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The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims

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THE BENCH TRIAL: A MORE BENEFICIAL ALTERNATIVE TO
ARBITRATION OF TITLE VII CLAIMS

DIANNE LARocca*

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INTRODUCTION

Today, an increasing percentage of the United States workforce is covered by pre-dispute mandatory arbitration agreements through which employees waive their right to bring suit under Title VII of the Civil Rights

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Act (“CRA”) of 1964, as amended. A recent study conducted under the auspices of the American Arbitration Association (“AAA”) found that by 1997, 19% of private sector employers were using arbitration, up from 3.6% in 1991.¹ By 2001, the number of employees covered by employment arbitration plans administered by the AAA had grown to 6 million, up from 3 million in 1997.² In addition, almost 90% of employers that had more than one hundred employees and had filed Equal Employment Opportunity (“EEO”) reports with the Equal Employment Opportunity Commission (“EEOC”) in 1992 had used at least one alternative dispute resolution (“ADR”) approach to resolve discrimination complaints.³ Ten percent of these employers used arbitration, and arbitration was mandatory for between one-fourth and one-half of employers using this approach.⁴

Although it appears clear that pre-dispute mandatory arbitration agreements are an increasingly important avenue for resolving disputes between employers and employees in the United States, these agreements can be unsatisfactory. In this paper, I will explore whether pre-dispute mandatory agreements through which employees waive their right to a jury trial and agree to a bench trial of their Title VII claims are a better alternative to arbitration. First, I will describe the advantages and disadvantages of arbitration agreements for employers and employees. Second, I will introduce jury waiver provisions and analyze their enforceability in the Title VII context. Finally, I will argue that jury waiver provisions are a solution to the problem of unenforceable arbitration agreements, that jury waiver provisions avoid the disadvantages of arbitration agreements, and that jury waiver provisions have the same advantages as arbitration agreements.

I. ADVANTAGES AND DISADVANTAGES OF ARBITRATION AGREEMENTS

Since the Supreme Court’s decision in *Circuit City Stores, Inc. v. Adams*,⁵ courts have made it clear that employers may require employees to waive their right to bring suit under Title VII of the CRA of 1964, as amended. However, over time, these agreements have proved unsatisfactory. For both employers and employees, pre-dispute mandatory arbitration agreements are a double-edged sword, providing advantages and disadvantages when compared to litigation.

1. Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May–July 2003, at 10.

2. *Id.*

3. U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-95-150, EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 7 (1995).

4. *Id.*

5. 532 U.S. 105 (2001).

A. Advantages for Employers

Employers turned to ADR as a means to avoid more formal dispute resolution processes, particularly litigation. The use of ADR was spurred in the early 1990s by a dramatic increase in the number of discrimination complaints, along with the costs, time, and frustration involved in attempting to resolve them.⁶ In the private sector, the number of discrimination complaints filed with the EEOC grew by 43%, from 63,898 to 91,189, between fiscal years 1991 and 1994.⁷ The increase in discrimination complaints in the early 1990s can be attributed to several factors, one of which is the CRA of 1991.⁸ While monetary damages had previously been available to private sector complainants, the CRA of 1991 made available compensatory and punitive damages.⁹ The Act also provided for jury trials, in which a plaintiff has a greater chance of prevailing and receiving a higher award.¹⁰

Many employers decided to implement pre-dispute mandatory arbitration agreements as a means to avoid many of the disadvantages of litigating before a jury. The advantages of pre-dispute mandatory arbitration agreements include reduced costs, faster resolutions, greater privacy, no jury, and increased predictability.

Arbitration is usually a more efficient means of resolving discrimination claims. Compared to litigation, arbitration typically costs less¹¹ and offers faster resolutions of employment disputes.¹² The time lapse in litigation, from the time of the events giving rise to a claim and the time of final

6. U.S. GEN. ACCOUNTING OFFICE, GAO/GCD-97-157, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE 9 (1997).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 10.

11. AM. ARBITRATION ASS'N, FAIR PLAY: PERSPECTIVES FROM AMERICAN ARBITRATION ASSOCIATION ON CONSUMER AND EMPLOYMENT ARBITRATION 16 (Jan. 2003); HOW ARBITRATION WORKS 2-3 (Edward P. Goggin & Alan Miles Rubin eds., 5th ed. Supp. 1999); Lisa B. Bingham & Denise R. Chachere, *Dispute Resolution in Employment: The Need for Research*, in EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 95, 98-99 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999); Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, DISP. RESOL. J., Fall 1997, at 19, 20, 22; *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1673 (1996).

12. HENRY S. KRAMER, ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE § 9.01, at 9-3 (2004); AM. ARBITRATION ASS'N, *supra* note 11, at 16; HOW ARBITRATION WORKS, *supra* note 11, at 2-3; Bingham & Chachere, *supra* note 11, at 98-99; Oppenheimer & Johnstone, *supra* note 11, at 20, 22; *Developments in the Law*, *supra* note 11, at 1673.

determination including appeals, can be measured in years or sometimes the substantial portion of a decade.¹³ The AAA reports that:

The mean length of all civil cases that reach a jury trial is just over two and one-half years, according to a study of state courts of general jurisdiction in 45 of the nation's 75 most populated counties. According to the Federal Judicial Center, it is almost 2 years from the time the average employment discrimination case is filed in federal district court until the time it is resolved. . . . [In comparison,] [t]he average arbitration case is resolved in 8.6 months. An external study of AAA employment cases terminated in 1999–2000 showed the average length of time to [arbitrate a case] was 8.2 months.¹⁴

Although there is a certain degree of obligation to report an arbitration award to the public, arbitration offers a greater potential for privacy than the public courtroom. Traditional litigation is often highly publicized, depending on the nature of the dispute and the parties involved. In contrast, arbitration is significantly more private and focused.¹⁵

Arbitration affords greater potential for a fairer resolution of discrimination claims. The jury is a prominent feature of employment discrimination litigation in the United States. Juries generally have a very good understanding of workplace issues. However, a jury often identifies very closely with the employee-plaintiff precisely because most jurors are employees.¹⁶ Consequently, shifting the decision making to a professional arbitrator who likely has substantial experience in studying workplace disputes will yield a fairer resolution.¹⁷

In addition, many arbitrators have proven track records. An arbitrator's decisions in prior, analogous disputes can provide insight into how he or she will decide a case. Many sources of arbitration decisions exist, including the Labor Arbitration Reports, the Labor Arbitration Awards, and the Labor Arbitration Index. Before an arbitration proceeding commences, the AAA rules require the arbitrator to disclose to each party the names of prior or pending cases in which the arbitrator served or is serving and the results of each case.¹⁸ The ability to review previous arbitration decisions increases predictability in the decision-making process.¹⁹ In comparison,

13. KRAMER, *supra* note 12, § 11.02, at 11-6.

14. AM. ARBITRATION ASS'N, *supra* note 11, at 18.

15. *Id.* at 16; KRAMER *supra* note 12, § 9.01, at 9-3; Bingham & Chachere, *supra* note 11, at 98-99; Oppenheimer & Johnstone, *supra* note 11, at 20; *Developments in the Law*, *supra* note 11, at 1673.

16. KRAMER, *supra* note 12, § 9.01, at 9-3.

17. Oppenheimer & Johnstone, *supra* note 11, at 20.

18. AM. ARBITRATION ASS'N, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES, Rule 11(b) (Nov. 1, 2002).

19. *Developments in the Law*, *supra* note 11, at 1673.

there is very little predictability with a jury; it is typically impossible to determine with certainty how a jury may resolve a dispute.

B. *Advantages for Employees*

Unlike employers, most employees do not take part in the formation of pre-dispute mandatory arbitration agreements. Typically, such agreements are presented to employees on a “take it or leave it” basis. However, pre-dispute mandatory arbitration agreements provide advantages to employees. These advantages include faster resolution, greater privacy, rarity of summary judgment, and increased access to justice.

As compared to traditional litigation, arbitration offers faster resolution of employment disputes²⁰ and a greater potential for privacy than the public courtroom.²¹ As a result, many employees find themselves willing to go forward with arbitration. Arbitration allows employees’ claims to be heard in a timely fashion, and it allows employees to move on with their lives more quickly.²² In addition, because there will be no public airing of the plaintiff’s psychological, emotional, or sexual history, many employees who would be otherwise reluctant to bring claims of emotional distress in litigation will bring such claims in the arbitral forum.²³

Many employment discrimination claims are lost at the summary judgment stage of litigation. Although an arbitrator may award summary judgment, such awards are rare.²⁴ As a result, employees who are hesitant to bring a claim in the litigation forum because of the threat of summary judgment may feel confident to bring a claim in arbitration.

Arbitration increases employee access to dispute resolution systems.²⁵ Arbitration affords justice to relatively small claims that would likely be rejected by attorneys who only consider litigation. According to one study, “19 of every 20 employees who feel that they have an employment discrimination claim against an employer are unable to obtain the representation of an attorney to pursue that claim in court.”²⁶ Thus, only the larger employment cases get litigated. A survey of plaintiffs’ lawyers indicated

20. See discussion *supra* Part I.A.

21. See discussion *supra* Part I.A.

22. Norman Brand, *Putting it Together I: A Note on the Economics of Imposed Employment Arbitration Agreements*, in HOW ADR WORKS 99, 102 (Norman Brand ed., 2002); Oppenheimer & Johnstone, *supra* note 11, at 20.

23. Brand, *supra* note 22, at 102.

24. *Id.* at 102–03.

25. HOW ARBITRATION WORKS, *supra* note 11, at 2–3; Oppenheimer & Johnstone, *supra* note 11, at 22; *Developments in the Law*, *supra* note 11, at 1673.

26. AM. ARBITRATION ASS’N, *supra* note 11, at 22–23.

that they often require a retainer of \$3,000–\$3,600, a 35% contingent fee, and minimum provable damages of \$60,000–\$65,000 before they will undertake a claim.²⁷

In addition, arbitration provides an affordable alternative to litigation. The cost of litigation shuts many people out of the court system, thus making the benefits inaccessible. In light of the controversy surrounding the issue of fee sharing²⁸ and the AAA rules for employment cases, many employees can afford to arbitrate their discrimination claims. The employee's forum costs, i.e., administrative fees and compensation for the arbitrator, are currently capped at \$125 under the AAA rules for employment cases arising from employer-promulgated dispute resolution plans.²⁹ Even before the AAA fee cap went into effect, a study of randomly chosen awards from AAA employment arbitration decisions showed that "32% of employees arbitrating under employer-promulgated ADR plans paid nothing at all for their AAA arbitrations, and that 61% paid no forum fees," i.e., filing, hearing, or arbitrator's fees.³⁰ In addition, the study found that arbitrators often reallocated the forum fees entirely to the employer.³¹ AAA employment arbitrators exercised their discretion to reallocate arbitrator's fees to the employer in 70.25% of the cases, hearing fees in 71.3% of the cases, and filing fees in 85.12% of the cases.³²

C. *Disadvantages for Employers*

With the increased number of discrimination complaints and the passage of the CRA of 1991, many employers have adopted pre-dispute mandatory arbitration agreements. Although these agreements avoid many of the disadvantages of litigating in court, arbitration carries its own disadvantages. These disadvantages include a greater number of discrimination claims, significant expenses, no guarantee of arbitrator expertise, and reduced appellate rights.

Although pre-dispute mandatory arbitration agreements may reduce the number of discrimination complaints that an employer litigates, arbitration may increase the total number of discrimination complaints against which the employer must defend.³³ Because arbitration is a faster, more

27. *Id.* at 22.

28. *See* discussion *infra* Part I.C.

29. AM. ARBITRATION ASS'N, *supra* note 11, at 24, 35.

30. *Id.* at 24.

31. *Id.* at 35 n.100.

32. *Id.*

33. *See, e.g.,* KRAMER, *supra* note 12, § 9.01, at 9-2.

private, and less costly means through which employees can bring their discrimination complaints, employees may utilize arbitration more frequently. In addition, because arbitrators rarely grant summary judgment,³⁴ not only will employees who are hesitant to bring complaints in litigation feel confident to bring complaints in arbitration, the employer will have to defend against many discrimination complaints that a court may have found meritless.³⁵

Although arbitration typically costs less than litigation, arbitration is expensive for employers.³⁶ Because the issue of fee sharing remains controversial,³⁷ employers are cautious when writing pre-dispute mandatory arbitration agreements. To ensure the enforceability of agreements, employers offer to pay some, if not most, of the arbitration costs.³⁸ These costs include the location cost, the arbitrator's fee for preparing and conducting the arbitration, which can be between \$300 and \$500 per hour for a seasoned arbitrator's services,³⁹ and the arbitrator's fee for studying and deciding discovery disputes or law and motion proceedings.⁴⁰ In a court proceeding, these costs are publicly funded.⁴¹ In addition to the direct costs of the arbitration procedure, controversy over arbitration agreements' enforceability and applicability to certain disputes has led to an increase in the types of claims being made in court against employers.⁴² The litigation surrounding these claims could potentially double costs for employers.

34. Brand, *supra* note 22, at 102–03.

35. See John-Paul Motley, *Compulsory Arbitration Agreements in Employment Contracts from Gardner-Denver to Austin: The Legal Uncertainty and Why Employers Should Choose Not to Use Preemployment Arbitration Agreements*, 51 VAND. L. REV. 687, 714 n.183 (1998).

36. See Bingham & Chachere, *supra* note 11, at 99. Some commentators argue that arbitration is more expensive for employers than traditional litigation. See, e.g., *Big Awards Debunk Myths of Arbitration*, N.Y. LAW., Aug. 22, 2002, available at <http://www.nylawyer.com/news/02/08/082202e.html>; Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 401, 421–24 (2000); Motley, *supra* note 35, at 714–15.

37. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). Some courts have struck down arbitration agreements in their entirety where employers have attempted to shift some or all of the burden of the cost of arbitration to employees. See, e.g., *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). Other courts have held that the mere possibility that a plaintiff may be required to pay arbitration fees is not, by itself, a sufficient reason to invalidate an agreement to arbitrate civil rights or other employment-based claims. See *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549 (4th Cir. 2001); *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999); *Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361 (7th Cir. 1999).

38. See discussion *supra* Part I.C.

39. Harold M. Brody & Anthony J. Oncidi, *Careful What You Wish For: Is Arbitration the Employer's Panacea? Perhaps There Is a Better Alternative*, HR ADVISOR, Nov./Dec. 2003, at 8.

40. *Id.*

41. *Id.* at 9.

42. See Motley, *supra* note 35, at 714–18.

Limited appellate review is problematic for employers.⁴³ A court can overturn an arbitration award only where the award was procured by corruption, fraud, or undue means; where there was evidence of partiality or corruption in the arbitrator; where the arbitrator was guilty of misbehavior by which the rights of any party were prejudiced; where the arbitrator exceeded his power; or where the arbitrator imperfectly executed his power.⁴⁴ In 1953, the Supreme Court stated that arbitrators' interpretations of law were not subject to *vacatur* under the FAA unless they displayed a "manifest disregard" for the law.⁴⁵ Subsequently, courts have interpreted "manifest disregard" to mean that the arbitrator knew the law but chose to disregard it.⁴⁶ These standards ensure a high degree of judicial deference to arbitrators.

This high degree of judicial deference is troublesome because there is no guarantee that the arbitrator will be well-versed in employment law.⁴⁷ An arbitrator may be unfamiliar with employment discrimination statutes, particularly the elements of discrimination and burdens of proof. In addition, because arbitrators have the discretion to decide a case based on broad principles of equity and justice, some have the tendency to grant broad equitable relief.⁴⁸ If the employer disagrees with the arbitrator's legal analysis or the outcome of the case, the high degree of judicial deference to arbitrators means there is a limited basis on which such awards can be challenged.

D. Disadvantages for Employees

Because most employees do not take part in the formation of pre-dispute mandatory arbitration agreements, and because such agreements are presented to employees on a "take it or leave it" basis, employees often find themselves accepting pre-dispute mandatory arbitration agreements that fail to include the due process protections one would expect from a court. The enforceability of these agreements has been subject to significant litigation. In light of decisions such as *Gilmer v. Interstate/Johnson Lane Corp.*,⁴⁹ *Cole v. Burns International Security Services*,⁵⁰ and *Circuit*

43. KRAMER, *supra* note 12, § 9.01, at 9-2.

44. 9 U.S.C. § 10 (2000).

45. *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953).

46. *See, e.g., Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992); *Robbins v. Day*, 954 F.2d 679, 683 (11th Cir. 1992).

47. HOW ARBITRATION WORKS, *supra* note 11, at 3; *Developments in the Law*, *supra* note 11, at 1680-81.

48. *Bingham & Chachere*, *supra* note 11, at 99.

49. 500 U.S. 20 (1991).

City Stores, Inc. v. Adams,⁵¹ most courts will require the procedural elements of pre-dispute mandatory arbitration agreements to be sufficient to preserve and enforce the substantive rights created by the applicable statutes.⁵² However, because courts have not agreed on what constitutes sufficiency, employees that sign pre-dispute mandatory arbitration agreements are not guaranteed that their due process rights will be fully protected.

In most pre-dispute mandatory arbitration agreements, the time allowed for employees to file their discrimination claims is shorter than the statute of limitations applicable under the various discrimination laws.⁵³ The shorter statute of limitations provided in most pre-dispute mandatory arbitration agreements prohibits employees, who might otherwise have access to the court, access to arbitration.

Arbitration agreements differ in their provisions for the selection of arbitrators, the payment of arbitrators, and the payment of arbitration fees. While some agreements allow both the employer and employee to select the arbitrator, others allow only the employer to select the arbitrator.⁵⁴ Allowing only the employer to select the arbitrator establishes arbitrator bias or the appearance of arbitrator bias. Wide variation exists in the handling of the arbitrator's compensation⁵⁵ and the payment of arbitration fees.⁵⁶ Agreements may require the parties to split the compensation and fees 50/50, 75/25, or 100/0. Requiring complaining employees to contribute to the compensation and fees is expensive; however, employer-only payment creates arbitrator bias or at least the appearance of arbitrator bias.

Arbitration agreements' provisions regarding employee counsel differ from agreement to agreement. Although most agreements allow employees to be represented by counsel, few fund the cost of employee counsel.⁵⁷ Employee-funded counsel is cost burdensome, particularly for lower-level

50. 105 F.3d 1465 (D.C. Cir. 1997).

51. 532 U.S. 105 (2001).

52. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997).

53. *See, e.g.*, JOHN T. DUNLOP & ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* 84 (1997).

54. *See, e.g.*, Katherine V.W. Stone, *Employment Arbitration Under the Federal Arbitration Act*, in *EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE*, *supra* note 11, at 27, 52. While arbitration agreements differ in their provisions for the selection of arbitrators, many provisions allowing only the employer to select the arbitrator have been found unenforceable. *See, e.g.*, *McMullen v. Meijer, Inc.*, 337 F.3d 697 (6th Cir. 2003); *Murray v. United Food & Commercial Workers Int'l Union, Local 400*, 289 F.3d 297 (4th Cir. 2002).

55. DUNLOP & ZACK, *supra* note 53, at 83.

56. Stone, *supra* note 54, at 52.

57. DUNLOP & ZACK, *supra* note 53, at 100.

employees. Some agreements even preclude employees from being represented by counsel.⁵⁸ Requiring complaining employees to present their complaints without counsel places the employees at an unfair disadvantage because the employer most likely will be represented by counsel or a human resources representative.

Limited judicial review of arbitration awards is a disadvantage for employees, as it is for employers.⁵⁹

Because many employers decide to implement pre-dispute mandatory arbitration agreements as a means to avoid large jury awards, many pre-dispute mandatory arbitration agreements place limits on the amount of damages an arbitrator may award.⁶⁰ Unlike the remedies provided by the CRA of 1964, as amended,⁶¹ many agreements specify that arbitrators cannot award punitive damages, compensatory damages, or interest on back pay awards.⁶²

II. BENCH TRIAL AS AN ALTERNATIVE

In this Part, I will explore whether pre-dispute mandatory agreements through which employees waive their right to a jury trial and agree to a bench trial of their Title VII claims are a more beneficial alternative to mandatory arbitration. Although jury waiver provisions are commonplace, not much discussion of this idea has emanated in the employment law field. The literature that does exist urges employers to consider using jury waiver provisions instead of mandatory arbitration.⁶³ However, this literature fails to examine in depth whether jury waiver provisions are enforceable in the Title VII context. Nor do they ask whether jury trial waivers are a solution to the problem of unenforceable arbitration agreements. In this Part, I will examine these subjects as well as discuss whether jury waiver provisions are a means to overcome the disadvantages of arbitration agreements at the same time as they maintain the advantages of arbitration agreements.

58. *Id.*; Stone, *supra* note 54, at 52.

59. See discussion *supra* Part I.C.

60. See, e.g., DUNLOP & ZACK, *supra* note 53, at 86; KRAMER, *supra* note 12, § 9.01, at 9-2; Stone, *supra* note 54, at 34, 52.

61. 42 U.S.C. § 1981a(b) (2000).

62. DUNLOP & ZACK, *supra* note 53, at 86.

63. See, e.g., Brody & Oncidi, *supra* note 39; Stephen F. Fink, *Insist on Bench Trials*, NAT'L L.J. Jan. 13, 2003, at A17; Richard J. Hafets & Linda Boyd, *An Alternative to Alternative Dispute Resolution*, EMPLOYEE REL. L.J., Winter 2003, at 73; Terence M. O'Neil & Mark N. Reinharz, *How to Avoid a "Runaway Jury": Voluntary Waivers of Jury Trials: An Alternative to Mandatory Arbitration of Employment Disputes*, EMP. L. STRATEGIST, Apr. 2003, at 1.

A. *Enforceability of the Jury Waiver Provision*

The parties to a contract may waive the right to a jury trial through a prior written agreement that is entered into knowingly and voluntarily.⁶⁴ Such agreements are neither illegal nor contrary to public policy.⁶⁵ Although contractual waiver of the right to jury trial is not illegal, the jury trial right is fundamental and a presumption against its waiver exists.⁶⁶ Therefore, contract provisions waiving this right are strictly and narrowly construed.⁶⁷ In addition, the requirement of knowing, voluntary, and intentional waivers is strictly applied.⁶⁸

64. *See, e.g.*, *Herman Miller, Inc. v. Thom Rock Realty Co., L.P.*, 46 F.3d 183, 189 (2d Cir. 1995) (enforcing the jury waiver provision of a commercial lease); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) (finding that the right to a jury trial can be knowingly and intentionally waived by contract); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir. 1985) (finding that parties to a contract may waive right to a jury trial); *N.W. Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 373 F.2d 136, 142 (8th Cir. 1967) (finding that parties to a labor contract, which provided that an arbitration board determine minor disputes, waived the right to a jury trial); *RDO Fin. Servs. Co. v. Powell*, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002) (stating that a “waiver must be made knowingly and voluntarily, and courts will indulge every reasonable presumption against a waiver of that right”); *In re Balsam Corp.*, 185 B.R. 54, 59 (E.D. Mo. 1995) (finding that a purchaser of debtor’s assets waived the right to a jury trial by including language in a sale agreement that all disputes would be resolved in bankruptcy court); *Conn. Nat’l Bank v. Smith*, 826 F. Supp. 57, 59 (D.R.I. 1993) (stating that the Seventh Amendment guarantees the right to a jury trial in many civil cases; nonetheless, “it is axiomatic that, if done so knowingly, intentionally, and voluntarily, parties to a contract can waive this fundamental right”); *Okura & Co., Inc. v. Careau Group*, 783 F. Supp. 482, 488–89 (C.D. Cal. 1991) (finding that the waiver provisions contained in loan documents were valid when they had been negotiated by the parties and were an essential aspect of the bargain); *In re Reggie Packing Co., Inc. v. Lazere Fin. Corp.*, 671 F. Supp. 571, 573 (N.D. Ill. 1987) (finding that a jury trial may be waived by contract); *Analytical Sys., Inc. v. ITT Commercial Fin. Corp.*, 696 F. Supp. 1469, 1479 (N.D. Ga. 1986) (finding that the parties contractually waived the right to a jury trial); *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F. Supp. 310, 313 (S.D.N.Y. 1983) (upholding the contractual waiver of a jury trial); *Seligson v. Plum Tree, Inc.*, 361 F. Supp. 748, 758 (E.D. Pa. 1973) (finding that an argument that waiver was invalid because the contract between the parties violated the antitrust laws was “clearly specious,” because that was the issue to be tried).

65. *See, e.g.*, *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988) (stating that agreements waiving a jury trial are not contrary to public policy); *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., Inc.*, 56 F. Supp. 2d 694, 706 (E.D. La. 1999) (finding that “[a]greements waiving the right to trial by jury are neither illegal nor contrary to public policy”); *Coop. Fin. Ass’n, Inc. v. Garst*, 871 F. Supp. 1168, 1171 (N.D. Iowa 1995) (finding that contractual waivers of a jury trial are “neither illegal nor contrary to public policy”); *Phoenix Leasing, Inc. v. Sure Broad., Inc.*, 843 F. Supp. 1379, 1384 (D. Nev. 1994) (stating that no abstract public policy disfavors nor limits contractual waiver of the right to jury trial in civil cases); *Conn. Nat’l Bank*, 826 F. Supp. at 59 (stating that contractual agreements waiving the right to jury trial are “neither illegal nor contrary to any abstract public policy”); *Okura & Co.*, 783 F. Supp. at 488 (finding no abstract public policy against waiving a jury trial).

66. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

67. *See, e.g.*, *Hulsey v. West*, 966 F.2d 579, 581–82 (10th Cir. 1992) (finding that the guarantor of a loan agreement was not bound by a jury waiver provision in an amendment to the agreement, even though he had executed the agreement as president of borrower, he did not sign in his individual capacity, and the amendment was made four years after his personal guaranty was executed); *Rodenbur v. Kaufmann*, 320 F.2d 679, 683–84 (D.C. Cir. 1963) (finding a jury waiver clause in an apartment lease applied only to issues relating to terms of the lease, not to an accident on the premises); *Phoenix Leasing, Inc.*, 843 F. Supp. at 1388 (stating that jury waivers are to be “narrowly construed, and any ambiguity is to be decided against the waiver”); *Okura & Co.*, 783 F. Supp. at 489 (finding that causes of

Factors to be considered in determining whether a contractual waiver of a jury trial right was entered into knowingly and voluntarily include: (1) negotiability of contract terms and negotiations between the parties concerning the waiver provision, (2) conspicuousness of the provision in the contract, (3) the relative bargaining power of the parties, (4) business acumen of the party opposing waiver, and (5) whether counsel for the party opposing waiver had an opportunity to review the agreement.⁶⁹ When the criteria outlined above have been met, courts have found jury waiver provisions enforceable.⁷⁰

action stemming from a separate purchase agreement, or from an oral reimbursement agreement predating the main contract, would be triable by a jury); *Nat'l Acceptance Co. v. Myca Prods., Inc.*, 381 F. Supp. 269, 270 (W.D. Pa. 1974) (deeming the waiver clause in a loan agreement inapplicable with regard to the borrower's counterclaim for breach of an antecedent oral agreement). *But see, e.g., Telum, Inc.*, 859 F.2d at 837-38 (upholding the waiver clause although an entire oil rig lease was challenged on grounds of fraud in the inducement); *Efficient Solutions, Inc. v. Meiners' Country Mart, Inc.*, 56 F. Supp. 2d 982, 984 (W.D. Tenn. 1999) (finding that a contractual jury waiver provision applied to defendant's counterclaims for fraud in inducement and negligent misrepresentation because defendant's tort claims arose out of and related to contract negotiations that led to the contract); *Nat'l Westminster Bank, U.S.A. v. Ross*, 130 B.R. 656, 667-68 (S.D.N.Y. 1991) (finding that the jury waiver clause in a guarantee, providing that guarantor waived jury trial right in any litigation with bank, applied to guarantor's counterclaims, whether or not relating to the guaranty); *Analytical Sys., Inc.*, 696 F. Supp. at 1479 (while the subject of the action was property not covered by security agreements, and it was argued that the defendant's alleged tortious conduct fell outside the relationship of the secured parties and thus could not have been contemplated by the jury waiver clause, the deprivation of property occurred in the context of the creditor's efforts to protect its collateral; defendant's actions may have been tortious, but they were taken in accordance with its understanding of its status under the security agreement).

68. *See, e.g., K.M.C. Co.*, 757 F.2d at 755-58 (finding waiver is neither knowing nor voluntary where the defendant's representatives had assured the plaintiff that the waiver provisions would not be enforced absent fraud); *Nat'l Equip. Rental v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (finding that the inequality in bargaining power suggested the waiver was neither intentional nor knowing where the waiver clause was set deeply and inconspicuously in the contract, and the defendant had no choice but to accept the conditions to obtain badly needed funds); *RDO Fin. Servs. Co.*, 191 F. Supp. 2d at 813 (stating "waiver must be made knowingly and voluntarily, and courts will indulge every reasonable presumption against" waiver); *Coop. Fin. Ass'n, Inc.*, 871 F. Supp. at 1171 (stating "for a waiver to be effective, the party waiving the right must do so 'voluntarily' and 'knowingly'"); *Phoenix Leasing, Inc.*, 843 F. Supp. at 1384 (stating that the court must decide the waiver was "knowing, voluntary and intelligent"); *Conn. Nat'l Bank*, 826 F. Supp. at 59 (stating that "[a]ll courts agree that a contractual jury waiver provision is enforceable only if it was entered into 'knowingly and intentionally' or 'knowingly and voluntarily'"); *In re Reggie Packing Co.*, 671 F. Supp. at 573 (finding the validity of a waiver depends on voluntary and knowing consent); *N. Feldman & Son, Ltd.*, 572 F. Supp. at 313 (stating "[w]hen the purported waiver exists in a contract signed prior to the contemplation of litigation, the party seeking to enforce it must demonstrate that the consent was both voluntary and informed"); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Colo. 1982) (stating that "[a] constitutional guarantee so fundamental as the right to jury trial cannot be waived unknowingly").

69. *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994).

70. *See, e.g., Telum, Inc.*, 859 F.2d at 837-38; *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986); *Westside-Marrero Jeep Eagle, Inc.*, 56 F. Supp. 2d at 707-09; *Coop. Fin. Ass'n, Inc.*, 871 F. Supp. at 1172-73; *Phoenix Leasing, Inc.*, 843 F. Supp. at 1384-85; *Conn. Nat'l Bank*, 826 F. Supp. at 60-61; *Gurfein v. Sovereign Group*, 826 F. Supp. 890, 921 (E.D. Pa. 1993); *Okura & Co.*, 783 F. Supp. at 489; *Smyly v. Hyundai Motor Am.*, 762 F. Supp. 428, 430 (D. Mass. 1991); *Nat'l Westminster Bank, U.S.A.*, 130 B.R. at 667; *Bonfield v. Aamco Transmissions, Inc.*, 717 F. Supp. 589, 595-96 (N.D. Ill. 1989); *Standard Wire & Cable Co. v. AmeriTrust Corp.*, 697 F. Supp. 368, 375 (C.D. Cal. 1988); *In re Reggie Packing Co.*, 671 F. Supp. at 573-74; *N. Feldman & Son, Ltd.*, 572 F. Supp. at 313.

B. *Enforceability of the Jury Waiver Provision in the Title VII Context*

Pre-dispute mandatory agreements through which employees waive their right to a jury trial and agree to a bench trial for their Title VII claims are uncommon in federal employment law, but do exist.⁷¹ In *Brown v. Cushman & Wakefield, Inc.*,⁷² the plaintiff signed an employment agreement on May 3, 1999, specifically stating that she and her employer “hereby do waive a trial by jury in any action, proceeding or counterclaim brought or asserted by either of the parties hereto against the other on **any matters whatsoever arising out of this Agreement.**”⁷³ After Brown was terminated on January 3, 2000, she filed a complaint alleging that she had been terminated because of her “sex, pregnancy and childbirth.”⁷⁴ She also claimed that the employer had breached her employment contract.⁷⁵ The employer denied the allegations, filed a counterclaim against Brown for payments made to her during her maternity leave, and sought to strike Brown’s demand for a jury trial.⁷⁶

In discussing the employer’s effort to strike Brown’s demand for a jury trial, the court cited precedent holding that parties to a contract may choose to waive their right to a jury trial.⁷⁷ In addition, the court recognized that an agreement to waive the right to a jury trial must be “knowing and voluntary.”⁷⁸ To determine whether the waiver was knowing and voluntary, the court looked to the following factors: “(1) the negotiability of contract terms and negotiations between the parties concerning the waiver provision; (2) the conspicuousness of the waiver provision in the contract; (3) the relative bargaining power of the parties; and (4) the business acumen of the party opposing the waiver.”⁷⁹

Although Brown claimed that she did not knowingly waive her right to a jury trial, the court disagreed.⁸⁰ The court found that the waiver was

But see, e.g., Nat’l Equip. Rental, 565 F.2d at 258; *RDO Fin. Servs. Co.*, 191 F. Supp. 2d at 813–14; *First Union Nat’l Bank v. United States*, 164 F. Supp. 2d 660, 665 (E.D. Pa. 2001); *Sullivan v. Ajax Navigation Corp.*, 881 F. Supp. 906, 911 (S.D.N.Y. 1995); *Dreiling*, 539 F. Supp. at 403.

71. I was only able to find two cases that analyzed a jury trial waiver provision in the Title VII context: *Brown v. Cushman & Wakefield, Inc.*, 235 F. Supp. 2d 291 (S.D.N.Y. 2002), discussed above, and *Schappert v. Bedford, Freeman & Worth Publ’g Group, LLC*, No. 03 Civ. 0058(RMB)(D.), 2004 U.S. Dist. LXXIS 14153 (S.D.N.Y. 2004) (finding jury waiver provision enforceable).

72. *Id.*

73. *Id.* at 293 (emphasis in original).

74. *Id.* at 292.

75. *Id.*

76. *Id.*

77. *Id.* at 293.

78. *Id.*

79. *Id.* at 293–94 n.5 (internal quotation marks and citation omitted).

80. *Id.* at 293–94.

sufficiently conspicuous in the agreement.⁸¹ Moreover, the court found Brown to be well-educated. Brown had obtained a Harvard M.B.A. and had worked as an investment banker.⁸² The court dismissed Brown's claim that she did not read the particular provision as a having "no merit."⁸³ The court concluded that the contractual waiver of a jury trial applied to all of Brown's claims, "including those arising under federal and state discrimination statutes."⁸⁴

The enforceability of jury waiver provisions outside the employment law context, combined with the holding in *Brown*, creates a strong argument that jury waiver provisions are enforceable in the Title VII context as long as such provisions are entered into knowingly and voluntarily. The argument in favor of enforceability is supported by cases holding pre-dispute mandatory arbitration agreements in the employment context enforceable.⁸⁵ If an employer can require its employees to agree to waive their right to a jury trial and to have all disputes resolved by an arbitrator, there seems to be no reason why an employer cannot require such a jury trial waiver, but keep the dispute in court before a judge. "This analogy is especially appropriate . . . because submission of a case to arbitration involves a greater compromise of procedural protections than does the waiver of the right to trial by jury."⁸⁶

C. Considerations in Drafting the Jury Waiver Provision

Outside the employment law context, to determine whether a jury waiver provision meets the knowing and voluntary burden, courts balance the following factors: the negotiability of contract terms, whether negotiations between the parties concerning the waiver provision took place, the conspicuousness of the provision in the contract, the relative bargaining power of the parties, the business acumen of the party opposing waiver, and whether counsel for the party opposing waiver had an opportunity to review the agreement.⁸⁷ Assuming courts will follow *Brown* and continue to apply the same type of balancing test in the employment law context, an employer seeking to enforce a jury waiver provision can meet the knowing and voluntary burden by satisfying the criteria articulated by the courts in

81. *Id.* at 294.

82. *Id.*

83. *Id.*

84. *Id.* (internal quotation marks omitted).

85. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) and its progeny.

86. *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 838 (10th Cir. 1988) (discussing in dicta, allegations of fraud in inducement of jury trial waiver provisions).

87. See *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994).

cases outside the employment law context. Because these criteria mirror the standards of procedural conscionability required for the enforceability of arbitration agreements,⁸⁸ they seem appropriate for the employment law context.

Employers should ensure negotiability of contract terms. Outside the employment law context, courts have found negotiability in situations where contract provisions, other than the waiver provision, have been negotiated or altered.⁸⁹ As long as there is no indication that an employee's contract terms are nonnegotiable, the court will most likely find negotiability.⁹⁰

Employers should present the provision conspicuously in the contract.⁹¹ The provision should be prominently placed in the employment

88. See discussion *infra* Part II.D.

89. See, e.g., *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) (finding negotiability where negotiations of a lease agreement were protracted and several changes were made to the document before signing); *Phoenix Leasing, Inc. v. Sure Broad., Inc.*, 843 F. Supp. 1379, 1384 (D. Nev. 1994) (finding negotiability where borrower negotiated and altered some terms of the agreement); *Nat'l Westminster Bank, U.S.A. v. Ross*, 130 B.R. 656, 667 (S.D.N.Y. 1991) (finding negotiability where guarantor, with the assistance of counsel, revised the agreement); *Standard Wire & Cable Co. v. AmeriTrust Corp.*, 697 F. Supp. 368, 375 (C.D. Cal. 1988) (finding negotiability where counsel made revisions to parts of the documents); *In re Reggie Packing Co., v. Lazere Fin. Corp.*, 671 F. Supp. 571, 573 (N.D. Ill. 1987) (finding negotiability where the plaintiff had the opportunity to negotiate provisions and had altered two provisions).

90. See, e.g., *In re S. Indus. Mech. Corp.*, 266 B.R. 827, 832 (W.D. Tenn. 2001) (finding negotiability where there was no evidence supporting the allegation that debtor had no opportunity to modify the contract terms); *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., Inc.*, 56 F. Supp. 2d 694, 707 (E.D. La. 1999) (finding negotiability where, "[a]lthough the terms of the contracts were not negotiated, there [was] no indication that the terms were not negotiable"); *Coop. Fin. Ass'n, Inc. v. Garst*, 871 F. Supp. 1168, 1172 (N.D. Iowa 1995) (finding negotiability where there was no suggestion that borrower could not negotiate contract provisions).

91. See, e.g., *Leasing Serv. Corp.*, 804 F.2d at 833 (finding conspicuousness where lease agreement was only two pages long); *In re S. Indus. Mech. Corp.*, 266 B.R. at 832-33 (finding conspicuousness where each promissory note was more than three pages long, jury waiver provision consistently was located in the paragraph above the signature block, and the jury waiver provision was written in clear language); *First Union Nat'l Bank v. United States*, 164 F. Supp. 2d 660, 665 (E.D. Pa. 2001) (finding conspicuousness where provision was written entirely in capital letters under the heading "Waiver of Jury Trial"); *Westside-Marrero Jeep Eagle, Inc.*, 56 F. Supp. 2d at 708 (finding conspicuousness where "the relevant clauses were clearly written, in most instances in block print, just above the signature line"); *Coop. Fin. Ass'n, Inc.*, 871 F. Supp. at 1172 (finding conspicuousness where the terms were clear and comprehensive and the provision was set off in its own paragraph just above the signature block with a warning to read the entire document); *Phoenix Leasing, Inc.*, 843 F. Supp. at 1384 (finding conspicuousness where clause was printed in capital letters above the signature line); *Conn. Nat'l Bank v. Smith*, 826 F. Supp. 57, 60-61 (D.R.I. 1993) (finding conspicuousness where the guarantees "were only four pages long and contained only three pages of text; the language of the jury waiver clauses was clear and definite; the jury waiver clauses were located at the end of a paragraph, only two inches above the guarantors' signatures;" and the clauses were entirely legible and were the same size text as every other clause in the contract); *Gurfein v. Sovereign Group*, 826 F. Supp. 890, 921 (E.D. Pa. 1993) (finding that the jury waiver provisions in the agreement were clear and conspicuous); *Smyly v. Hyundai Motor Am.*, 762 F. Supp. 428, 430 (D. Mass. 1991) (finding conspicuousness where jury waiver provision was set out plainly and was foretold in capital letters in an introductory table of contents); *Nat'l Westminster Bank, U.S.A.*, 130 B.R. at 667 (finding conspicuousness where provision

application. The language should be in a type size at least a bit larger and bolder than the language used in the rest of the application.

Although employers must ensure that the bargaining power between the parties is not unequal, employers need not ensure that the bargaining power between the parties is exactly equal. To invalidate a waiver provision, the bargaining difference must be the kind of “extreme bargaining disadvantage” or “gross disparity in bargaining position” that occurs only in certain exceptional situations.⁹² While employers should not write one-sided jury waiver provisions,⁹³ “take it or leave it” contracts are not automatically unenforceable.⁹⁴ In addition, the court will most likely not find unequal bargaining power if the employee can refuse to sign the contract and search for a job elsewhere.⁹⁵

Any inequality in bargaining power that exists can be counterbalanced by an employee’s sophistication and retention of counsel to oversee the transaction. Although a formal education is not necessary for the court to find an employee “sophisticated,” it does constitute evidence of sophistication.⁹⁶ As long as an employee is sufficiently sophisticated to understand

was set off in its own paragraph two inches above the signature line, and the provision was printed in small but entirely legible text, like the balance of the guaranty); *Bonfield v. Aamco Transmissions, Inc.*, 717 F. Supp. 589, 595 (N.D. Ill. 1989) (finding conspicuousness where the agreement contained bold-face caption stating “Jury Trial Waived”); *In re Reggie Packing Co.*, 671 F. Supp. at 574 (finding conspicuousness where contract only three pages long and the waiver clause was located at the end of a paragraph just two inches above the signature line and in the same print type as every other contract clause); *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F. Supp. 310, 313 (S.D.N.Y. 1983) (finding conspicuousness where the waiver provision was clearly visible, and located directly above the signatures of the parties). *But cf.* *Nat’l Equip. Rental v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (finding the jury waiver provision inconspicuous where the clause was buried in the eleventh paragraph of a fine print, sixteen clause agreement); *RDO Fin. Servs. Co. v. Powell*, 191 F. Supp. 2d 811, 814 (N.D. Tex. 2002) (finding the jury waiver provision inconspicuous where the waiver was printed in very small font, buried in the middle of a lengthy paragraph entitled “Guarantor’s Waivers,” and not set off from the text); *Whirlpool Fin. Corp.*, 866 F. Supp. at 1106 (finding the jury waiver provision inconspicuous, even though the provision was printed in capital letters, and it constituted three lines in a six page form loan agreement); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Colo. 1982) (finding a jury waiver provision inconspicuous where the waiver was inserted inconspicuously on the twentieth page of a twenty-two page standardized form contract).

92. *See Westside-Marrero Jeep Eagle, Inc.*, 56 F. Supp. 2d at 709; *Phoenix Leasing, Inc.*, 843 F. Supp. at 1385; *Conn. Nat’l Bank*, 826 F. Supp. at 60; *In re Reggie Packing Co.*, 671 F. Supp. at 573.

93. *See, e.g., RDO Fin. Servs. Co.*, 191 F. Supp. 2d at 814 (finding that a one-sided waiver of the right to a jury trial was unenforceable).

94. *See, e.g., Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1564–65 (Fed. Cir. 1990) (finding that the bare fact that the contracts in question were “take it or leave it” offers by the government was not controlling); *Smyly*, 762 F. Supp. at 429–30 (finding a “take it or leave it” contract that included a jury waiver provision was enforceable).

95. *See, e.g., In re S. Indus. Mech. Corp.*, 266 B.R. at 832 (finding that a waiver was enforceable where there was no evidence that the debtors could not have taken their business elsewhere); *Coop. Fin. Ass’n, Inc.*, 871 F. Supp. at 1172 (finding a waiver enforceable where there was no evidence that the borrower could not have sought financing elsewhere if he objected to the terms of the loan).

96. *Compare Conn. Nat’l Bank*, 826 F. Supp. at 60 (finding that the defendants were sophisticated where the signatory graduated from Yale Law School, served as a law clerk, had been a practicing

the jury waiver provision, the court should find that the employee knowingly waived his right to a jury.

To ensure employees understand the jury waiver provision, an employer should write the provision in such a manner that the average person can understand exactly what he or she is signing. The scope of the agreement, in terms of parties and claims, should be clearly delineated. Moreover, the agreement should expressly reference the types of employees that it will cover. Examples include all employees not covered by collective bargaining agreements; certain divisions, departments, or workgroups; specific categories of employees such as executives, supervisors, or professionals; independent contractors; and new hires. Additionally, the agreement should expressly reference the employment disputes that it will cover. Examples include termination, benefits, statutory claims, sexual harassment, wages and compensation, and performance evaluations.

In determining whether the employee is sufficiently sophisticated to understand the jury waiver provision, courts also consider whether counsel for the party opposing waiver had an opportunity to review the contract.⁹⁷ Although representation and review of the provision is not necessary to find the provision knowingly and voluntarily waived,⁹⁸ to ensure knowing and voluntary waiver employers should give employees the opportunity for counsel to review the contract.⁹⁹

In addition to meeting the criteria articulated by courts outside the employment law context, employers should ensure that the jury waiver

attorney in a variety of business fields for many years, was President and CEO of a number of substantial corporations, and had participated in complex financial loan transactions on behalf of these companies); *Nat'l Westminster Bank, U.S.A.*, 130 B.R. at 667 (finding that a guarantor was sophisticated where he had received a bachelor's degree in political science from San Francisco State University and subsequently attended Harvard Business School where he earned an MBA, guarantor was CEO and major shareholder of a corporation, and guarantor had at least six years experience negotiating complex financial transactions); *with Leasing Serv. Corp.*, 804 F.2d at 833 (finding that the lessees were "manifestly shrewd businessmen" despite their lack of formal education); *In re S. Indus. Mech. Corp.*, 266 B.R. at 832 (finding that debtors were sophisticated businesspeople without discussing formal education); *Coop. Fin. Ass'n, Inc.*, 871 F. Supp. at 1172 (finding that the borrower was a sophisticated and experienced businessman without discussing formal education); *Phoenix Leasing, Inc.*, 843 F. Supp. at 1385 (finding that the defendant was experienced, professional, and sophisticated in business dealings without discussing formal education); *Smyly*, 762 F. Supp. at 430 (finding that the dealer was a sophisticated businessman without discussing formal education); *Bonfield*, 717 F. Supp. at 595 (finding that the franchisee was an experienced businessman without discussing formal education).

97. *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994).

98. *See, e.g., Bonfield*, 717 F. Supp. at 595 (upholding waiver provision even though franchisee chose not to have his lawyer review the agreement); *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F. Supp. 310, 313 (S.D.N.Y. 1983) (upholding the waiver provision even though the buyer was unrepresented).

99. *See, e.g., Phoenix Leasing, Inc.*, 843 F. Supp. at 1385; *Conn. Nat'l Bank*, 826 F. Supp. at 60; *Nat'l Westminster Bank, U.S.A.*, 130 B.R. at 667; *Standard Wire & Cable Co. v. Ameritrust Corp.*, 697 F. Supp. 368, 375 (C.D. Cal. 1988).

provision complies with other federal and state laws. For example, agreements covering claims under the Age Discrimination in Employment Act (“ADEA”) must comply with the requirements of the Older Workers Benefit Protection Act (“OWBPA”).¹⁰⁰ The OWBPA requires that in order for an individual to release an age claim under the ADEA, the waiver must specifically mention the ADEA, the individual must be given additional consideration, and the individual must be advised to consult an attorney prior to signing the release.¹⁰¹ In addition, the Act requires that the individual must be informed that he or she may take twenty-one days to consider the offer and has seven days after the signing of the agreement to change his or her mind and revoke the agreement.¹⁰²

D. Jury Trial Waivers as a Solution to the Problem of Unenforceable Arbitration Agreements

Although courts have made clear that employers may require employees to waive their right to bring suit under Title VII of the CRA of 1964, as amended, the parties are not guaranteed that the pre-dispute mandatory arbitration agreements will be enforced.¹⁰³ And, if the agreements are found enforceable, the parties are not guaranteed that particular provisions of their agreements will be preserved.

Pursuant to Section 2 of the Federal Arbitration Act (“FAA”),

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹⁰⁴

This language permits courts to inquire into whether the elements traditionally required to conclude that a contract has been entered into are present. In addition, this language provides the basis for courts to inquire into whether the employer utilized impermissible tactics to obtain an employee’s acquiescence to submit disputes to arbitration, so-called procedural unconscionability. This language has also resulted in courts examining arbitration procedures to determine whether particular proce-

100. Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. § 626(f) (2000)); see *Hammaker v. Brown & Brown, Inc.*, 214 F. Supp. 2d 575, 578–79 (E.D. Va. 2002).

101. See 29 U.S.C. § 626(f)(1).

102. *Id.*

103. See *Brown v. Cushman & Wakefield, Inc.*, 235 F. Supp. 2d 291 (S.D.N.Y. 2002).

104. 9 U.S.C. § 2 (2000).

dures were too heavily weighted in the employer's favor, so-called substantive unconscionability.

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court stated that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”¹⁰⁵ The Court then added a caveat, noting that “courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’”¹⁰⁶ The Court also indicated that the arbitration procedures at issue must be sufficient to preserve and enforce the substantive rights created by the relevant statute.¹⁰⁷

The elements needed for an enforceable program have been the subject of significant litigation. In *Cole v. Burns International Security Services*, the U.S. Court of Appeals for the D.C. Circuit indicated some of the procedural elements it would require for an enforceable arbitration agreement.¹⁰⁸ The court referred to five factors of the agreement at issue that fulfilled *Gilmer's* requirement that employee substantive rights provided by the relevant statute not be violated. In *Cole* there was: (1) a neutral arbitrator, (2) more than minimal discovery, (3) a written award, (4) all relief otherwise available in court, and (5) no requirement to pay unreasonable costs or arbitrator's fees or expenses.¹⁰⁹

Following remand from the U.S. Supreme Court, the Ninth Circuit, in *Circuit City Stores, Inc. v. Adams*,¹¹⁰ used California state law to employ a slightly different test. The court ruled that the arbitration agreement is unenforceable only if it is both procedurally and substantively unconscionable.¹¹¹ When assessing procedural unconscionability, the court examined the comparative bargaining power of the parties to the arbitration agreement and whether the agreement was clear in its requirements.¹¹² When assessing substantive unconscionability, the court examined whether the terms of the contract were unduly harsh or oppressive.¹¹³ The court found the agreement procedurally and substantively unconscionable.¹¹⁴ The court

105. 500 U.S. 20, 33 (1991).

106. *Id.* (quoting *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)).

107. *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

108. 105 F.3d 1465 (D.C. Cir. 1997).

109. *Id.* at 1482.

110. 279 F.3d 889 (9th Cir. 2002).

111. *Id.* at 893.

112. *Id.*

113. *Id.*

114. *Id.* at 893–95.

ruled that the arbitration agreement was procedurally unconscionable because it was a contract of adhesion.¹¹⁵ It found the arbitration agreement to be substantively unconscionable because the employer reserved the right to sue the employee in court, the employer limited the amounts of recoverable pay and damages as well as the statute of limitations, and the agreement required the employee to split the arbitration fees.¹¹⁶

To determine whether bench trials are a solution to the problem of enforceable pre-dispute mandatory arbitration agreements, I analyzed the federal court cases since the Supreme Court's decision in *Circuit City Stores, Inc.* that found arbitration agreement provisions unenforceable in the context of Title VII claims. I divided the courts' rationales for finding provisions unenforceable into three main categories: no contract, procedural unconscionability, and substantive unconscionability. The no contract category includes inadequate consideration, inadequacy of waiver, and claimed defect in the contract formation process. The substantive unconscionability category includes problems with fairness of the system's administration and process, cost allocations, discovery limitations, short statutes of limitations, restrictions on punitive damages and other remedies, and attorneys' fees.

Through my research, I discovered thirty-five federal court cases since the Supreme Court's decision in *Circuit City Stores, Inc.* that found arbitration agreement provisions unenforceable in the context of Title VII claims.¹¹⁷ In these cases, there were seventy-two rationales given for find-

115. *Id.* at 893.

116. *Id.* at 893-95.

117. *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269 (3d Cir. 2004); *McMullen v. Meijer, Inc.*, 355 F.3d 485 (6th Cir. 2004); *Lee v. Red Lobster Inns of Am., Inc.*, No. 02-5188, 2004 U.S. App. LEXIS 1375 (6th Cir. Jan. 27, 2004); *Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024 (11th Cir. 2003); *Zimmer v. Cooperneff Advisors, Inc.*, Civil Action No. 04-3816, 2004 U.S. Dist. LEXIS 25465 (E.D. Pa. Dec. 20, 2004); *Kai v. Asia Source, Inc.*, No. Civ. A. 304CV1188M, 2004 U.S. Dist. LEXIS 22598 (N.D. Tex. Nov. 4, 2004); *Plebani v. Bucks County Rescue Emergency Med. Servs.*, No. Civ. A. 03-6225, 2004 U.S. Dist. LEXIS 20332 (E.D. Pa. Oct. 1, 2004); *Hill v. Peoplesoft USA, Inc.*, 333 F. Supp. 2d 398 (D. Md. 2004); *Gaines v. Mr. Formal, Inc.*, No. 04-588-KI, 2004 U.S. Dist. LEXIS 15290 (D. Or. July 30, 2004); *Smith v. Devlin Partners, LLC*, No. Civ.A.03-2380-KHV, 2004 U.S. Dist. LEXIS 12407 (D. Kan. July 2, 2004); *Booker v. Robert Half Int'l, Inc.*, 315 F. Supp. 2d 94 (D.D.C. 2004); *Scovill v. WSXY/ABC*, 312 F. Supp. 2d 955 (S.D. Oh. 2004); *Sapiro v. Verisign*, 310 F. Supp. 2d 208 (D.D.C. 2004); *Minter v. Freeway Food, Inc.*, No. 103CV00882, 2004 U.S. Dist. LEXIS 5709 (M.D.N.C. Apr. 2, 2004); *Taylor v. Ash Grove Cement Co.*, No. CV 03-1509-ST, 2004 U.S. Dist. LEXIS 11956 (D. Or. June 22, 2004); *Rogue v. Applied Materials, Inc.*, No. CV 03-1564-ST, 2004 U.S. Dist. LEXIS 10477 (D. Or. Feb. 20, 2004); *DeOrnellas v. Aspen Square Mgmt., Inc.*, 295 F. Supp. 2d 753 (E.D. Mich. 2003); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003); *McMullen v. Meijer, Inc.*, 337 F.3d 697 (6th Cir. 2003); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212 (3d Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003); *Murray v. United Food & Commercial Workers Int'l Union, Local 400*, 289 F.3d 297 (4th Cir. 2002); *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778 (9th Cir. 2002); *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677 (7th Cir. 2002); *Perez v. Globe Airport Sec. Servs.*, 253 F.3d 1280 (11th Cir. 2001); *Plaskett v. Bechtel Int'l*,

ing provisions unenforceable. Fifteen of these reasons fell into the no contract category, seven into the procedural unconscionability category, and fifty into the substantive unconscionability category. The distribution within these categories is illustrated below:

TABLE 1 Rationales Given by Courts for Finding Arbitration Agreement Provisions Unenforceable

	Number of Reasons	Percentage
NO CONTRACT	15	20.83%
Inadequate consideration	5	6.94%
Inadequacy of waiver	4	5.56%
Claimed defects in contract formation process	6	8.33%
PROCEDURAL UNCONSCIONABILITY	7	9.7%
SUBSTANTIVE UNCONSCIONABILITY	50	69.44%
Fairness of the system's administration and process	14	19.44%
Cost allocations	13	18.06%
Discovery limitations	2	2.78%
Short statute of limitations	5	6.94%
Restrictions on punitive damages and other remedies	6	8.33%
Attorneys' fees	10	13.89%

Because the bench trial alternative will be a pre-dispute mandatory agreement, courts will inquire whether the contract is unconscionable. Because the criteria required for a knowing and voluntary waiver of the right to a jury trial mirror the standards of procedural conscionability, the bench trial alternative will not pose procedural unconscionability problems. In addition, unlike pre-dispute mandatory arbitration agreements, the bench trial alternative does not pose the substantive unconscionability problems illustrated above. The parties to the contract have no control over the selec-

Inc., 243 F. Supp. 2d 334 (D.V.I. 2003); Cooper v. MRM Inv. Co., 199 F. Supp. 2d 771 (M.D. Tenn. 2002); Brennan v. Bally Total Fitness, 198 F. Supp. 2d 377 (S.D.N.Y. 2002); Phox v. Atriums Mgmt. Co., Inc., 230 F. Supp. 2d 1279 (D. Kan. 2002); Gambardella v. Pentec, Inc., 218 F. Supp. 2d 237 (D. Conn. 2002); Ball v. SFX Broad., Inc., 165 F. Supp. 2d 230 (N.D.N.Y. 2001); Gourley v. Yellow Transp., LLC, 178 F. Supp. 2d 1196 (D. Colo. 2001); LeLouis v. W. Directory Co., 230 F. Supp. 2d 1214 (D. Or. 2001); Dumais v. Am. Golf Corp., 150 F. Supp. 2d 1182 (D.N.M. 2001); Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985 (S.D. Ind. 2001).

tion of the judge.¹¹⁸ Title VII dictates the cost allocations,¹¹⁹ statute of limitations,¹²⁰ punitive damages,¹²¹ other remedies,¹²² and attorneys' fees.¹²³ The Federal Rules of Civil Procedure dictate the discovery limitations.¹²⁴ As a result, the bench trial alternative is a solution to the problem of unenforceable arbitration agreements as long as an employer ensures that a valid contract has been created.

E. Jury trial waivers allow employers and employees to avoid the disadvantages of arbitration agreements.

1. Avoidance of the Disadvantages of Arbitration Agreements for Employers

A jury waiver provision avoids the disadvantages of arbitration agreements for employers.¹²⁵ With a jury waiver provision, fewer discrimination claims will be brought, the employer will be guaranteed judicial expertise, and the employer will possess full appellate rights. In addition, although a bench trial will be expensive, employers will not be pressured to bear the full cost of the procedure.

Because bench trials are typically slower, less private, and more costly than arbitration, fewer employees may choose to bring discrimination claims. In addition, because judges have the power to grant summary judgment, hesitant employees may not bring complaints. Thus, the employer will not have to defend against as many discrimination complaints.

A judge, unlike some arbitrators, will be well-versed in employment law. And, in the event an employer disagrees with a judge's legal analysis or the outcome of the case, typical judicial review exists. The appeals court will review findings of fact under the clearly erroneous standard¹²⁶ and conclusions of law under the *de novo* standard.¹²⁷

118. 42 U.S.C. § 2000e-5(f)(4) (2000).

119. *Id.* § 2000e-5(f)(1).

120. *Id.* § 2000e-5(e)(1).

121. *Id.* § 1981a(b).

122. *Id.* § 2000e-5(g).

123. *Id.* § 2000e-5(k).

124. FED. R. CIV. P. 26–37.

125. *See supra* Part I.C.

126. FED. R. CIV. P. 52(a); *see* Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982) (“Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous.”).

127. *See* Williams v. New Orleans Steamship Ass’n, 688 F.2d 412, 414 (5th Cir. 1982) (“[I]f a district court’s findings rest on an erroneous view of the law, they may be set aside on that basis.”); Johnson v. Uncle Ben’s, Inc., 628 F.2d 419, 422 (5th Cir. 1980). The *Johnson* court noted:

Although arbitration may be less costly than litigation, arbitration is nonetheless expensive for employers.¹²⁸ With a bench trial, employers are not pressured to pay the additional costs for location and employment of the decision maker because these costs are publicly funded. In addition, if jury waiver provisions are found enforceable, employers will not be subject to the additional costs of litigating controversies over an agreement's enforceability or applicability to certain disputes.

2. Avoidance of the Disadvantages of Arbitration Agreements for Employees

A jury waiver provision avoids the disadvantages of arbitration agreements for employees as well.¹²⁹ Because a judge is bound by Title VII and the Federal Rules of Civil Procedure, employees are guaranteed appropriate statutes of limitations, unbiased selection of the decision maker, appropriate cost allocations, judicial expertise, full appellate rights, appropriate punitive damages, and appropriate remedies.

The statute of limitations provided by Title VII allows employees full access to the court. The statute provides:

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier.¹³⁰

The parties to a jury waiver provision have no control over the selection of the judge. Title VII provides:

It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be,

The clearly erroneous standard of review does not apply to findings of fact premised upon an erroneous view of controlling legal principles. The district court's findings based on its misunderstanding of this legal standard are entitled to no deference. We must undertake an independent analysis of the record before us in light of the correct legal standards.

Id.

128. See discussion *supra* Part I.C.

129. See *supra* Part I.D.

130. 42 U.S.C. § 2000e-5(e)(1) (2000).

shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.¹³¹

Thus, bias or the appearance of bias is eliminated.

Although a complaining employee is required to pay fees, the fees are minimal and waiveable at the court's discretion. Title VII provides, "[u]pon application by the complainant and in such circumstances as the court may deem just, the court . . . may authorize the commencement of the action without the payment of fees, costs, or security."¹³² In addition, there is no cost for the employment of the judge.

Unlike some arbitration agreements, employees have access to counsel in a bench trial. In addition, pursuant to Title VII, the court has the discretion to appoint counsel for a complaining employee. The statute provides, "[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant."¹³³ The appointed counsel costs the complaining employee nothing.

Like employers, employees benefit from judicial expertise and full appellate review.¹³⁴

Employees are entitled to the damages and remedies provided by Title VII. The statute provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.¹³⁵

The CRA of 1991 amended Title VII and provided for additional compensatory damages¹³⁶ and punitive damages. The statute states:

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices

131. *Id.* § 2000e-5(f)(4).

132. *Id.* § 2000e-5(f)(1).

133. *Id.*

134. *See supra* Part II.E.1.

135. 42 U.S.C. § 2000e-5(g)(1).

136. § 1981a(b)(2).

with malice or with reckless indifference to the federally protected rights of an aggrieved individual.¹³⁷

The sum of compensatory and punitive damages allowed by the CRA of 1991 is limited based on the size of the employer.¹³⁸

F. Bench trials have the same advantages as arbitration agreements.

If found enforceable in the Title VII context, a jury waiver provision maintains most of the advantages of arbitration agreements for employers¹³⁹ and some of the advantages of arbitration agreements for employees.¹⁴⁰

Like arbitration, a bench trial costs less and offers faster resolutions compared to a jury trial.¹⁴¹ Before litigation begins in a jury trial, lawyers typically select jurors and make trial motions to remove the case, or selected issues of the case, from the jury's authority. These pre-trial activities are time consuming and costly for both parties. During litigation, the presence of a jury makes the trial cumbersome and lengthy for both parties; judge-counsel conferences and evidentiary hearings outside of the jury's presence become necessary. In addition, instructing the jury is often tedious and time consuming because counsel and the judge often debate the precise wording of each part of the charge. After the jury instruction is given, the jury must deliberate, which can take hours or days, and there is no guarantee that the jury will reach a verdict. One study demonstrated that the average federal jury trial lasted more than twice as long as the average bench trial.¹⁴² Another study, comparing jury and non-jury trials in nine state court jurisdictions, found that the median length of both civil and criminal jury trials was roughly three times that of non-jury trials.¹⁴³

A jury waiver provision avoids a jury and increases the predictability of outcome, which benefits employers. As described in Part I.A, eliminat-

137. § 1981a(b)(1).

138. § 1981a(b)(3).

139. *See supra* Part I.A.

140. *See supra* Part I.B.

141. *See, e.g.*, Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 57-58 (2001); Patrick E. Longan, *Congress, the Courts, and the Long Range Plan*, 46 AM. U. L. REV. 625, 663 (1997); *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1424 (1997); *see also* Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 110 (1990).

142. Lilly, *supra* note 141, at 58 (citing RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM 193-94* n.1 (2d ed. 1996) (citing ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 19 A1-284, A1-287* (1993))).

143. *Id.* (citing NATIONAL CENTER FOR STATE COURTS, *ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 8-9* (1998)).

ing a jury results in a fairer resolution of employment disputes. Like an arbitrator's previous decisions, parties can study the case law promulgated by a particular judge, which provides increased predictability of a claim's outcome.

CONCLUSION

Although pre-dispute mandatory arbitration agreements are an important avenue for the resolution of disputes between employers and employees, these agreements have proved unsatisfactory. Pre-dispute mandatory arbitration agreements are a double-edged sword providing advantages and disadvantages to employers and employees. In addition, although the courts have made clear that employers may require employees to waive their right to bring suit under Title VII of the CRA of 1964, as amended, the parties are guaranteed neither that the pre-dispute mandatory arbitration agreements nor particular provisions of the agreements will be enforced.

Given the disadvantages and questionable enforceability of pre-dispute mandatory arbitration agreements, Part II explored whether pre-dispute mandatory agreements through which employees waive their right to a jury trial and agree to a bench trial of their Title VII claims are a more beneficial alternative. As discussed in Parts II.A and II.B, given the enforceability of jury waiver provisions in other contexts, the Southern District of New York's decision in *Brown*, and cases holding pre-dispute mandatory arbitration agreements in the employment context enforceable, jury waiver provisions should be held enforceable in the Title VII context.

As discussed in Part II.D, jury waiver provisions solve the problem of unenforceable arbitration agreements. Because the criteria required for a knowing and voluntary waiver of the jury trial right mirror the standards of procedural conscionability, the bench trial alternative will not pose procedural unconscionability problems. In addition, the bench trial alternative does not pose the substantive unconscionability problems prevalent in arbitration agreements. Thus, jury waiver provisions should be found conscionable under applicable state law.

As discussed in Part II.E, the bench trial alternative avoids the disadvantages pre-dispute mandatory arbitration agreements pose for both employers and employees. For employers, as compared to arbitration agreements, a jury waiver provision will reduce the number of discrimination claims, decrease expense, guarantee decision-maker expertise, and maintain appellate rights. For employees, as compared to arbitration agreements, a jury waiver provision will protect employees' procedural and substantive rights under Title VII.

In addition, as discussed in Part II.F, the bench trial alternative maintains most of the advantages of arbitration agreements. For both employers and employees, as compared to a jury trial, a bench trial is less costly and offers faster resolution of claims as compared to a jury trial. For employers, a bench trial avoids a jury and increases the predictability of outcome.

Thus, it seems that pre-dispute mandatory agreements through which employees waive their right to a jury trial and agree to a bench trial for their Title VII claims present a more beneficial alternative for employers and employees. Moreover, as long as employers create valid pre-dispute mandatory agreements through which employees knowingly, voluntarily, and intentionally waive their rights, the agreements should be upheld.