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# Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker

Lisa A. Nagele-Piazza

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# Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker

Lisa A. Nagele-Piazza \*

*Although the use of arbitration provisions in collective bargaining agreements and executive employment contracts serve a beneficial purpose for workers and employers alike, the growing use of mandatory, pre-dispute arbitration agreements in non-unionized employment settings stands as an obstacle for employees to vindicate their statutorily prescribed civil rights. In particular, by forcing workers to share in the unique costs of arbitration, employees may be deterred from bringing otherwise meritorious claims. Given the federal policy favoring arbitration, and in the absence of legislation banning mandatory employment arbitration agreements, it is essential for arbitration service providers and drafters of arbitration clauses to provide for employer paid arbitration expenses, all remedies that would be available to the employee in court, and the selection of a neutral arbitrator to ensure fairness for the average worker.*

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I. INTRODUCTION

Arbitration has become a favorable method of resolving employment related conflicts without tying up the resources of the courts<sup>1</sup> and is often viewed as fast, efficient, and less costly than litigation.<sup>2</sup> It may also minimize hostilities between parties that seek to continue their relationship after the dispute is resolved because it is less formal and may be less adversarial than litigation.<sup>3</sup>

Arbitration and mediation are alternative dispute resolution (“ADR”) mechanisms. Mediation is a *non-binding* process wherein a neutral third-party assists the disputing parties in reaching a “mutually agreeable solution.”<sup>4</sup> Arbitration differs from mediation in that the neutral third-party (or a panel of three neutrals) renders a decision that is *binding* on the disputing parties.<sup>5</sup> While an arbitrator decides matters based on the evidence and arguments presented by each side of the disagreement, arbitration is typically less formal than judicial proceedings.<sup>6</sup>

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<sup>1</sup> See Erin O’Hara O’Connor et. al., *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 140 (2012).

<sup>2</sup> See RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 8-9 (1997).

<sup>3</sup> *Id.* at 9-10.

<sup>4</sup> BLACK’S LAW DICTIONARY 1003 (8th ed. 2004).

<sup>5</sup> See BLACK’S LAW DICTIONARY 112 (8th ed. 2004).

<sup>6</sup> See DENNIS R. NOLAN, *LABOR AND EMPLOYMENT ARBITRATION IN A NUTSHELL* 1 (2d ed. 2007).

Arbitration has been the foremost method of dispute resolution involving labor related matters under collective bargaining agreements (“CBA”) since the 1960s Supreme Court decisions in the *Steelworkers Trilogy*.<sup>7</sup> In these seminal cases, the Supreme Court created a presumption that employer-union disputes were arbitrable and determined that the role of courts in CBA disputes was limited.<sup>8</sup> These decisions encouraged unions and employers to generate an internal system for resolving disputes based on the terms of their CBA.<sup>9</sup>

Although arbitration became the predominant dispute resolution format for unionized workers, arbitration agreements in non-union settings were virtually nonexistent until relatively recently.<sup>10</sup> Historically, private, non-union employment was governed by the employment-at-will doctrine, which provides that both the employer and the employee have the right to terminate the employment relationship at any time and for any legal reason, without any liability.<sup>11</sup> Therefore, there were few potential disputes that could arise from the average employment relationship, and employers had little need for arbitration agreements.<sup>12</sup> While employment-at-will is still the presumption in the private workplace today, both federal and state statutes have been enacted that provide added protections for employees.<sup>13</sup> These statutes include Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, as well as various state civil rights, fair employment, and workers’ compensation statutes.<sup>14</sup>

As these laws evolved and private employees gained new rights in the workplace, employers sought to minimize their exposure to costly litigation by requiring employees to sign mandatory, pre-dispute agreements to arbitrate as a condition of employment.<sup>15</sup> Employers may find arbitration preferable to litigation because they perceive juries in a trial to be unpredictable and more likely to decide the case based on

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<sup>7</sup> See generally *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel and Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); see also BALES, *supra* note 2, at 6.

<sup>8</sup> See BALES, *supra* note 2, at 6.

<sup>9</sup> See *id.* at 20.

<sup>10</sup> See NOLAN, *supra* note 6, at 330-31.

<sup>11</sup> See *id.* at 330.

<sup>12</sup> See *id.* at 331.

<sup>13</sup> See *id.*

<sup>14</sup> See U.S. Equal Emp’t Opportunity Comm’n, *Federal Laws Prohibiting Job Discrimination Questions and Answers*, EEOC.GOV (Nov. 21, 2009), <http://www.eeoc.gov/facts/qanda.html>; see also CAL. GOV’T CODE § 12900 (West 2012).

<sup>15</sup> See THOMAS E. CARBONNEAU, *EMPLOYMENT ARBITRATION 2* (2d ed. 2006).

emotions or sympathy toward the employee, whereas neutral arbitrators are perceived as more likely to decide the case based on its merits.<sup>16</sup> Further, employers view arbitration as faster, less formal, and less costly than litigation.<sup>17</sup> Additionally, employers may be able to avoid expensive class action lawsuits through arbitration agreements.<sup>18</sup>

Mandatory arbitration agreements also receive judicial support.<sup>19</sup> Courts were already overburdened when they experienced an influx of employment rights claims.<sup>20</sup> Thus, if arbitration was the standard for resolving these disputes, the courts could set standards in test cases while private dispute resolution proceedings could handle the majority of the cases.<sup>21</sup>

On the contrary, many employee advocates view arbitration as disadvantageous to nonunionized workers.<sup>22</sup> Employees are often forced to agree to arbitration or lose their jobs, and since agreements are usually non-negotiable and drafted by the employer, the agreements may be one-sided or inherently designed to favor the employer.<sup>23</sup> Further, if an agreement obligates the employee to split the cost of arbitration, the employee either may be unable to bring the claim or decide that the risk of personal expense is too high to justify bringing an otherwise meritorious claim.<sup>24</sup>

This Article explores the unique dilemma faced by employees who are obligated to sign mandatory, pre-dispute arbitration agreements as a condition of employment, and specifically focuses on how cost-splitting provisions serve as a barrier to the vindication of statutory rights. Federal and state court opinions on cost-splitting provisions vary greatly from intensive *ad hoc* analyses to *per se* rules disallowing their use. Although voluntary, post-dispute agreements to arbitrate are preferable to ensure

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<sup>16</sup> See BALES, *supra* note 2, at 9.

<sup>17</sup> See *id.*

<sup>18</sup> See generally *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751-52 (2011) (finding that (1) a “switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment”; (2) “class arbitration *requires* procedural formality”; and (3) class arbitration greatly increases risks to defendants; therefore, an arbitration agreement that disallowed class actions could not be held unconscionable under state law) (emphasis in original)).

<sup>19</sup> See BALES, *supra* note 2, at 8-9.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> See *id.* at 9.

<sup>23</sup> See *id.*

<sup>24</sup> See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 687 (Cal. 2000).

fairness,<sup>25</sup> ultimately, if an employer is going to mandate arbitration, the agreement should: (1) allow employees to vindicate statutory rights, to the fullest extent prescribed by law, without incurring substantial fees and (2) minimize arbitrator bias (or perceived bias) toward the employer where the employer has paid for and determined the guidelines for the arbitration process. In the absence of a clearly-defined national standard that safeguards employees, courts and arbitration service providers must set criteria for arbitration agreements that ensure fairness for employees.

A. *Distinguishing Between Labor and Employment Arbitration*

To start, this Article must distinguish between the long-established use of arbitration in collective bargaining and the unique challenges that the individual employee in a non-union environment faces when he or she is required to arbitrate a claim.<sup>26</sup> In the unionized labor setting, arbitration is commonly viewed as a swift and cost effective means of resolving disputes related to the CBA.<sup>27</sup> In labor arbitration, the employee-grievant is provided with a union representative who likely has experience dealing with company management, arbitrators, and other grievants.<sup>28</sup> Further, the employee's share of the arbitration costs is paid from union dues.<sup>29</sup> Therefore, arbitration is not cost-prohibitive to the grievant, and the likelihood of arbitrator bias is minimized by the union representative's familiarity with individual arbitrators and the shared cost of arbitration between the union and the company.<sup>30</sup>

In contrast, the non-unionized employee likely has little or no experience with the arbitration process, other than the matter at hand.<sup>31</sup> Moreover, as a "one-time player," the employee has no knowledge of individual arbitrators and their potential biases.<sup>32</sup> Unlike union-represented workers, individual employees do not typically have funds allocated to pay for arbitration proceedings.<sup>33</sup> Thus, when positioned against the employer, who may have previous dealings with specific arbitrators and has the finances to fund the arbitration process, the

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<sup>25</sup> See *Policy Statement on Employment Arbitration*, NAT'L ACAD. OF ARBITRATORS (May 20, 2009), [http://naarb.org/due\\_process.asp](http://naarb.org/due_process.asp).

<sup>26</sup> See Reginald Alleyne, *Arbitrators' Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 U. PA. J. LAB. & EMP. L. 1, 13-14 (2003).

<sup>27</sup> See *id.* at 14-15.

<sup>28</sup> See *id.* at 15.

<sup>29</sup> See *id.* at 32.

<sup>30</sup> See *id.* at 14-15.

<sup>31</sup> See Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 689-90 (2004).

<sup>32</sup> See *id.* at 690.

<sup>33</sup> See NOLAN, *supra* note 6, at 347.

employee is placed in a precarious position with the cards stacked against him.<sup>34</sup>

As a result, it is essential for courts and ADR service providers to develop standards that enable employees to vindicate their statutory rights and receive damage awards that remedy the immediate injury and deter future violations of anti-discrimination laws.

### B. *The White Collar vs. the Wage Worker's Agreement*

It is also important to make the distinction between the contemporary use of mandatory employment arbitration and the traditional form of employment arbitration agreements, which were freely negotiated contracts between employers and sophisticated, sought-after professionals with bargaining power.<sup>35</sup> High-level employees and executives often negotiate employment agreements that included salary and bonus compensation, benefits, incentive plans, and termination provisions.<sup>36</sup> These agreements also address certain duties the executive may owe the company, such as a duty not to compete or disclose trade secrets and a duty to maintain confidentiality.<sup>37</sup> Thus, there are various potential disputes that may prompt the *employer* to bring a claim against the executive employee.

These duties arise out of the nature of the executive's position and are often irrelevant to the average employee's job responsibilities.<sup>38</sup> The average employee is generally in a weaker bargaining position than the employer, and arbitration agreements are presented on a "take it or leave it" basis as a condition of initial or continued employment.<sup>39</sup> Thus, this type of arbitration agreement is a unilateral contract of adhesion, meaning that employees must accept a set of standard terms, dictated by the employer, without the opportunity to negotiate.<sup>40</sup>

Courts have found that an offer of new employment or the continuation of existing employment in an "at-will" environment is

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<sup>34</sup> See Summers, *supra* note 31.

<sup>35</sup> See Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000); see also O'Connor, *supra* note 1, at 136-38.

<sup>36</sup> See Randall Thomas, et al., *Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis*, 63 VAND. L. REV. 957, 960-61 (2010); see also Trigg v. Little Six Corp., No. E2013-01929-COA-R9-CV, (Tenn. Ct. App. July 28, 2014) (arbitration clause was part of a chief engineer's negotiated employment agreement that included a \$1.5 million buyout of his equity in the company, a \$154,472 annual salary and a \$50,000 severance package).

<sup>37</sup> See Thomas, *supra* note 36, at 969; O'Connor, *supra* note 1, at 167-68.

<sup>38</sup> See Armendariz, 6 P.3d at 694.

<sup>39</sup> See CARBONNEAU, *supra* note 15, at 2.

<sup>40</sup> BALES, *supra* note 2, at 122.

sufficient consideration for the mandatory agreement.<sup>41</sup> If an employee does not wish to be bound to arbitration, he or she may find employment elsewhere.<sup>42</sup> Critics of this reasoning bring to light the fact that in reality, this is not a viable option, as most workers cannot afford to forgo a job opportunity based on a requirement to arbitrate disputes.<sup>43</sup> Moreover, if every employer in a particular industry imposes a similar arbitration obligation, then there are no meaningful options for workers who do not wish to be bound by such conditions.<sup>44</sup>

While low-wage earning employees are the most disadvantaged by mandatory arbitration when there is a cost-splitting provision in the agreement, all but a few highly compensated professionals are likely to be discouraged from bringing a claim to arbitration when faced with potentially high fees, especially when they have recently been terminated from employment.<sup>45</sup> Thus, the traditional use of freely-negotiated, executive-level arbitration agreements are markedly different than mandatory, non-negotiable, pre-dispute arbitration agreements that employees at all levels of the organization are required to sign as a condition of employment. This Article focuses on the latter.

### C. *The Added Costs of Arbitration*

There are some costs that are similar in both arbitration and litigation proceedings. For example, an employee will pay a filing fee in both fora. Presently the cost for filing a claim in federal court is \$350 plus a \$50 administrative fee,<sup>46</sup> whereas organizations such as the American Arbitration Association (“AAA”) charge employees a \$200 filing fee.<sup>47</sup> There are other costs in both litigation and arbitration that are not required but are typical expenses, such as attorneys’ fees; however, there are additional charges in arbitration that are not a part of the litigation process.

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<sup>41</sup> See *Tinder v. Pinkerton Security*, 305 F. 3d 728, 734 (7th Cir. 2002) (“Wisconsin recognizes that, because at-will employees are free to quit their jobs at any time, at-will employees give adequate consideration for employer promises that modify or supplant the at-will employment relationship by remaining on the job.”); *In re Halliburton Co.*, 80 S.W. 3d 566, 572-73 (Tex. 2002) (holding that a worker’s continued employment constituted acceptance of a binding arbitration agreement where he had clear notice of the changes to his at-will employment contract); see also NOLAN, *supra* note 6, at 363.

<sup>42</sup> See *id.* at 359.

<sup>43</sup> See *Armendariz*, 6 P.3d at 690.

<sup>44</sup> See *Alleyne*, *supra* note 26, at 23-24.

<sup>45</sup> See NOLAN, *supra* note 6, at 347.

<sup>46</sup> See *Forms and Fees*, U.S. COURTS, [www.uscourts.gov/FormsAndFees/Fees.aspx](http://www.uscourts.gov/FormsAndFees/Fees.aspx) (last visited Sept. 27, 2014).

<sup>47</sup> AM. ARBITRATION ASS’N, EMPLOYMENT ARBITRATION RULES & MEDIATION PROCEDURES 32 (Nov. 1, 2009).



In arbitration, the employee may be required to pay fees in advance of the proceedings, as well as substantial costs at the conclusion of the process, which would be unheard of in a courtroom. For example, arbitrators charge the parties an hourly rate or *per diem* fee, whereas a judge's salary would never be invoiced to the parties. In addition to the arbitrator's fees, parties to an arbitration proceeding are required to pay for room rentals, stenography, administrative fees, and the arbitrator's travel expenses. By the time the matter is resolved, arbitration costs and fees can amount to thousands of dollars, as one estimate shows the average cost of arbitrating an employment claim is approximately \$20,000.00.<sup>48</sup> In contrast, while litigation can be expensive, there are no *required* fees beyond the initial filing fee, and thus employee-claimants likely will not experience the same cost barriers in litigation as they may in arbitration.

## II. THE EVOLUTION OF EMPLOYMENT ARBITRATION

The Federal Arbitration Act ("FAA") governs arbitration agreements that involve maritime trade and interstate commerce.<sup>49</sup> While the FAA excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,"<sup>50</sup> courts have construed this narrowly to exclude certain transportation workers and not contracts of employment generally.<sup>51</sup> Thus, courts have upheld arbitration agreements that apply to employment relationships and have maintained a "liberal federal policy favoring arbitration agreements."<sup>52</sup>

Prior to the 1990s, it was generally accepted that arbitration agreements did not prevent employees from asserting common law or statutory claims.<sup>53</sup> This was based on the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*, which held that that an arbitration provision in a CBA did not preclude an employee from bringing a claim under Title VII of the Civil Rights Act of 1964.<sup>54</sup> In relevant part, the Supreme Court explained:

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<sup>48</sup> See Morse Barnes-Brown Pendleton, *Should Employers Require the Workplace Disputes be Arbitrated?*, <http://www.mbbp.com/resources/employment/arbitration.html> (last visited April 3, 2014).

<sup>49</sup> See 9 U.S.C. § 1 (2012).

<sup>50</sup> *Id.*

<sup>51</sup> See *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Local 437*, 207 F.2d 450, 453 (3d Cir. 1953); see also BALES, *supra* note 2, at 44.

<sup>52</sup> *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

<sup>53</sup> NOLAN, *supra* note 6, at 331.

<sup>54</sup> See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974).

In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.<sup>55</sup>

Accordingly, employment rights under the common law, as well as state and federal statutes, were considered separate from the CBA.

In 1991, the seminal non-union employment arbitration case, *Gilmer v. Interstate/Johnson Lane Corp.*, created a distinction between statutory claims that were outside of the CBA, as in *Gardner-Denver*, and arbitrations agreements that specifically included statutory claims arising out of the employment relationship.<sup>56</sup> *Gilmer*, an employee of Interstate, was required as a condition of employment to register with the New York Stock Exchange (“NYSE”).<sup>57</sup> In his application with the NYSE, *Gilmer* had to sign an agreement to arbitrate any employment-related disputes, including claims arising out of the termination of his employment.<sup>58</sup> Interstate discharged *Gilmer* when he was sixty-two years old, and he subsequently filed a claim under the Age Discrimination in Employment Act (“ADEA”) with the Equal Employment Opportunity Commission (“EEOC”) and eventually filed a suit in federal district court.<sup>59</sup> Based on the arbitration agreement *Gilmer* signed in his NYSE application, Interstate moved to dismiss the federal court claim and compel arbitration.<sup>60</sup>

*Gilmer* argued, among other things, that arbitration was not an adequate forum to vindicate statutory employment rights.<sup>61</sup> The Supreme Court struck down this argument based on the standard set in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, which held that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum.”<sup>62</sup>

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<sup>55</sup> *Id.* at 49-50.

<sup>56</sup> *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

<sup>57</sup> *See id.* at 23.

<sup>58</sup> *See id.*

<sup>59</sup> *See id.* at 23-24.

<sup>60</sup> *See id.* at 24.

<sup>61</sup> *See id.* at 26-27.

<sup>62</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

The Supreme Court distinguished *Gilmer* from *Gardner-Denver* in three ways: (1) the *Gardner-Denver* arbitration agreement, based on the CBA, did not include statutory claims; (2) since the *Gardner-Denver* case involved a CBA, where employees were represented by a union in the arbitration proceedings, “an important concern . . . was the tension between collective representation and individual statutory rights,” which was not applicable in *Gilmer*; and (3) *Gardner-Denver* was not decided under the FAA, “which reflects a ‘liberal federal policy favoring arbitration agreements.’”<sup>63</sup>

Even though the *Gilmer* arbitration agreement was not considered a “contract of employment” because it was part of the NYSE application, court decisions following *Gilmer* involved an array of employment arbitration cases, including claims under the Americans with Disabilities Act (“ADA”), Fair Labor Standards Act (“FLSA”), and Family Medical Leave Act (“FMLA”).<sup>64</sup> Since the case law has been generally favorable toward mandatory arbitration in employment disputes, workplace relationships covered by mandatory arbitration agreements have grown to represent between twenty-five-percent and thirty-three-percent of non-union workers.<sup>65</sup>

Some employers have taken advantage of the policy favoring arbitration by creating agreements that put workers at a distinct disadvantage. One of the most extreme examples of an employer stacking the arbitration process in its favor can be found in *Hooters of America, Inc. v. Phillips*.<sup>66</sup> In this case, Hooters required its staff to sign a mandatory arbitration agreement that required employees to follow certain rules, such as providing notice to the company with specific details regarding the nature of the claim and providing lists of witnesses

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<sup>63</sup> *Id.* at 35 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)).

<sup>64</sup> See *Durkin v. Cigna Prop. & Cas. Corp.*, 942 F. Supp. 481 (D. Kan. 1996) (compelling arbitration of a claims supervisor’s Title VII, ADA, ADEA and state law claims); *Hampton v. ITT Corp.*, 829 F. Supp. 202 (S.D. Tex. 1993) (finding employment arbitration agreements enforceable for FLSA claims); *Reese v. Commercial Credit Corp.*, 955 F. Supp. 567 (D.S.C. 1997) (holding that an employee’s FMLA and ADA claims were within the scope of arbitration).

<sup>65</sup> See Theodore J. St. Antoine, *An Arbitrator Looks at ADR in the Coming Decade*, ABA Labor and Employment Law Section ADR in Labor and Employment Law Committee Midwinter Meeting, at 2 (2013) (citing Alexander J. S. Colvin, *Labor & Employment ADR in a Portable Employment World: Moving Away from Employer Promulgated ADR?*, ABA Section of Labor & Employment Law, ADR in Labor and Employment Law Committee Midwinter Meeting, Program Materials, Tab L (2012), available at, [http://www.americanbar.org/content/dam/aba/events/labor\\_law/2013/02/adr\\_in\\_labor\\_employmentlawcommitteemidwintermeeting/s.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/2013/02/adr_in_labor_employmentlawcommitteemidwintermeeting/s.authcheckdam.pdf)).

<sup>66</sup> *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

and summaries of each witness' knowledge of the events.<sup>67</sup> Hooters, on the other hand, was not required to provide any pleadings or notices.<sup>68</sup> Further, as if to eliminate all objectivity, employees had to choose arbitrators from a list of Hooters approved arbitrators.<sup>69</sup> In the *Hooters* case, the Fourth Circuit found that Hooters' rules were "so one-sided that their only purpose [was] to undermine the neutrality of the proceeding."<sup>70</sup> Thus, the entire agreement was held to be invalid.<sup>71</sup>

In other cases, where employers placed limitations on statutory rights and remedies, courts have deemed arbitration clauses invalid. For example, in *Circuit City Stores, Inc. v. Adams*, employees were obligated to sign an arbitration agreement that limited the amount of damages an employee could be rewarded to an amount much less than prescribed by statute.<sup>72</sup> The agreement stated that "back pay is limited to one year, front pay to two years, and punitive damages to the greater amount of front pay and back pay awarded or \$5000."<sup>73</sup> On the other hand, the applicable statute had no such limits on back and front pay and included punitive damages.<sup>74</sup> Applying California contract law to the arbitration agreement, the Ninth Circuit found these limitations on statutory rights to be unconscionable.<sup>75</sup>

While courts have found clauses in arbitration agreements that are heavily one-sided or force employees to forfeit statutorily prescribed remedies to be invalid, courts are inconsistent in their rulings on other matters that serve as more subtle obstacles for employees to vindicate their rights. Among those obstacles are cost-splitting clauses, which force employees to share in the expense of arbitration and have the potential to create a significant barrier for employees to bring their claims.<sup>76</sup>

### III. FEDERAL COURT RULINGS ON COST PROVISIONS

Where federal statutes are the subject of a claim, courts have evaluated the effect of cost-splitting provisions on an employee's ability to vindicate rights in accordance with the federal anti-discrimination

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<sup>67</sup> *See id.* at 938.

<sup>68</sup> *See id.*

<sup>69</sup> *See id.* at 938-39.

<sup>70</sup> *Id.* at 938.

<sup>71</sup> *See id.* at 941.

<sup>72</sup> *See Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002).

<sup>73</sup> *See id.* at 891.

<sup>74</sup> *See id.* at 894.

<sup>75</sup> *See id.* at 896.

<sup>76</sup> *See Alleyne, supra note 26*, at 4-5.

scheme. Since the Supreme Court's decision in *Gilmer*, lower courts are not free to hold that mandatory employment arbitration agreements are categorically unenforceable.<sup>77</sup> However, federal courts have not construed *Gilmer* to dictate that every employment arbitration agreement or all of its provisions must be held valid.<sup>78</sup> Federal courts may deem an arbitration agreement unenforceable if the employee must "forgo the substantive rights afforded by the statute," instead of simply deferring "to resolution in an arbitral, rather than a judicial, forum."<sup>79</sup> Motions to compel arbitration may be denied if the applicable federal statute intended to exclude arbitration as a forum or if the arbitration agreement requires the party to waive certain statutory rights.<sup>80</sup>

In *Gilmer*, the employee was not required to pay any of the arbitration expenses, thus the Supreme Court did not address whether an employer may require employees to share in the arbitration cost.<sup>81</sup> In a decision that followed *Gilmer*, *Green Tree Financial Corp.-Alabama v. Randolph*, the Supreme Court held, where the mandatory arbitration agreement was silent on the payment of arbitration fees, "[t]he 'risk' that [the claimant] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."<sup>82</sup> While the Court in *Green Tree* did find the burden is on the party seeking to invalidate the agreement to show the likelihood of incurring prohibitive expenses, the Court did not determine how much of a showing is required.<sup>83</sup> Consequently, lower courts remain divided on the issue and have developed various tests that differ greatly between jurisdictions.

#### A. *The Case-by-Case Approach to Evaluating Cost-Sharing Agreements*

Since arbitration includes unique expenses that are not a part of court proceedings, some employers create arbitration agreements that split these fees between the parties. When determining whether a cost-sharing clause in an arbitration agreement is valid, courts have created various fact intensive tests that are applied on a case-by-case basis. For example, in *Bradford v. Rockwell Semiconductor, Inc.*, the Fourth Circuit developed an analysis that evaluated the cost-splitting clause on a

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<sup>77</sup> See *id.* at 20.

<sup>78</sup> See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

<sup>79</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); accord *In re Poly-Am., L.P.*, 262 S.W.3d 337, 349 (Tex. 2008).

<sup>80</sup> See *Poly-Am.*, 262 S.W.3d at 349 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Mitsubishi Motors Corp.*, 473 U.S. at 628).

<sup>81</sup> See Alleyne, *supra* note 26, at 20.

<sup>82</sup> *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

<sup>83</sup> See *id.* at 92.

subjective basis, focused on the individual employee's circumstances.<sup>84</sup> This test analyzes the following factors: (1) the employee's ability to pay the fees and costs; (2) the estimated difference between the cost of arbitration and litigation; and (3) "whether that cost differential is so substantial as to deter the bringing of claims."<sup>85</sup> In other words, this test analyzes the cost of arbitration and the employee's ability to pay for it against the cost of litigation and the employee's ability to pay for it.<sup>86</sup> This test may determine that a manager earning \$100,000.00 per year would not be deterred by the cost of arbitration whereas a factory worker earning minimum wage would be significantly dissuaded. This leaves a large gray area for courts to determine where to draw the line on what is "so substantial" as to become a barrier to the individual employee.

Furthermore, the Fourth Circuit's test requires a substantial amount of information at the start of the process that may not be readily available to the employee. Accordingly, the Sixth Circuit determined that the *Bradford* test was deficient because "requiring the plaintiff to come forward with concrete estimates of anticipated or expected arbitration costs asks too much at this initial stage in the proceedings" since "such average figures may appear 'too speculative' to support a finding that the costs are prohibitively expensive, even though the plaintiff has no other evidence of the cost."<sup>87</sup>

As a means to overcome the speculative nature of the expense analysis in the *Bradford* approach, some courts have instituted a *post hoc* judicial review of the expenses, reasoning that the court will have before it the actual expenses and arbitration award.<sup>88</sup> However, critics of this approach claim that "the *post hoc* judicial review approach places plaintiffs in a kind of 'Catch 22'"<sup>89</sup> because they cannot argue prior to the arbitration proceeding that it is prohibitively expensive, since they are unaware of what the actual costs will be, yet they cannot argue after arbitration that the costs deterred them from bringing the claim, because the arbitration has already occurred.

The case-by-case approach presents additional problems. By only examining the effect of cost-spitting clauses on the individual, the *Bradford* test "is inadequate to protect the deterrent functions of the federal anti-discrimination statutes at issue."<sup>90</sup> Thus, to address these deficiencies, the Sixth Circuit, in *Morrison v. Circuit City Stores, Inc.*,

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<sup>84</sup> *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001).

<sup>85</sup> *Id.*

<sup>86</sup> *See id.* at 559 n.5.

<sup>87</sup> *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 660 (6th Cir. 2003).

<sup>88</sup> *See id.* at 660-61.

<sup>89</sup> *Id.* at 662-63.

<sup>90</sup> *Id.* at 661.

developed a revised approach focused on the deterrent effect on classes of complainants.<sup>91</sup> The Sixth Circuit determined that “a cost-splitting provision should be held unenforceable whenever it would have the ‘chilling effect’ of deterring a substantial number of potential litigants from seeking to vindicate their statutory rights.”<sup>92</sup> The Sixth Circuit’s revised test includes the following steps:

1. Identify the class of employees who are similarly situated in terms of job description and socio-economic status;
2. Review the individual plaintiff’s income and other resources as representative of the members of the class and their ability to pay for arbitration;
3. Consider the average cost of a typical arbitration and compare it to realistic litigation expenses;
4. Review whether the employee will take on the added expenses of the arbitration forum (such as arbitrator fees and room rental); and
5. Analyze the total costs and expenses of arbitration compared to the total cost of litigation and consider whether, when taken together, potential litigants would be deterred from arbitrating their claims.<sup>93</sup>

The Sixth Circuit also provided that courts “should discount the possibilities that the plaintiff will not be required to pay costs or arbitral fees because of ultimate success on the merits, either because of cost-shifting provisions . . . or because the arbitrator decides that such costs or fees are contrary to federal law.”<sup>94</sup> The court reasoned that employees will likely “err on the side of caution”<sup>95</sup> when deciding whether or not to pursue a claim, “especially when the worst-case scenario would mean not only losing on their substantive claims but also the imposition of the costs of the arbitration.”<sup>96</sup>

Even though the Sixth Circuit’s revised case-by-case analysis in *Morrison* considered the deterrent purpose of federal anti-discrimination

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<sup>91</sup> See *id.* at 663.

<sup>92</sup> *Id.* at 661

<sup>93</sup> See *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 663-65 (6th Cir. 2003).

<sup>94</sup> *Id.* at 664.

<sup>95</sup> *Id.* at 665

<sup>96</sup> *Id.*

statutes in addition to the remedial role covered in the *Bradford* approach, critics still oppose *any* cost-sharing provisions for various reasons including: (1) arbitration should not cost the claimant any more than bringing the claim in court, (2) if the employer is unilaterally mandating arbitration, then it should have to pay the costs, and (3) litigants are not forced to compensate judges out of pocket, and therefore, they should not be responsible for paying the arbitrator's fees and expenses.<sup>97</sup> Thus, some courts have developed rules that deem cost-sharing provisions *per se* denials of an employee's access to a forum.

*B. Cost-Sharing as a per se Denial of an Employee's Access to a Forum*

In *Cole v. Burns International Security Services*, the D.C. Circuit ruled that an employer could not require employees to pay all, or even part, of an arbitrator's fees.<sup>98</sup> The D.C. Circuit reasoned that "because public law confers both the substantive rights and a reasonable right of access to a neutral forum in which those rights can be vindicated . . . employees cannot be *required* to pay for the services of a 'judge' in order to pursue their statutory rights."<sup>99</sup> The court further ruled that the only way an employment arbitration agreement could be required as a condition of employment is if the employer is fully responsible for paying the arbitrator's fees.<sup>100</sup> If the employer wants the benefits of arbitration, then it should be prepared to pay for it, as the DC Circuit explained:

Arbitration will occur in this case only because it has been mandated by the employer as a condition of employment. Absent this requirement, the employee would be free to pursue his claims in court without having to pay for the services of a judge. In such a circumstance—where arbitration has been imposed by the employer and occurs only at the option of the employer—arbitrators' fees should be borne solely by the employer.<sup>101</sup>

Thus, *per se* rules disallowing cost-sharing, such as this, are more employee-friendly than case-by-case approaches, not only because they place the financial burden solely on the employer who benefits from

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<sup>97</sup> See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1465-69 (D.C. Cir. 1997).

<sup>98</sup> See *id.* at 1485.

<sup>99</sup> *Id.* at 1468.

<sup>100</sup> See *id.*

<sup>101</sup> *Id.* at 1484-85.



arbitration, but also because employees do not have to spend additional time and money seeking a judicial determination on the validity of such cost-sharing provisions before the actual arbitration of the claim ever begins.

#### IV. STATE LAW DECISIONS ON COST PROVISIONS UNDER CONTRACT LAW

Similar to the federal circuit court divide over cost-splitting provisions, the state courts vary significantly in their evaluation of arbitration fees as a barrier to vindicating statutory rights. Some states have *per se* rules, similar to the D.C. Circuit's approach, and others employ case-by-case methods with differing standards of analysis that range from providing the employee with very little burden to requiring detailed calculations that demonstrate the employees' inability to pay. This difference in state law analysis can be attributed, to some extent, to the states' use of contract law to determine the validity of arbitration agreements.

The Supreme Court has clearly stated in several opinions that the FAA pre-empts state law, and thus, governs arbitration agreements in both state and federal court.<sup>102</sup> Therefore, state courts have limited power in this area since they are bound by the FAA and any state laws that disfavor arbitration will be pre-empted through the Supremacy Clause.<sup>103</sup> However, even though the FAA creates a "liberal federal policy favoring arbitration,"<sup>104</sup> section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>105</sup> In other words, "[s]ection 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."<sup>106</sup> Therefore, an arbitration agreement is only valid if it meets the requirements of the applicable state's contract law, and the agreement must withstand general contract defenses, including fraud, duress, and unconscionability.<sup>107</sup>

Nevertheless, states must treat arbitration favorably. As the Supreme Court provided in *Moses H. Cone Mem'l Hospital v. Mercury Construction Corp.*: "Any doubts concerning the scope of arbitrable

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<sup>102</sup> See *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983); see also *Perry v. Thomas*, 482 U.S. 483, 489 (1987).

<sup>103</sup> See *In re Poly-Am. L.P.*, 262 S.W.3d 337, 349 (Tex. 2008).

<sup>104</sup> *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

<sup>105</sup> 9 U.S.C. § 2 (2012).

<sup>106</sup> *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

<sup>107</sup> See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996).

issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”<sup>108</sup> Furthermore, courts are not permitted to “invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”<sup>109</sup> Thus, arbitration agreements must be evaluated like any other contract and not singled out for extra scrutiny or subjected to special rules.<sup>110</sup>

A state court must determine “through the neutral application of its own contract law”<sup>111</sup> whether there is an enforceable contract and whether there are any defenses that invalidate the contract while remaining in accord with the FAA’s provisions. It follows that challenges to the validity of arbitration agreements under state law often include a claim that the agreement is unenforceable on the grounds of unconscionability.<sup>112</sup>

#### A. *Unconscionability and Arbitration*

Although state laws vary, contracts are largely analyzed with regard to both procedural and substantive unconscionability.<sup>113</sup> Unconscionability, in general, refers to “extreme unfairness” in an agreement, as evaluated by the weaker party’s lack of meaningful choice and “contractual terms that unreasonably favor the other party.”<sup>114</sup> Procedural unconscionability refers to unfairness in the formation of the contract, while substantive unconscionability refers to the specific terms of the contract that may be unduly harsh or one-sided.<sup>115</sup> Although some states, like California, require a finding of both procedural and substantive unconscionability in order to render the contract unenforceable, a greater showing of one will mean a lesser showing of the other is required.<sup>116</sup>

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<sup>108</sup> *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24-25.

<sup>109</sup> *Doctor’s Assocs., Inc.*, 517 U.S. at 687 (emphasis in original).

<sup>110</sup> *In re Poly-Am., L.P.*, 262 S.W.3d 337, 347-48 (Tex. 2008).

<sup>111</sup> *Id.* at 348.

<sup>112</sup> See CARBONNEAU, *supra* note 15, at 183.

<sup>113</sup> See *Poly-Am.*, 262 S.W.3d at 355; see also *Armendariz v. Found. Health Psychcare Servs. Inc.*, 6 P.3d 669, 682-83 (Cal. 2000).

<sup>114</sup> BLACK’S LAW DICTIONARY 1560 (8th ed. 2008).

<sup>115</sup> See *id.* at 1561; see also *Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 228 (3d Cir. 2008); see also *James v. Conceptus, Inc.*, 851 F. Supp. 2d 1020, 1030-32 (S.D. Tex. 2012).

<sup>116</sup> See *Conceptus*, 851 F. Supp. 2d at 1030-32.

## 1. California

While most state courts agree that placing limits on statutorily prescribed remedies is unconscionable, states are divided on the use of cost-splitting provisions.<sup>117</sup> Using the D.C. Circuit's analysis in *Cole* as guidance, the California Supreme Court, in *Armendariz v. Foundation Health Psychcare Services, Inc.*, developed four requirements that arbitration agreements must meet in order to withstand an unconscionability claim:

1. The agreement may not limit statutory remedies;
2. The agreement must not deny the opportunity to engage in adequate discovery;
3. A written arbitration decision must be issued to allow for judicial review; and
4. The employee shall not be responsible for unreasonable costs and arbitration fees.<sup>118</sup>

Where these minimum requirements were followed, in addition to arbitrator neutrality, the California Supreme Court held that arbitration is a permissible forum for employees to vindicate state statutory rights.<sup>119</sup>

With regard to the cost of arbitration, the *Armendariz* court further elaborated that "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement . . . cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court."<sup>120</sup> The court found this to be a fair rule, because "it places the cost of arbitration on the party that imposes it."<sup>121</sup> Furthermore, since this rule only applies to *mandatory, pre-dispute* agreements, the court reasoned that where arbitration genuinely is an efficient means of dispute resolution, the parties may negotiate a *post-dispute* agreement to arbitrate.<sup>122</sup>

In her concurring opinion in *Armendariz*, Justice Brown disagreed with the "bright-line" approach requiring employers to pay for all of the costs peculiar to arbitration.<sup>123</sup> Justice Brown found that the majority's

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<sup>117</sup> See *Armendariz*, 6 P.3d at 682-83; *Poly-Am.*, 262 S.W.3d at 355.

<sup>118</sup> See *Armendariz*, 6 P.3d at 685.

<sup>119</sup> See *id.* at 674.

<sup>120</sup> *Id.* at 687 (emphasis in original).

<sup>121</sup> *Id.* at 688.

<sup>122</sup> See *id.*

<sup>123</sup> See *id.* at 699.

approach “ignore[d] the unique circumstances of each case” including the employee’s ability to pay the expenses and the fact that some arbitration proceedings are less costly to employees than litigation.<sup>124</sup> Thus, Justice Brown’s concurring opinion concluded:

As long as the mandatory arbitration agreement does not *require* the employee to front the arbitration forum costs or to pay a certain share of these costs, apportionment should be left to the arbitrator. When apportioning costs, the arbitrator should consider the magnitude of the costs unique to arbitration, the ability of the employee to pay a share of these costs, and the overall expense of the arbitration as compared to a court proceeding. Ultimately, any apportionment should ensure that the costs imposed on the employee, if known at the onset of litigation, would *not* have deterred her from enforcing her statutory rights or stopped her from effectively vindicating these rights.<sup>125</sup>

This rule would eliminate any upfront costs that serve as an obstacle for employees to bring their claims, and it would delegate the responsibility of determining actual cost sharing to the arbitrator.<sup>126</sup> However, it also asks the arbitrator to retrospectively determine what dollar amount would have deterred the employee from bringing a claim and to appropriate the costs accordingly.<sup>127</sup> This cost allocation method may be confusing for some employees, and leaving it up to the arbitrator to allocate costs after the fact may still be viewed as too risky to employees who would face the imposition of potentially high fees.<sup>128</sup>

## 2. Texas

The Supreme Court of Texas follows a similar approach to Justice Brown’s, as it held in *In re Poly-America, LP* that determinations on the reasonableness of cost-splitting provisions were best left to the arbitrator.<sup>129</sup>

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<sup>124</sup> See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 699-700 (Cal. 2000).

<sup>125</sup> See *id.* at 700.

<sup>126</sup> See *id.*

<sup>127</sup> See *id.* at 700 (“[A]ny apportionment should ensure that the costs imposed on the employee, if known at the onset of litigation, would *not* have deterred her from enforcing her statutory rights or stopped her from effectively vindicating these rights.”).

<sup>128</sup> See *id.*

<sup>129</sup> See *In re Poly-Am., L.P.*, 262 S.W.3d 337, 357 (Tex. 2008).

In *Poly-America*, an employee filed a claim for wrongful discharge and retaliation for filing a workers' compensation claim under the Texas Workers' Compensation Act, and in response, the employer filed a motion to compel arbitration.<sup>130</sup> The employee claimed, *inter alia*, that the cost-splitting provision in the arbitration agreement was substantively unconscionable, and therefore, unenforceable under Texas law.<sup>131</sup> The cost provision in *Poly-America* provided as follows:

Fees associated with arbitration—including but not limited to mediation fees, the arbitrators' fees, court reporter fees, and fees to secure a place for a hearing—are to be split between the parties, with the employee's share capped at 'the gross compensation earned by the Employee in Employee's highest earning month in the twelve months prior to the time the arbitrator issues his award.'<sup>132</sup>

The agreement further provided that the arbitrator had the authority to modify unconscionable terms.<sup>133</sup> The recently discharged employee expressed concern that this provision, which would potentially require him to pay his highest month's gross income (around \$3,300.00) in arbitration costs, was "way more money than [he] could afford."<sup>134</sup> He also stated that he unsuccessfully attempted to retain two attorneys on a contingency-fee basis, and both attorneys declined to represent him based on the arbitration agreement.<sup>135</sup> The employer did not dispute these facts, but maintained that the provision was not unconscionable under Texas law.<sup>136</sup>

The Texas Supreme Court declined to apply the *per se* unconscionability rule of the California courts, reasoning that employees should be required to provide "some evidence" that they "will likely incur arbitration costs in such an amount as to deter enforcement of statutory rights in the arbitral forum."<sup>137</sup> The court in *Poly-America* found the mere risk of unaffordable costs to be "too speculative to justify the invalidation of an arbitration agreement."<sup>138</sup>

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<sup>130</sup> *See id.* at 355.

<sup>131</sup> *See id.*

<sup>132</sup> *Id.* at 344 (citation omitted).

<sup>133</sup> *See id.* at 357.

<sup>134</sup> *Id.* at 354.

<sup>135</sup> *See In re Poly-Am., L.P.*, 262 S.W.3d 337, 355 (Tex. 2008).

<sup>136</sup> *See id.*

<sup>137</sup> *Id.* at 356.

<sup>138</sup> *Id.* (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)).

The court also found in *Poly-America* that, depending on the situation, the employee may not have to pay any expenses at all, or could even benefit from the capped cost provision as compared to the potential cost of litigation.<sup>139</sup> Moreover, since the agreement in *Poly-America* allowed the arbitrator to modify unconscionable terms, the court reasoned that “if the cost provisions precluded [the employee’s] enforcement of his non-waivable statutory rights, they would surely be unconscionable . . . and the arbitrator would be free to modify them.”<sup>140</sup> The court held that the arbitrator was more suited to determine if the cost provision was prohibitive and upheld the lower court’s decision declining to find the provision unconscionable.<sup>141</sup>

### 3. Other States

Comparable to Texas, Washington requires employees to show that the cost-splitting provision is prohibitive.<sup>142</sup> In *Mendez v. Palm Harbor Homes, Inc.*, the Court of Appeals of Washington found a cost-splitting provision to be prohibitively expensive where the employee would have been required to pay a \$2,000.00 filing fee in order to bring a \$1,500.00 claim.<sup>143</sup> In *Mendez*, “[t]he filing cost of \$2,000 [was] relatively certain under the AAA schedules produced by [the employee].”<sup>144</sup> To the contrary, in *Zuver v. Airtouch Communications, Inc.*, where the employee could not offer any details about the actual fees she would incur in arbitration or her inability to pay them, the Supreme Court of Washington held the cost-splitting fee was not unconscionable (the issue, however, was also rendered moot because the employer offered to pay the arbitrator’s fees).<sup>145</sup>

Further, in *Zuver*, even though the agreement provided that the prevailing party may be entitled to attorney’s fees, when the state law only allowed for the prevailing plaintiff to recover fees, the court did not find the provision to be unconscionable. The court reasoned that because the agreement used “the permissive word ‘may,’” it was “mere speculation to assume that the arbitrator would disregard case law holding that a prevailing defendant may receive attorney fees only if a plaintiff’s discrimination claim was ‘frivolous, unreasonable, or without foundation.’”<sup>146</sup> In contrast, where the agreement used the directive word

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<sup>139</sup> See *id.* at 357.

<sup>140</sup> *Id.*

<sup>141</sup> See *In re Poly-Am., L.P.*, 262 S.W.3d 337, 357 (Tex. 2008).

<sup>142</sup> See *Zuver v. Airtouch Communications, Inc.*, 103 P.3d 753, 762 (Wash. 2004).

<sup>143</sup> See *Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 603 (Wash. Ct. App. 2002).

<sup>144</sup> *Id.*

<sup>145</sup> See *Zuver*, 103 P.3d at 762-63.

<sup>146</sup> *Id.* at 764 (citation omitted).

“shall” in a similar provision in *Walters v. A.A.A. Waterproofing, Inc.*, the Court of Appeals of Washington found the provision to be “one-sided and harsh” and “an enormous deterrent to an employee contemplating a suit.”<sup>147</sup>

Missouri courts also require a specific showing of more than “just a hypothetical inability to pay.”<sup>148</sup> In *Moore v. Ferrellgas, Inc.*, the Western District of Michigan, applying Missouri contract law, found a cost-splitting provision enforceable where the plaintiff did not provide “the necessary evidence . . . to estimate the length of time necessary to complete arbitration or an estimate of arbitrators’ fees.”<sup>149</sup> Nonetheless, the court in *Moore* decided to “indulge [the employee’s] argument and alternatively demonstrate why it fails.”<sup>150</sup> Since the employee earned \$50,000.00 annual income, which was approximately in the fiftieth percentile of income in the United States, the court was being asked “to conclude that arbitration provisions, such as the one [here], cannot be enforced against at least fifty percent of the population of the United States.”<sup>151</sup> The court found this to be “quite telling as to the frivolousness of [the employee’s] argument,”<sup>152</sup> although it made no mention of the fact that the employee in *Moore* had recently lost his job and his income.

The Supreme Court of California cautions that “[t]urning a motion to compel arbitration into a mini-trial on the comparative costs and benefits of arbitration and litigation for a particular employee would not only be burdensome on the trial court and the parties, but would likely yield speculative answers.”<sup>153</sup> The court also maintains that unless there are “clearly articulated guidelines,”<sup>154</sup> post-arbitration apportionment of costs will create uncertainty to a degree that employees may consider it too risky to bring meritorious claims to arbitration. Furthermore, the employer is in the best position to perform a cost/benefit analysis when determining the most economical forum.<sup>155</sup> Thus, rather than a case-by-case analysis that burdens the courts and the parties, there should be a bright-line rule placing the unique cost of arbitration, specifically for mandatory, employer imposed, pre-dispute arbitration agreements, on the employer who imposed them.<sup>156</sup>

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<sup>147</sup> *Walters v. AAA Waterproofing, Inc.* 211 P.3d 454, 459 (Wash. Ct. App. 2009).

<sup>148</sup> *Moore v. Ferrellgas, Inc.*, 533 F. Supp. 2d 740, 750 (W.D. Mich. 2008) (quoting *Faber v. Menard, Inc.*, 367 F.3d 1048, 1053 (8th Cir. 2004)).

<sup>149</sup> *Id.* at 751.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 688 (Cal. 2000).

<sup>154</sup> *See id.*

<sup>155</sup> *See id.*

<sup>156</sup> *See id.*

### B. Severability

Even where clauses are held unenforceable, judges have the discretion, in accordance with an agreement's severability clause, to remove the invalid clause from the agreement and compel arbitration with the remaining, enforceable terms intact.<sup>157</sup> For example, in *Poly-America*, the Supreme Court of Texas held that where "provisions are not integral to the parties' overall intended purpose to arbitrate their disputes"<sup>158</sup> those terms "are severable from the remainder of the arbitration agreement."<sup>159</sup> However, "if the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced," as the Supreme Court of California ruled in *Armendariz*.<sup>160</sup> Thus, since unconscionable terms may be severed without invalidating the entire arbitration agreement, employers have little incentive to refrain from crafting one-sided terms that disfavor employees.

## V. IS ARBITRATION A NEUTRAL FORUM WHEN THE EMPLOYER COVERS THE EXPENSES?

The *per se* rule that requires employers to pay for arbitration may eliminate cost as an obstacle for employees, however, it creates a potential, or at least perceived, arbitrator bias toward the financing company. In *Cole*, the D.C. Circuit briefly addressed the concerns of commentators regarding arbitrator biases based on employer funding and dismissed them as unlikely.<sup>161</sup> The *Cole* court felt that arbitrators were not concerned with the source of their paychecks, as long as each received one, and if an arbitrator was inclined to favor employers (which the court had no reason to believe was true) it was because the employer is a source of potential future business.<sup>162</sup> The D.C. Circuit further supports its position that employer-funded arbitration does not promote arbitrator bias by stating:

[T]here are several protections against the possibility of arbitrators systematically favoring employers because employers are the source of future business. For one thing, it is unlikely that such corruption would escape the scrutiny of plaintiffs' lawyers or appointing agencies

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<sup>157</sup> See *id.* at 695-96; see also *In re Poly-Am., L.P.*, 262 S.W.3d 337, 344 (Tex. 2008).

<sup>158</sup> *Poly-Am.*, 262 S.W.3d at 344.

<sup>159</sup> *Id.*

<sup>160</sup> *Armendariz*, 6 P.3d at 696.

<sup>161</sup> See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997).

<sup>162</sup> See *id.*



like AAA. Corrupt arbitrators will not survive long in the business. In addition, wise employers and their representatives should see no benefit in currying the favor of corrupt arbitrators, because this will simply invite increased judicial review of arbitral judgments. Finally, if the arbitrators who are assigned to hear and decide statutory claims adhere to the professional and ethical standards set by arbitrators in the context of collective bargaining, there is little reason for concern. In this sense, the rich tradition of arbitration in collective bargaining *does* serve as a valuable model.<sup>163</sup>

As a result, the D.C. Circuit held that the employee in *Cole* could not be compelled to arbitrate his claim as a condition of employment if he was required to pay any of the arbitrator's fees or expenses and rejected the notion that employer-financed arbitration creates a bias process in favor of the employer.<sup>164</sup>

Opponents of mandatory employment arbitration are not convinced by this reasoning. Judges in federal and state court alike are subject to disqualification if their ability to remain impartial may reasonably come into question.<sup>165</sup> This is an objective standard that applies even if there is no actual impartiality but only the appearance of it.<sup>166</sup> Courts regard this as a critical component in upholding the public's confidence in the judicial system.<sup>167</sup> Consequently, if arbitration is simply a change in forum, it should follow that arbitrators must also be disqualified if there is an appearance of bias.<sup>168</sup> Some scholars believe it is likely that where an employer pays for all the expenses and is also a "repeat player" in the arbitration setting, it will hire arbitrators again in the future, and at a minimum, the process will *appear* to be bias in the favor of the employer.<sup>169</sup>

## VI. MINIMIZING EMPLOYER BIAS THROUGH A NEUTRAL ARBITRATOR SELECTION PROCESS

It may be impossible to remove all perceptions of bias when the employer is paying for the process, but even critics of employment

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<sup>163</sup> *Id.*

<sup>164</sup> *See id.*

<sup>165</sup> *See* Alleyne, *supra* note 26, at 35-36.

<sup>166</sup> *See id.* at 36.

<sup>167</sup> *See id.*

<sup>168</sup> *See id.*

<sup>169</sup> *See id.* at 38; *see also* Summers, *supra* note 31.

arbitration agree that the mutual selection of an arbitrator minimizes this potential perception.<sup>170</sup>

Biases may be further diminished by utilizing an arbitration service provider such as the AAA which is committed to neutrality in dispute resolution. The AAA has developed its own set of Employment Arbitration Rules and Mediation Procedures that outline the AAA's approved methods for selecting arbitrators, as well as the process for disqualifying partial arbitrators.<sup>171</sup> The AAA will honor contractually agreed upon arbitrator selection procedures between the parties; however, the arbitrators *must* be neutral and experienced in employment law matters.<sup>172</sup> Arbitrators must also act in good faith and "have no personal or financial interest in the results of the proceeding,"<sup>173</sup> nor may they have a relationship with the parties or their representatives "that may create an appearance of bias."<sup>174</sup> If an arbitrator appears to be partial, parties have the right to object to the continued use of the arbitrator's services, or the AAA may disqualify an arbitrator on its own accord.<sup>175</sup> Thus, since the employee may object to the arbitrator after the proceedings have begun, when a bias may be revealed, this provides an additional safeguard for the employee.

If the parties do not outline the arbitrator selection process in the agreement, the AAA shall send a list to both parties.<sup>176</sup> The parties are encouraged to agree upon an arbitrator on the list, but if they cannot reach a decision, they are permitted to strike the names of arbitrators they object to and rank the remaining names in order of preference.<sup>177</sup> The AAA will then select the name of a remaining arbitrator based on this elimination and ranking process.<sup>178</sup>

By utilizing the services of an arbitration association, such as the AAA, employees are provided with added protections from arbitration agreements designed to create employer biases. Further, the association's published rules and monitoring of procedures aid in institutionalizing fairness as part of the process.

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<sup>170</sup> See Alleyne, *supra* note 26, at 38.

<sup>171</sup> See AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES & MEDIATION PROCEDURES (Nov. 1, 2009).

<sup>172</sup> See *id.*

<sup>173</sup> *Id.* at 20.

<sup>174</sup> *Id.*

<sup>175</sup> See *id.*

<sup>176</sup> See *id.* at 15.

<sup>177</sup> See *id.*

<sup>178</sup> See *id.*

## VII. RECOMMENDATIONS FOR UNIFORMITY AND FAIRNESS

Due to the lack of uniformity among courts in determining standards of fairness to adequately protect employees, there have been legislative attempts to eliminate the use of mandatory arbitration agreements in employment. Additionally, arbitration service providers have imposed minimum standards of fairness to safeguard employee rights.

### A. *Proposed Legislation to Amend the Federal Arbitration Act*

The most effective way to protect employees and create a uniform standard would be to pass legislation that clarifies the intent of Congress in the FAA. Several attempts have been made in Congress to pass legislation banning mandatory, pre-dispute arbitration agreements. An Arbitration Fairness Act was unsuccessfully introduced in the Senate in 2007, 2009, and 2011.<sup>179</sup> In May 2013, the Arbitration Fairness Act of 2013, S. 878 sponsored by Senator Alan “Al” Franken (D-MN), was introduced to the Senate and HR. 1844, sponsored by Rep. Henry “Hank” Johnson, Jr. (D-GA), was introduced to the House of Representatives. In the bill, Congressional findings included:

- (1) The Federal Arbitration Act . . . was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.
- (2) A series of decisions by the Supreme Court of the United States have interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress.
- (3) Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.
- (4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators’ decisions.

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<sup>179</sup> Arbitration Fairness Act of 2007, S. 1782. 110th Cong.; Arbitration Fairness Act of 2009, S. 931 111th Cong.; Arbitration Fairness Act of 2011, S. 987 112th Cong.

- (5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.<sup>180</sup>

The Arbitration Fairness Act would “restore the original intent of the FAA by clarifying the scope of its application.”<sup>181</sup> A new chapter would be added to the FAA invalidating mandatory, pre-dispute arbitration agreements for employment, consumer, anti-trust, and civil rights matters.<sup>182</sup> The proposed Act would not ban arbitration or place limitations on parties’ ability to enter into voluntary, post-dispute arbitration agreements, nor would it interfere with the rights of labor unions and companies to include arbitration provisions in CBAs.<sup>183</sup> The purpose of the Act is to “restore[] the rights of workers and consumers to seek justice in our courts” and to safeguard the rights afforded by statute.<sup>184</sup>

### *B. The Employment Due Process Protocol*

Emphasizing the need for fairness in employment arbitration, A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship (“Due Process Protocol”) was developed in 1995 by individual members of the Labor & Employment Section of the American Bar Association, the National Academy of Arbitrators, the American Arbitration Association (“AAA”), the Federal Mediation and Conciliation Services, and the National Lawyers Association.<sup>185</sup> Although the committee of experts felt “impartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator”<sup>186</sup> this belief may be attributable to the members’ backgrounds in traditional labor arbitration where cost does

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<sup>180</sup> Arbitration Fairness Act, H.R. 1844 § 2(1)-(5), 113th Cong. (2013).

<sup>181</sup> Al Franken, *The Arbitration Fairness Act of 2013*, SENATE.GOV, <http://www.franken.senate.gov/files/documents/130507ArbitrationFairness.pdf> (last visited Sept. 27, 2014).

<sup>182</sup> See H.R. 1844 § 3(a) (amending 9 U.S.C. by adding § 402(a): “Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute.”); see also Al Franken, *The Arbitration Fairness Act of 2013*, SENATE.GOV, <http://www.franken.senate.gov/files/documents/130507ArbitrationFairness.pdf> (last visited Sept. 27, 2014).

<sup>183</sup> Al Franken, *The Arbitration Fairness Act of 2013*, SENATE.GOV, <http://www.franken.senate.gov/files/documents/130507ArbitrationFairness.pdf> (last visited Sept. 27, 2014).

<sup>184</sup> *Id.*

<sup>185</sup> See *Policy Statement on Employment Arbitration*, NAT’L ACAD. OF ARBITRATORS (May 9, 2009), [http://www.naarb.org/due\\_process/due\\_process.html](http://www.naarb.org/due_process/due_process.html).

<sup>186</sup> *Id.*

not present the same dilemma as it does in the non-union workforce.<sup>187</sup> Nonetheless, the Due Process Protocol set forth the following provisions as essential to fair arbitration proceedings:

- Employee has the right to choose his or her own representative
- Employee and the representative may determine their own fee arrangement and the arbitrator may provide fee reimbursement
- Encouragement of “adequate but limited pre-trial discovery”
- Development of a roster of qualified mediators and arbitrators who have knowledge of the subject matter
- Training on statutory issues, as well as the mediation and arbitration process
- Duty of the arbitrator to disclose any relationships that present a conflict of interest – arbitrators should sign an oath stating that no conflict exists
- Arbitrator should be bound the applicable agreements, statutes, regulations and rules of procedure<sup>188</sup>

ADR service providers, such as the AAA, adopted the Due Process Protocol in their procedural rules and guidelines, although most providers have strengthened the employees’ protection against prohibitive expenses by requiring employers to pay all but the initial filing fee.<sup>189</sup>

### C. *Organizational Minimum Standards of Fairness*

ADR service provider, JAMS, The Resolution Experts (formerly Judicial Arbitration and Mediation Services, Inc.) has the following Policy on Employment Arbitration Minimum Standards of Procedural Fairness that must be included in mandatory arbitration agreements:

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<sup>187</sup> See NOLAN, *supra* note 6, at 346-47.

<sup>188</sup> See *id.*

<sup>189</sup> See *id.*

1. All remedies that would be available to the employee in court, including attorneys' fees, exemplary damages, and statutes of limitations must also be available to the employee in arbitration.
2. The arbitrator(s) must be neutral and the employee must have the opportunity to participate in the selection process.
3. The employee must have the right to representation by counsel and the employer may not discourage the employee from obtaining counsel.
4. The arbitration agreement must allow for the exchange of essential information. This discovery should minimally include: relevant documents, identification of witnesses and one deposition for each side.
5. Each side has the right to present proof by way of testimony and documentary evidence, and each side also has the right to cross-examine witnesses.
6. *The cost and location must not be prohibitive for the employee. The employee may only be required to pay the initial case management fee. The employer must pay all other costs, including additional case management fees, and all of the arbitrator's fees.*
7. There must be mutuality in the agreement, i.e., the requirements must be the same for the employer and the employee.
8. The award must include a signed statement by the arbitrator regarding each claim and award, the reasons for any award, and the essential findings and conclusions that merited the award.<sup>190</sup>

JAMS will only facilitate mandatory employment arbitrations if these minimum standards are met.<sup>191</sup> Further, JAMS encourages the use of voluntary mediation or other forms of dispute resolution in the early

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<sup>190</sup> See JAMS, INC., POLICY ON EMPLOYMENT ARBITRATION MINIMUM STANDARD OF PROCEDURAL FAIRNESS 2-5 (Jul 15, 2009), available at [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Employment\\_Min\\_Std-2009.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Employment_Min_Std-2009.pdf) (emphasis added).

<sup>191</sup> See *id.* at 4.

stages of conflict.<sup>192</sup> It is important to note that the minimum standards listed above do not apply to individually negotiated agreements or to agreements that were entered into while the employee was represented or advised by counsel.<sup>193</sup> Thus, these standards are meant specifically to ensure fairness in pre-dispute, mandatory employment arbitration agreements that were signed as a condition of employment.<sup>194</sup>

Following these guidelines can help employers to create a fair and accessible dispute resolution process for employees and minimize potential litigation over the validity of the arbitration agreement.

### VIII. CONCLUSION

There has been much debate, both in scholarly journals and in the courtrooms, over what constitutes a fair and neutral arbitration process for employees to effectively vindicate their statutory rights. Opinions range from proponents who believe that arbitration is a quick and cost effective dispute resolution forum that is sufficiently bargained for in the employment process, to critics who feel that arbitration can never be an acceptable forum in employment because it takes advantage of workers in a weaker bargaining position. In the middle of the spectrum are employees and employers who would like to avoid the slow and highly adversarial litigation process in way that minimizes obstacles for employees.

As demonstrated here, cost is a significant obstacle for employees and minimizes the other benefits of arbitration for those who cannot afford it. However, since legislative attempts to eliminate mandatory employment arbitration agreements have been unsuccessful, and the courts overwhelmingly favor arbitration, it is likely that employment disputes will be subjected to mandatory arbitration for the foreseeable future. Thus, to ensure that cost is not a barrier to employees seeking to vindicate statutory rights, it is essential for arbitration service providers and drafters of mandatory arbitration agreements to provide for employer paid arbitration expenses and a carefully designed arbitrator selection process that ensures neutrality.

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<sup>192</sup> *See id.* at 2.

<sup>193</sup> *See id.* at 5.

<sup>194</sup> *See generally id.* at 2-5.