} Id.
award, the award was reversed because the contract did not provide for indefinite suspension or reinstatement upon the submission of required documents.

Similarly, an arbitration award was not enforced where it provided employees with benefits coverage without considering the protections of the ERISA\footnote{Dunham v. Holland, No. 04-1993 (JR), 179 LRRM 2988, 2992-93 (D.D.C. May 15, 2006).}. The award was based on non-contractual notions of “industrial justice,” so the court refused to enforce the award because it adopted an “enforceable obligation” requirement that was indistinguishable from the “legal obligation” requirement imposed by previous court decisions. Because the award did not “draw its essence” from the contract, it was vacated.

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

VII. Conclusion and Recommendations

Employers can establish an enforceable arbitration program by ensuring that employees have knowingly entered into the agreement to arbitrate their employment disputes. As long as the process is fair, with unbiased arbitrators and an adequate process and decision writing guidelines, as well as adequate remedies available, an employer should be able to enforce the agreement to arbitrate. Without this structure in place, an employer can face an employee claim in court despite the implementation of an arbitration program. Even worse, the employer could proceed with arbitration of the claim, only to have that award reversed by a reviewing court because the agreement to arbitrate was unconscionable or the process was unfair.
Once the agreement to arbitrate is enforceable, courts will be very reluctant to overturn the arbitrator’s interpretation of the facts or application of the law. Only if the award conflicts with an express public policy or blatantly disregards the applicable legal standards will a court step in to reverse the award.

A bar of all arbitration of employment disputes, as suggested by the proposed amendment to the FAA, would force both employers and employees to give up the benefits of arbitration in resolving disputes in the workplace. Instead, policy makers should follow the lead of the providers of arbitrators by setting standards. Standards could ensure that arbitration agreements are explained to employees so that they understand the ramifications of such agreements. As a substitute for litigation, arbitration should ensure that the arbitrator is unbiased and the proceedings provide an opportunity for the employee to present his or her claims. At the same time policy makers must ensure that the benefits of arbitration – including timely resolution of a dispute – are not lost.