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Arbitrating Employment Law Disputes

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TABLE OF CONTENTS

I. ARBITRATION—HISTORICAL CONTEXT AND CURRENT TENSIONS 416
A. *Two Contexts: Union-Management and Individual Employee* 416
B. *The Historical Context of Arbitration* 418
1. *The "Private" Law Tradition of Arbitration* .. 419
2. *The Growth of "Public" Law in Arbitration* .. 420
C. *Supreme Court Treatment of "Public" Law Issues at Arbitration* 421
D. *The Current Tension of Arbitration* 426
II. JUDICIAL REVIEW OF THE ARBITRATION AGREEMENT .. 427
A. *Initial Judicial Intervention* 427
1. *Enforcement under the Montana Uniform Arbitration Act and the Federal Arbitration Act* 428
2. *Defenses to Judicial Enforcement of an Arbitration Agreement* 431
B. *Post-Award Judicial Intervention* 431
1. *The Basis for Judicial Intervention* 431
2. *Non-Enforcement of Pre-Dispute Arbitration Agreements—Generally* 433
C. *The Unconscionable Arbitration Provision* 434
D. *Unconscionability in Montana* 435
1. *Procedural Unconscionability* 435
a. *Adhesion—The Pre-Dispute Arbitration Is Presented on a "Take-It-or-Leave-It" Basis* 435
b. *Is the Arbitration Provision within the Reasonable Expectation of the Challenging Party?* 437
c. *Additional Criteria to Determine Reasonable Expectation* 438
d. *The Reasonable Expectation Test May Be Both Objective and Subjective* 440
2. *Substantive Unconscionability* 441

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a. Criteria to Determine Substantive Unconscionability 441
b. Additional Criteria to Determine Substantive Unconscionability 442
c. Consequence of a Finding of Substantive Unconscionability 446
E. Waiver of the Judicial Forum 447
III. CONCLUSION 449

I. ARBITRATION—HISTORICAL CONTEXT AND CURRENT TENSIONS

A. Two Contexts: Union-Management and Individual Employee

There has been a substantial increase in the use of arbitration to resolve employment law disputes that only a decade ago would have been litigated in court. Some members of the legal community have welcomed this development[1] and others have cursed it.[2] Regardless, an employment law attorney must be prepared to effectively represent clients in the arbitration arena.

There are two types of arbitrated employment disputes: (1) disputes that arise out of a union-management collective bargaining agreement providing for the arbitration of such disputes (normally called "grievance" arbitration); and (2) disputes that arise when the employee is *not* covered by a union-management collective agreement but rather a different agreement containing an arbitration clause.

The arbitration of union-management disputes has a long history in the United States, yet the arbitration of non-union-man-

1. *See generally* Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 Ohio St. J. on Dis. Res. 369 (2004); Kimberlee K. Kovach, *Musings on Idea(l)s in the Ethical Regulation of Mediators: Honesty, Enforcement, and Education*, 21 Ohio St. J. on Dis. Res. 123 (2005); Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 Notre Dame J.L., Ethics & Pub. Policy 173 (1998).

2. *See generally* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 Denv. U. L. Rev. 1017 (1996) (discussing the employer take-it-or-leave-it approach to forcing arbitration on employees); Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration*, 52 U. Kan. L. Rev. 583 (2004) (showing that contract provisions evidence an overreaching by business and employers in drafting arbitration provisions); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGeorge L. Rev. 223 (1998); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Dis. Res. 559 (2001); Lucy T. France & Timothy C. Kelly, *Mandatory Arbitration of Civil Rights Claims in the Workplace: No Enforceability without Equivalency*, 64 Mont. L. Rev. 449 (2003).

agement disputes is of recent origin. The latter context is most controversial and, consequently, where this Article directs its attention. The Article will also draw upon the development of labor-management arbitration because it, unlike the recent development of non-labor-management employment contract arbitration, is universally accepted by the disputing parties and the courts. Thus, labor-management arbitration provides a convenient backdrop for the discussion of practices and procedures in the non-union-management context.

This Article is for the attorney who (1) considers using arbitration as the dispute resolution method in employment agreements; (2) drafts or reviews such agreements; (3) defends or challenges arbitration provisions in court; (4) contests or defends arbitrators' awards in court; or (5) serves as an employment law arbitrator.

As used herein, "arbitration" is a dispute resolution process in which a neutral third party (arbitrator), generally chosen by the disputing parties, renders a binding decision[3] after a hearing at which the parties have an opportunity to be heard and present evidence.[4] The general attraction of arbitration is that the parties may resolve their disputes using decision-makers of their choosing,[5] based on principles of their choosing (often widely accepted industry principles), and pursuant to a process of their choosing.[6]

3. *Harrison v. Nissan Motors Corp.*, 111 F.3d 343, 349–50 (3d Cir. 1997) (holding that completion of non-binding arbitration as a precondition to filing a lawsuit does not constitute "arbitration" under the Federal Arbitration Act, because it is non-binding and its use is only required as a mandated form of potential settlement, not resolution of the dispute).

4. *Cheng-Canindin v. Renaissance Hotel Assocs.*, 57 Cal. Rptr. 2d 867, 872 (Cal. App. 1st Dist. 1996) (adopting a definition of "arbitration" from Black's Law Dictionary; what is not included in this definition is what is often called "non-binding" arbitration, where the decision-maker makes a non-binding decision which the disputants may consider as a settlement option during further settlement negotiations); *Ditto v. RE/MAX Preferred Props., Inc.*, 861 P.2d 1000, 1001 n. 1 (Okla. App. 1993) (citing *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 830 (2d Cir. 1988)) (explaining that, "[a]lthough the clause refers to 'mediation,' the process is clearly binding on both parties, and is therefore indistinguishable from, and may be treated as, an agreement to arbitrate disputes").

5. *Ditto*, 861 P.2d at 1004 (holding the arbitration agreement unenforceable because all the arbitrators were chosen by one party).

6. Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 Buff. L. Rev. 49, 51 (1997) (discussing the benefits of arbitration).

B. The Historical Context of Arbitration

Traditionally, parties used arbitration to resolve commercial, business, and union-management contract disputes.[7] Arbitration arose in two scenarios: when the disputing parties agreed to submit an "existing" or "current" dispute to arbitration, or when their pre-dispute business agreement included an arbitration clause requiring the arbitration of any "future" dispute.

Although courts historically enforced arbitration agreements calling for the arbitration of existing or current disputes, they approached agreements requiring the arbitration of "future" disputes with hostility and refused enforcement.[8] In 1925, Congress enacted the Federal Arbitration Act (FAA), which required judicial enforcement of both contemporaneous agreements mandating the arbitration of "existing" or "current" disputes and "pre-dispute" arbitration agreements. Because Congress enacted the FAA under its constitutional authority to regulate interstate commerce, the Act applies only to "maritime transaction[s]" and contracts "evidencing a transaction involving commerce."[9]

Outside of maritime and interstate transactions, judicial hostility to mandatory arbitration continued after enactment of the FAA.[10] Courts applying the FAA read the Commerce Clause nar-

7. In England, mercantile disputes have been decided by merchants since at least the thirteenth century. During the Tudor period (1485–1603), the Privy Council, a major forum for commercial matters, solved its mercantile cases by reference to merchant arbitrators. In the American colonies, arbitration was an accepted form of dispute resolution. In 1753, Connecticut enacted a statute that created a formal legal framework for arbitration, and, in 1768, the New York Chamber of Commerce was founded, one purpose of which was the arbitration of disputes among its members. In 1920, New York enacted the first modern arbitration statute in the United States. Other states followed the New York lead, and, in 1925, Congress enacted the Federal Arbitration Act, which was followed by the drafting of a Model Uniform Arbitration Act for the states. Montana adopted the Model Uniform Arbitration Act in 1985. Bruce H. Mann, *The Formalization of Informal Law: Arbitration before the American Revolution*, 59 N.Y.U. L. Rev. 443 (1984); Soia Mentschikoff, *Commercial Arbitration*, 61 Colum. L. Rev. 846 (1961). *See also* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33; John R. Van Winkle, *An Analysis of the Arbitration Rule of the Indiana Rules of Alternative Dispute Resolution*, 27 Ind. L. Rev. 735 (1994) (discussing the history of arbitration in Indiana).

8. *See Kulukundis Ship. Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982–85 (2d Cir. 1942). Eighteenth century English court hostility to arbitration was adopted by many U.S. courts in the nineteenth century. Judicial refusal to enforce arbitration agreements was so accepted that even courts that recognized the precedent as unsound said that it could be overturned only by legislative action. *Id.*

9. 9 U.S.C. § 2 (1946).

10. *See Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting) ("Even though the [FAA] had been on the books for almost 50 years in 1973, apparently neither

rowly,[11] and state and federal courts routinely invalidated arbitration agreements under state law unless the law required arbitration agreements be judicially enforced.[12] Indeed, as late as 1978, the Montana Supreme Court refused to enforce a pre-dispute arbitration clause.[13]

In 1955, the National Conference of Commissioners on Uniform State Law adopted the Model Uniform Arbitration Act (MUAA).[14] In turn, the MUAA adopted the FAA position regarding the enforceability of both current and pre-dispute arbitration agreements.[15] In 1985, the Montana State Legislature enacted a variation of the MUAA[16] and, with certain exceptions,[17] authorized both current and pre-dispute arbitration.[18]

1. The "Private" Law Tradition of Arbitration

Traditionally, arbitrators construed the parties' "private" agreement and applied it to disputes of specialized facts pursuant

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the [U.S. Supreme] Court nor the litigants even considered the possibility that the [FAA] had pre-empted state-created rights."); *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 477 (1989) ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.").

11. Donna Meredith Matthews, *Employment Law after* Gilmer*: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 Berkeley J. Empl. & Lab. L. 347, 368 (1997) ("Logically, one could argue that the FAA reaches employment contracts only by way of the Commerce Clause, and that when the FAA was enacted in 1925 commerce was still narrowly defined. Thus, this exclusion clause was intended to assuage concerns by the very employees who might be affected—those engaged in interstate commerce. Because the Commerce Clause did not reach other employment contracts, they were unaffected by the FAA." (footnote omitted)).

12. Courts often used the *Erie* doctrine in deciding whether to apply state substantive law in arbitration disputes. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *see also Moses H. Cone Meml. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (noting the FAA does not create federal question jurisdiction).

13. *Palmer Steel Structures v. Westech, Inc.*, 584 P.2d 152, 154–55 (Mont. 1978).

14. Am. Arb. Assoc., *Fair Play: Perspectives from American Arbitration Association on Consumer and Employment Arbitration* 9 (Am. Arb. Assoc. Jan. 2003) (available at http://www.adr.org/si.asp?id=3652).

15. Unif. Arb. Act § 1, 7 U.L.A. 1956.

16. Mont. Code Ann. §§ 27-5-101 to -324 (2005).

17. *Id.* at § 27-5-114(2), which states pre-dispute arbitration clauses are valid and enforceable, except for

> (a) claims arising out of personal injury, whether based on contract or tort;
> (b) any contract by an individual for the acquisition of real or personal property, services, or money or credit when the total consideration to be paid or furnished by the individual is $5,000 or less;
> (c) any agreement concerning or relating to insurance policies or annuity contracts except for those contracts between insurance companies; or
> (d) claims for workers' compensation.

18. *Id.* at § 27-5-114(1), (2).

to the "rules of decision"[19] and procedure dictated by the parties. Typically, the parties expected the "rules of decision" governing their dispute would be "industry standards" rather than the common law or statutes. For example, to resolve a dispute between merchants in the paper industry, parties would choose a decision-maker knowledgeable of accepted paper industry standards. Similarly, a labor-management dispute in the paper industry would be resolved pursuant to principles particular to labor-management relationships in that industry. Indeed, arbitrator selection was generally based on knowledge of industry standards and the accepted relationship standards of the parties (i.e., labor-management, architect-builder, buyer-seller, etc.) rather than legal training or experience.

Procedurally, arbitrations are simpler than what happens in court. The arbitrator construes the parties' agreement regarding facts of which the parties are equally aware pursuant to the rules of decision. Thus, the parties do not require elaborate procedures or evidentiary standards. Indeed, the parties chose arbitration, at least in part, to escape court procedure and evidence standards that impose unnecessary delays, and financial and human costs.

This is the context in which union-management arbitrators usually operate today: the typical union-management dispute concerns the interpretation of the parties' private law,[20] and the arbitrator is a labor-management specialist who decides the dispute under the particular collective agreement with due consideration to accepted union-management principles.

2. *The Growth of "Public" Law in Arbitration*

Particularly since the post-Depression era of the late 1930s and 1940s, legislatures and courts have imposed greater legal standards in the business, commercial, consumer and employment arenas. In the labor-management arena, most of the law was

19. The term "rules of decision" is used here rather than the term "law," because it is intended to address industry-based standards rather than judge- or legislature-made standards.

20. Throughout this Article, a distinction is made between the "private" law of contract (the parties' intent) and "public" law (common law or statutory law intended to govern the larger public, regardless of the wishes of any particular members of the public). Certainly, public law may have a role in the construction of a contract, but the guiding principle is to determine the "intent of the parties," and to the extent that legal rules of construction are used to assist in determining "intent," "law" is used to determine the private law of the parties.

made from 1934 to the mid-1950s.[21] In the broader employment arena, much development has occurred since the 1964 enactment of Title VII of the Civil Rights Act.[22] Contracting parties now face innumerable legal standards, rights, and duties that greatly impact the parties' relationship, if not their own existence. Their contractual relationship is governed as much by these legally imposed standards as their private intent. Consequently, contracts expressly or implicitly incorporate legal standards apart from what the parties might otherwise agree. With the development of modern law, arbitrators frequently are called upon to apply judicially- and legislatively-made "public" law in resolving disputes.[23] Of course, as always, the disputing parties dictate the rules of decision and the applicable procedure, but public law plays an ever-increasing role. With this change, conflict between arbitrators and courts regarding the interpretation and application of public law was inevitable.

C. Supreme Court Treatment of "Public" Law Issues at Arbitration

In the 1953 case *Wilko v. Swan*,[24] the U.S. Supreme Court held that an arbitration clause invoked in connection with a Securities Act[25] claim was void regarding the resolution of a statutory claim.[26] Lower federal courts treated *Wilko* as creating a

21. The National Labor Relations Act (the Wagner Act) was enacted in 1935. 29 U.S.C. §§ 151–69 (1940). The first major amendment occurred in 1947 with the enactment of the Labor-Management Relations Act (the Taft-Hartly Act). 29 U.S.C. §§ 114–97 (1952). The last major change occurred in 1959 with the passage of the Labor-Management Reporting and Disclosure Act (the Landrum-Griffin Act). 29 U.S.C. §§ 401–531 (1964).

22. 42 U.S.C. §§ 2000e to 2000e–17 (2000).

23. The first modern arbitration statute, the New York Arbitration Act of 1920, recognized that arbitrators were hearing and deciding issues of law, and that even though a reviewing court of law could determine that the arbitrator made an error of law, the court was not to set aside the arbitration award. Mentschikoff, *supra* n. 7, at 856. The principle of limited judicial review was carried forward in the FAA and the MUAA. The reviewing court was to honor the parties' agreement for the resolution of their dispute, and the court was to enforce the arbitrator's decision, even if it was based on a point of law on which the court would have reached a different decision. Enforcement of contracts was given priority over technical accuracy as to the state of the law. *Infra* nn. 87–92.

24. *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled, Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

25. 15 U.S.C. § 77 (2000).

26. *Wilko*, 346 U.S. at 438.

"public policy" defense against the enforcement of arbitration agreements as to statutory claims under the FAA.[27]

Only four years later, the Court departed from *Wilko* in a union-management arbitration case, holding that public law claims arising from collective agreements were to be arbitrated.[28] The Court based its holding on the Labor-Management Relations Act[29] rather than on the FAA. In the 1960 *Steelworkers Trilogy*, the Court strongly endorsed the arbitration of union-management disputes.[30]

In 1964, Congress enacted Title VII of the Civil Rights Act, which prohibited employment discrimination on the basis of race, color, religion, sex, or national origin.[31] These protections were later extended to age,[32] pregnancy,[33] and disability.[34] State legislatures, including Montana's, enacted parallel statutes,[35] and state courts later began offering contract and tort claims for wrongful discharge.[36] These employee rights, based on public law rather than an employment contract, presented a new question: would the U.S. Supreme Court enforce union-management agreements requiring arbitration of these new public law claims?[37]

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27. *E.g. Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827–28 (2d Cir. 1968).

28. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 458 (1957); *see also United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960).

29. *Textile Workers Union of Am.*, 353 U.S. at 451 (citing Labor-Management Relations Act of 1947 (29 U.S.C. § 301(a) (1947), *replaced by* 29 U.S.C. § 185 (2000))) (stating that "the agreement to arbitrate grievance disputes, contained in this collective bargaining agreement, should be specifically enforced"). The Labor-Management Relations Act provides for alleged contract breach issues to be brought in federal district court. The Court determined that the Act is the enforcement mechanism for a pre-dispute arbitration provision contained in a collective agreement. *Id.* at 454–55.

30. *See United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 566–67 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); *Warrior & Gulf Nav. Co*, 363 U.S. at 582 (1960) (*Steelworkers Trilogy*).

31. 42 U.S.C. § 2000e–2 (2000).

32. 29 U.S.C. § 621 (2000).

33. 42 U.S.C. § 2000e(k).

34. *Id.* at 42 U.S.C. §§ 12101(b)(1) to (b)(4).

35. R. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 Hous. L. Rev. 1863, 1877 (1994) (citing Mont. Code Ann. §§ 39-2-901 to -915 (1993)).

36. *Id.* at 1877–78.

37. *See generally* Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 Neb. L. Rev. 7, 7 (1988) (noting that the principal source of worker protection was shifting from contractual rights negotiated through collective bargaining agreements to law-created individual employment rights).

In the 1974 case *Alexander v. Gardner-Denver Co.*,[38] the Court held that when an employee brought a Title VII gender discrimination claim under the "just cause" clause in a collective bargaining contract, the "just cause" arbitration did not preclude subsequent judicial litigation of the gender discrimination claim.[39] The Court, refusing to defer to arbitration, cited the informality of arbitral procedures, the lack of labor arbitrator expertise on issues of substantive law, and the absence of written opinions as reasons for rejecting arbitration.[40]

Then, in 1985, 1987, and 1989, in three cases known collectively as the *Mitsubishi Trilogy*,[41] the Court overruled *Wilko* and enforced arbitration agreements covering public law claims.[42] The Court declared that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[43]

The next development occurred in *Gilmer v. Interstate/Johnson Lane Corp.*,[44] in which the Court held that the FAA allowed an employer to require a non-union employee to arbitrate, rather than litigate, a federal age discrimination claim when the employee signed a pre-dispute arbitration agreement as an employment condition.[45] The Court quoted *Mitsubishi*'s reasoning: "[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 a judicial, forum."[46] Thus, objections to arbitration based on substantive or procedural unconscionability or other general contract defenses must be ad-

38. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

39. *Id.* at 51–52, 59–60. Almost all union-management contracts contain a "just cause" clause, which requires the employer to prove "just cause" for any disciplinary action. Thus, if an employer discharges an employee for disciplinary reasons, and the employee alleges that the asserted disciplinary reason was pretext to hide a real reason of gender discrimination, the employee asserts that the employer did not have "just cause" for discipline and that the discharge violated Title VII because it was unlawful sex discrimination.

40. *Id.* at 56–58.

41. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (*Mitsubishi Trilogy*).

42. *Rodriguez*, 490 U.S. at 484–86 (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)); *McMahon*, 482 U.S. at 238, 242; *Mitsubishi*, 473 U.S. at 639–40.

43. *Mitsubishi*, 473 U.S. at 626–27.

44. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

45. *Id.* at 26.

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

dressed on a case-by-case basis.[47] Implicit in the Court's holding was a determination that the procedures afforded at arbitration met the minimum substantive rights of the Age Discrimination in Employment Act (ADEA),[48] thereby rebutting the employee's allegations of unconscionability and procedural unfairness.[49] Although the Court did not provide guidance as to the minimum standards that would generally satisfy these or similar employee allegations, lower federal courts have since attempted to provide such guidance.[50]

In 1998, in *Wright v. Universal Maritime Service Corp.*,[51] the Court addressed whether a union-management agreement's arbitration clause could prospectively waive an employee's right to litigate a statutory discrimination claim.[52] The Court held that such a waiver could occur only if it was "clear and unmistakable."[53] Two years later, in *Green Tree Financial Corp. v. Randolph*,[54] the Court considered whether an arbitration clause is void for being unconscionable if the arbitration would be prohibitively expensive compared with judicial litigation.[55] There, the Court held the plaintiff "bears the burden of showing the likelihood of incurring such costs."[56]

One of the most important issues regarding non-union-management employment arbitration during this period was whether the FAA applied to employment arbitration. The FAA provides that it does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[57] The concern was whether this provision exempted employment contracts from arbitration, and most circuit courts concluded that the "employee contract" exception was limited to employees who work directly in interstate com-

47. *Id.* at 33 (quoting *Mitsubishi*, 473 U.S. at 627) ("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.' ").

48. 29 U.S.C. § 621 (Supp. 1965–1968).

49. *Gilmer*, 500 U.S. at 33.

50. Bales, *supra* n. 2, at 625–26.

51. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998).

52. *Id.* at 72.

53. *Id.* at 80 (internal quotation marks and citation omitted).

54. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

55. *Id.* at 90.

56. *Id.* at 92.

57. 9 U.S.C. § 1 (2000).

merce.[58] Nevertheless, a three-member panel of the Ninth Circuit Court of Appeals held that "the FAA does not apply to labor or employment contracts."[59]

In *Circuit City Stores, Inc. v. Adams*,[60] the Supreme Court rejected the Ninth Circuit's interpretation of the FAA, holding that the FAA exempts only the employees specified—"seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"—and does not exempt all employment contracts.[61] The Court determined that, except for certain workers who are engaged in actual interstate transportation (for example, truck drivers), the FAA requires employees subject to pre-dispute arbitration clauses to arbitrate their employment-related claims.[62]

Additionally, pre-dispute arbitration agreements are valid and enforceable, "save upon such grounds as exist at law or in equity for the revocation of *any* contract [term]."[63] The Supreme Court has stated that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[64] The effect of this policy "is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA],"[65] that both state and federal courts must enforce.[66] There is a presumption "in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, de-

58. *E.g. Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882–85 (4th Cir. 1996).

59. *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999). The dissenter would have followed the majority of circuits and reached the opposite conclusion. *Id.* at 1094–95 (Brunetti, J., dissenting). Previously, the Ninth Circuit held that even though an employment agreement contained a provision requiring the arbitration of Title VII claims (race, sex, national origin, color, and religion), an employee could not be compelled to arbitrate such a claim. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1196 (9th Cir. 1998), *certiorari denied*, 585 U.S. 989 (1998) *and* 525 U.S. 996 (1998). The court determined that in the 1991 amendments to Title VII, Congress intended to preclude compulsory arbitration of Title VII claims and other statutory discrimination disputes. *Id. See also Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 365 (7th Cir. 1999) (refusing to follow *Duffield*).

60. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

61. *Id.* at 109 (quoting 9 U.S.C. § 1).

62. *Id.* at 119.

63. 9 U.S.C. § 2 (2000) (emphasis added).

64. *Moses H. Cone Meml. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

65. *Id.*

66. *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (citations omitted).

lay, or a like defense to arbitrability."[67] Further, while "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA],"[68] neither state nor federal courts may refuse to enforce "arbitration agreements under state laws applicable *only* to arbitration provisions."[69]

D. The Current Tension of Arbitration

In the employment dispute context, arbitrators continue to decide traditional private law disputes by applying rules of decision based on industry standards. However, more frequently they are also called upon to decide disputes by interpreting and applying public law using judicially- or legislatively-defined procedural standards.

The growth of public law in employment arbitration has occurred because (1) it provides rights and obligations for the contracting parties apart from their underlying contractual agreement when their arbitration agreement requires the arbitration of "any and all" disputes;[70] and (2) the parties frequently include language in their employment agreement incorporating public law, such as a provision providing that the agreement shall be construed consistent with a general or specified federal or state law.[71]

Consequently, an employment arbitrator often interprets and applies both industry standards and public law, and must address

67. *Moses H. Cone Meml. Hosp.*, 460 U.S. at 25.

68. *Drs. Assocs. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (citations omitted); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (citing 9 U.S.C. § 2).

69. *Drs. Assocs.*, 517 U.S. at 687 (refusing to enforce Montana state law applicable only to arbitration provisions).

70. Integration of public law into a contract through an "any and all" dispute arbitration clause is also applicable to contracts between consumers and merchants or other suppliers of goods and services. Consumer law, like employment law, is of recent origin, and designed to protect classes of individuals *vis-à-vis* their contract counterparts who have more bargaining power and usually dictate the contract terms. Particularly in the employment context, the development of the law has focused in providing employees' rights well beyond concerns an individual employee has. These rights include protections from discrimination on the basis of gender, race, and religion, 42 U.S.C §§ 2000e-2 to 2000e-17 (2000); age, 29 U.S.C. §§ 621–34; disability, 42 U.S.C. § 12101(b)(1) to (b)(4); union support, 29 U.S.C. §§ 141–87; health and safety protection, *Id.* at §§ 651–78; pension and benefit assurances, *Id.* at §§ 1001–1461; medical leave, *Id.* at § 2601–54; work place privacy, *Id.* at §§ 2001–09; and protection in the event of plant shutdowns and relocations, *Id.* at §§ 2101–09.

71. For example, a law prohibiting discrimination based on gender, race, age, health and safety standards, pension and benefit protections, etc. *See supra* n. 59.

any inconsistencies between the specific contract language, the industry standards, and public law. In the union-management context, the actual language of the disputants' contract and industry standards continue to play a dominant role in arbitration, although the use of public law is on the rise. In the non-union-management context, public law plays a more dominant role because there are often no widely-accepted industry- or arbitrator-developed standards that collectively form the "rules of decision."[72]

The U.S. Supreme Court has stated that, with regard to pre-dispute arbitration in public law disputes, parties have not waived any substantive rights but only the judicial forum.[73] Thus the employer, as drafter of the pre-dispute arbitration clause covering public law disputes, must assure that the arbitration process is fair and appropriate to an individual employee relative to the nature of the dispute.

II. Judicial Review of the Arbitration Agreement

Judicial intervention to assure that the arbitration process is fair and appropriate occurs at two points: (1) at the time a party seeks enforcement of the arbitration provision;[74] and (2) after the arbitrator's decision is rendered on judicial review.[75] The enforcement proceeding generally occurs after a dispute has arisen and one party refuses to arbitrate. The judicial review proceeding occurs after the arbitration hearing upon the parties' receipt of the arbitrator's award.

A. Initial Judicial Intervention

Initial judicial intervention may occur in several contexts: (1) the allegedly aggrieved party sidesteps the arbitration agreement and takes her claim directly to court; (2) the allegedly aggrieved party seeks to arbitrate her claim and the other party refuses, al-

72. Certainly, there are exceptions. An individual employment agreement may explicitly or implicitly incorporate industry standards, such as an employment agreement of a professional healthcare provider, a baseball player, or a corporate executive. But in non-union-management arbitration, particularly when compared with union-management arbitration, the rules of decision are almost entirely public law.

73. *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)).

74. 9 U.S.C. § 4 (2000); Mont. Code Ann. § 27-5-115 (2005). An even earlier opportunity for judicial intervention may occur prior to a dispute if a party seeks a declaratory order as to the validity of the arbitration agreement. 28 U.S.C. § 2201.

75. 9 U.S.C. §§ 10–11 (1925); Mont. Code Ann. §§ 27-5-311 to -313.

leging that the procedural preconditions to arbitration have not been satisfied;[76] (3) one party seeks to arbitrate and the other party refuses, asserting that the claim is not arbitrable (the claim is not subject to arbitration under the arbitration agreement and the decision regarding arbitrability is for a court to make);[77] or (4) one party seeks to arbitrate and the other party refuses, alleging that the arbitration provision or the contract in which it is contained is voidable based on a contract law defense.[78] In any of these situations, the party seeking arbitration must either petition a court for an order compelling arbitration or, when the other party has initiated a court proceeding on her claim, move the court to dismiss the plaintiff's claim and compel arbitration.

1. Enforcement under the Montana Uniform Arbitration Act and the Federal Arbitration Act

The Montana Uniform Arbitration Act (MTUAA)[79] provides that if one party to an arbitration clause refuses to arbitrate, the other party may sue in Montana district court to compel arbitration.[80] Alternatively, if a party believes that it is not required to arbitrate, it may bring a district court action to stay the arbitration proceeding.[81] Similarly, the FAA[82] provides that a federal district court may enter an order to compel or stay arbitration.[83] The court, however, may not use the proceeding to address the merits of the controversy. Rather, its function is solely to deter-

76. *Infra* section II.D.1.

77. *Infra* section II.D.2.

78. E.g., fraud, incapacity, duress, undue influence, misrepresentation, mistake, unconscionability, breach of good faith and fair dealing, etc. *Infra* section II.B.2.

79. Mont. Code Ann. § 27-5-113. The MTUAA does not generally apply to arbitration agreements "between employers and employees or between their respective representatives," unless the parties' agreement "so specifies," but certain provisions are applicable to all such agreements. *Id.* One provision that is applicable to all arbitration agreements provides that a Montana district court may compel arbitration when a party, pursuant to an agreement to arbitrate, refuses to do so. *Id.* at § 27-5-115. In addition to enforcing agreements to arbitrate, the other provisions of the act that are applicable to employee and employer arbitration agreements are as follows: (1) the authority to stay an arbitration proceeding where there is no arbitration agreement (*Id.* at § 27-5-115(2)); (2) the authority to confirm the award of an arbitrator (*Id.* at § 27-5-311); (3) the authority to vacate an arbitration award (*Id.* at § 27-5-312(1), -312(3) to -312(5)); and (4) the authority to modify or correct an award (*Id.* at § 27-5-313).

80. *Id.* at § 27-5-115(1).

81. *Id.* at § -115(2); *see also Intl. Bhd. of Elec. Workers, AFL-CIO, Loc. 1638 v. Mont. Power Co.*, 929 P.2d 839, 842–43 (Mont. 1996).

82. 9 U.S.C. §§ 1–16 (2000).

83. *Id.* at §§ 3–4.

mine whether the dispute comes within the arbitration clause and, if so, the merits of the dispute are then referred to arbitration.[84]

As discussed previously, in construing the FAA, the U.S. Supreme Court has stated that the question of "who" (the court or the arbitrator) is to decide the issue of substantive arbitrability depends on the language of the arbitration agreement.[85] If the agreement directs the arbitrator to decide the issue, then a court cannot make that decision.[86] The Court stated that when looking at the language of an agreement,

> [c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakable" evidence that they did so. In this manner the law treats silence or ambiguity about the question "*who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement"—for in respect to this latter question the law reverses the presumption . . . . The latter question arises when the parties have a contract that provides for arbitration of some issues.[87]

The FAA is generally applicable to Montana employment contracts for two reasons: (1) the MTUAA on its face is inapplicable in the employment context unless the arbitration agreement spec-

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84. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). The Court stated that "[c]hallenges to the validity of arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract,' can be divided in two types. One type challenges specifically the validity of the agreement to arbitrate . . . . The other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." *Id.* at 444 (citations omitted). For example, "if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the federal court may proceed to adjudicate it. But . . . [a court may not] consider claims of fraud in the inducement of the contract generally." *Id.* at 444–45 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967)). *See also Martz v. Beneficial Mont., Inc.*, 135 P.3d 790, 792–95 (Mont. 2006) (adopting *Buckeye*'s language and reasoning); *Ratchye v. Lucas*, 957 P.2d 1128, 1133 (Mont. 1998) (holding that under Mont. Code Ann. § 27-5-115(5), the lower court did not have jurisdiction to enter summary judgment on certain aspects of the underlying dispute once it was determined that those disputes fell within the arbitration clause).

85. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

86. *Id.*

87. *Id.* at 944–45 (brackets and citations omitted). Indeed, the Court held that if the issue of substantive arbitrability arises in state court, the state court "should apply ordinary state-law principles that govern the formation of contracts" to determine whether the parties objectively revealed an intent as to whether an arbitrator or a court is to determine the issue of arbitrability. *Id.* at 944.

ifies its applicability;[88] and (2) the FAA generally preempts the MTUAA.[89] As discussed above,[90] the FAA is applicable to all employees whose employment contracts evidence interstate commerce, except employees actually engaged in the movement of goods in commerce.[91] Alternatively, because the FAA is inapplicable to public sector (governmental) employment agreements, the MTUAA should apply to Montana state and subdivision employees subject to arbitration agreements when the agreements state the MTUAA is applicable.[92]

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88. Mont. Code Ann. § 27-5-113 (2005).

> Arbitration agreements between employers and employees or between their respective representatives are valid and enforceable and may be subject to all or portions of this chapter *if the agreement so specifies*, except 27-5-115 [providing for subpoenas, and depositions of witnesses]; 27-5-311 [providing for court modification or correction of an arbitrator award]; 27-5-312 (1) and (3) through (5) [court vacating an award; limitations period for seeking vacation; if the award is vacated, provision for rehearing before arbitrators; court order confirming an award]; 27-5-313 [modification or correction of an award]; and 27-5-322 [providing for state district court jurisdiction] apply in each case.

Id. (emphasis added).

89. The Court has determined that the FAA is applicable to state courts. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984); *but see Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 282–85 (1995) (O'Connor, J., concurring) (expressing concern about the Court's determination). The FAA preempts contrary state law. *Drs. Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (determining that the venue provision of the MTUAA was inconsistent with the FAA and was thus preempted). Consequently, if the MTUAA, another Montana statute, or Montana common law is inconsistent with the FAA, that Montana law would be preempted.

Alternatively, if the parties include in the arbitration agreement a choice-of-law provision stating that state law is to apply to their agreement, then state law is applicable. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior U.*, 489 U.S. 468, 479 (1989) (finding no FAA preemption of the state arbitration law when the parties agree to abide by state rules on arbitration). The *Volt* decision was limited in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995). *Mastrobuono* concluded that, in conflicts between state law under the choice-of-law provision and the arbitration clause, state law covers the rights and duties of the parties, while the arbitration clause covers the arbitration. The arbitration provision provided that the arbitrator could issue punitive damages whereas state law did not authorize punitives. *Id.*

90. *See supra* n. 61 and accompanying text.

91. For some period of time, there was confusion whether the FAA was applicable to employment arbitration, but the Court later adopted the position of the majority of U.S. Courts of Appeals that the FAA exempts only the classification of employees specified, which are seamen, railroad employees, or others who work directly in interstate commerce. *Cir. City Stores Inc. v. Adams*, 532 U.S. 105, 119 (2001).

92. I have not found any cases where this issue has been raised, but I believe, first, that when the FAA was enacted in 1925, Congress did not intend to regulate the relationship between a state and its employees. Second, the FAA was enacted under the Commerce Clause and, at the time the statute was enacted, the Commerce Clause would not have reached states *vis-a-vis* their own employees. *See generally* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 3.3, 247–50 (3d ed., Aspen Publishers 2006) (discussing the interpretation of the Commerce Clause before 1937). Third, Commerce Clause ju-

2. Defenses to Judicial Enforcement of an Arbitration Agreement

Both the MTUAA and the FAA provide that an arbitration agreement may be voided "upon grounds that exist in law or in equity for the revocation of any contract."[93] Thus, while arbitration agreements are presumptively valid and enforceable, a court may refuse to enforce them, like any other contract provision, based on fraud, incapacity, duress, undue influence, misrepresentation, mistake, unconscionability, or breach of the duty of good faith.[94] Like other state courts, the Montana Supreme Court has consistently refused to enforce arbitration agreements on the same grounds generally used as contract enforcement defenses, including that the contract is an unlawful contract of adhesion.[95] Federal courts have acted similarly.[96] The topic of unlawful adhesive employment arbitration agreements is discussed below.

B. Post-Award Judicial Intervention

1. The Basis for Judicial Intervention

After the arbitrator's award is delivered, a party may seek judicial intervention: (1) to modify or correct the award;[97] (2) to vacate the award;[98] or (3) to confirm the award.[99]

A motion for "modification or correction" concerns matters that do not change the merits of the award, e.g., clerical mistakes,

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risprudence, especially in recent years with the Court's concern for the Tenth Amendment and federalism, arguably indicates that states as employers are not regulated by the FAA. *See Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (stating a Missouri state law that set a mandatory retirement age for state judges was not invalidated by the federal ADEA). In *Gregory*, the Court determined that a federal law will be applied to important state government activities only if there is a clear statement from Congress that the law was meant to apply. *Id.* at 464. Thereafter, in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000), the Court held that state governments cannot be sued for violating ADEA.

93. 9 U.S.C. § 2 (2000); Mont. Code Ann. § 27-5-114 (2005).

94. *See generally Drs. Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); John D. Calamari & Joseph M. Perillo, *The Law of Contracts* ch. 9 (5th ed., West Group 2003).

95. *E.g. Iwen v. U.S. W. Direct*, 977 P.2d 989, 994–95 (Mont. 1999) (stating that a predispute agreement is an unlawful contract of adhesion if (1) the arbitration clause is contained in a standardized form contract which was presented to the other party as take-it-or-leave-it "without the opportunity to negotiate its terms"; and (2) the arbitration clause is not within the weaker party's reasonable expectations). The clause in *Iwen* was "unduly oppressive, unconscionable, or against public policy." *Id.*; *see infra* nn. 120–21, 158–60.

96. *See generally Drs. Assocs., Inc.*, 517 U.S. 681.

97. Mont. Code Ann. §§ 27-5-313, 27-5-217; 9 U.S.C. § 11.

98. Mont. Code Ann. § 27-5-312; 9 U.S.C. § 10(a).

99. Mont. Code Ann. § 27-5-311; 9 U.S.C. § 9.

mistakes as to identity or description, or miscalculation of figures. Alternatively, a motion to "vacate" challenges the validity of the award, and requests the court to vacate or set aside the award. A motion for "confirmation" requests that the court enter an order confirming the award. The effect of a confirmation is that the prevailing party has a court order which, in the event of non-compliance, the party may execute and potentially seek a contempt order.

Judicial authority to vacate an arbitration award is limited. The MTUAA "clearly does not authorize judicial review of arbitration awards on the merits of the controversy,"[100] including the sufficiency of the evidence and misapplication of law.[101] Arbitrator partiality sufficient to cause an award to be vacated must be "certain, definite, and capable of demonstration: alleged partiality which is remote, uncertain or speculative is insufficient."[102] Arbitral "misconduct" is demonstrated when the arbitrator or award "manifests a disregard of the law."[103] A manifest disregard for the law "requires more than simply [the arbitrator's] misapplication of the law. . . . [the arbitrator must] appreciate[ ] the existence of a clearly governing legal principle but decide[ ] to ignore or pay no attention to it."[104] If the remedy determined by the arbitrator "has been rationally derived from the [arbitration] agreement it will be upheld on review."[105]

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100. *Duchscher v. Vaile*, 887 P.2d 181, 184 (Mont. 1994); *Hasbro, Inc. v. Catalyst USA, Inc.*, 367 F.3d 689, 692 (7th Cir. 2004) (stating that, under the FAA, "as long as the arbitrator does not exceed [her] delegated authority," an arbitration award is to be confirmed "even if [it] contains serious error of law or fact" (first set of brackets in original, second set added)); *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 382 (5th Cir. 2004) (stating that arbitrariness and capriciousness are not grounds for vacatur of an arbitration award under the FAA).

101. *Terra W. Townhomes, LLC v. Stu Henkel Realty*, 996 P.2d 866, 872 (Mont. 2000) (holding that, for an arbitrator's award to be vacated under the manifest disregard test, the arbitrator must be "aware of a clearly governing principle of Montana law, and blatantly refuse[ ] to follow it" (quoting *Geissler v. Sanem*, 949 P.2d 234, 237–38 (Mont. 1997)).

102. *May v. First Natl. Pawn Brokers, Ltd.*, 887 P.2d 185, 189 (Mont. 1994).

103. *Geissler v. Sanem*, 949 P.2d at 237.

104. *Id.* at 238–39 (citations omitted); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 198 (2d Cir. 1998) (overturning an arbitrator's award under the FAA using the "manifest disregard" standard).

105. *Paulson v. Flathead Conserv. Dist.*, 91 P.3d 569, 574 (Mont. 2004) (quoting *Terra W. Townhomes*, 996 P.2d at 871); *Drayer v. Krasner*, 572 F.2d 348, 352 (2d Cir. 1978) (stating that "the nonstatutory ground of 'manifest disregard' of the law as a basis for vacating arbitration awards presupposed 'something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law' " (quoting *san Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961))); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972) (stating that "an arbitration award will not be vacated for a mistaken interpretation of law . . . [b]ut if

Additionally, a court may not vacate an arbitration award based on the court's subjective judgment that the award would violate public policy.[106] The order must be based on "some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interest."[107]

2. Non-Enforcement of Pre-Dispute Arbitration Agreements—Generally

The FAA and the MTUAA were both enacted to reverse the longstanding judicial hostility to arbitration and to place arbitration agreements on the same footing as other contracts. As noted above, both the FAA and the MTUAA provide that an arbitration agreement may be invalidated on traditional contract grounds.[108] In recent years, the leading issue in non-union-management arbitration is whether a pre-dispute arbitration provision of an employment agreement may be revoked under traditional defenses against contract.[109] Whether the provision is revocable because it is unconscionable, and whether the opponent of arbitration has waived any right to a judicial forum and jury trial are of particular concern.[110] The issue of unconscionability is generally a question of state law.[111]

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the arbitrators simply ignore the applicable law, the literal application of a 'manifest disregard' standard should presumably compel vacation of the award" (citations omitted)); *Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp.*, 86 F.3d 96, 100 (7th Cir. 1996) (citing *Gingiss Intl. Inc. v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995) (stating that "insufficiency of the evidence is not a ground for setting aside an arbitration award under the FAA")).

106. *United Paperworkers Intl. Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987).

107. *Id.* at 42 (citing *W.R. Grace & Co. v. Loc. Union 759*, 461 U.S. 757, 766 (1983)); *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57 (2000); Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 Ohio St. J. on Dis. Res. 19, 85 (2001).

108. *Supra* nn. 93–96 and accompanying text.

109. Pre-dispute arbitration is the norm in collectively bargained agreements, which are not normally "contracts of adhesion." *LaFournaise v. Mont. Developmental Ctr.*, 77 P.3d 202, 205 (Mont. 2003).

110. *See e.g. Ingle v. Cir. City Stores, Inc.*, 328 F.3d 1165, 1172–74 (9th Cir. 2003).

111. *Ticknor v. Choice Hotels Intl., Inc.*, 265 F.3d 931, 937 (9th Cir. 2001) (stating that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA]") (citing *Drs. Assocs., Inc., v. Casarotto*, 571 U.S. 681, 685 (1996); 9 U.S.C. § 2 (1925)); *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987) ("[S]tate law, whether of legislative or of judicial origin, is applicable [as a defense to the enforcement of an arbitration provision under the FAA] *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."); *Ticknor*, 265 F.3d at 939 (holding that Montana law rather than Maryland law applied to the dispute despite the fact that the contract containing the

C. The Unconscionable Arbitration Provision

The unconscionability analysis focuses on both procedural unconscionability (unfair surprise) and substantive unconscionability (oppression).[112] Procedural unconscionability addresses "how" the arbitration provision became part of the contract. The "how" question concerns the balance of bargaining power between the employer and the employee and how clearly the contract discloses the presence and terms of the arbitration provision (unfair surprise).[113] The provision is procedurally unconscionable if the employee has relatively little comparative bargaining power *and* the pre-dispute provision and its terms are not clearly disclosed and understood.[114] Substantive unconscionability is the "whether" question, asking in effect whether the substance and procedure provided in the arbitration provision are oppressive or overly harsh and against public policy (oppression).[115]

Most courts require that, for a contract or contract provision to be struck for being unconscionable, there must be both procedural and substantive unconscionability. Thus, there must be imbalance in bargaining power, unfair surprise, and oppression.[116] In Montana, however, a contract provision may be struck as being unconscionable if it suffers only procedural unconscionability.[117] While the Montana Supreme Court has not specifically relied on

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arbitration clause provided that Maryland law was to apply). *See also Cir. City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002) (relying on *Ticknor* in determining whether an arbitration provision was unconscionable under California law); *Iwen v. U.S. W. Direct*, 977 P.2d 989, 994 (Mont. 1999).

112. *Adams*, 279 F.3d at 893 ("Under California law, a contract is unenforceable if it is both procedurally and substantively unconscionable."); *see also* Calamari & Perillo, *supra* n. 94, at 388–89 (explaining the use of the terms "substantive" and "procedural" unconscionability, "oppression," and "unfair surprise").

113. *Adams*, 279 F.3d at 893.

114. *Id.* A finding of procedural unconscionability may not be solely premised on the fact that there was unequal bargaining power between the employer and the employee; *c.f. Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 7 (Mont. 2002) ("[M]ere inequality in bargaining power does not render a contract unenforceable, nor are all standardized contracts unenforceable. As a consequence of current commercial realities, form forum clauses will control, absent a strong showing it should be set aside."). Indeed, "if a court found procedural unconscionability based solely on an employee's unequal bargaining power, that holding could potentially apply to [invalidate] every contract of employment in our contemporary economy." *Zuver v. Airtouch Communs., Inc.*, 103 P.3d 753, 761 (Wash. 2004) (citing *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002)) (brackets in original).

115. *Adams*, 279 F.3d at 893.

116. *See* Calamari & Perillo, *supra* n. 94, at 381; *see also supra* n. 113.

117. *See* Scott J. Burnham, *The War against Arbitration in Montana*, 66 Mont. L. Rev. 139 (2005) (critiquing the Montana Supreme Court's approach to arbitration and constitutionality).

the concepts of "procedural" and "substantive" in its analysis of unconscionability, this terminology provides an appropriate construct to analyze the court's decisions.

D. Unconscionability in Montana

The Montana Supreme Court relies on a three-part test to determine unconscionability.[118] The first two steps involve procedural unconscionability: 1) whether the contract provision is adhesive, and if adhesive, 2) whether the provision is within the reasonable expectation of the weaker party. The third step is to determine whether the provision is unduly oppressive, unconscionable or against public policy (substantively unconscionable).[119] If it is, it will be struck, even if the provision is within the reasonable expectation of the weaker party.

1. Procedural Unconscionability

a. Adhesion—The Pre-Dispute Arbitration Is Presented on a "Take-It-or-Leave-It" Basis

In *Iwen v. U.S. West Direct*, the Montana Supreme Court defined the circumstance in which a contract becomes a contract of adhesion. It said,

> When determining whether a contract is one of adhesion, we focus on the nature of the contracting process, rather than the parties' relative sizes, resources, or bargaining power. Hence, we have held that contracts of adhesion "arise when a standardized form agreement, usually drafted by the party having superior bargaining power, is presented to a party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms."[120]

In *Iwen*, plaintiff challenged a pre-dispute arbitration provision included in a contract for a "yellow pages" advertisement. Applying the above definition, the court held that the contract was adhesive because plaintiff was faced with defendant's standardized form agreement, the terms of which were non-negotiable, and his only choice was to accept or reject the contract as presented.[121]

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118. *Iwen v. U.S. W. Direct*, 977 P.2d 989, 995–96 (Mont. 1999).

119. *Id.* at 994–95. The Montana Supreme Court struck the arbitration clause because it was "completely one-sided," allowing the company access to the court system, but requiring the customer to arbitrate. *Id.* at 996.

120. *Id.* at 989 (quoting *Passage v. Prudential-Bache Secs., Inc.*, 727 P.2d 1298, 1301 (Mont. 1986)).

121. *Id.*

Thereafter, in *Kloss v. Edward D. Jones*,[122] the Montana Supreme Court applied the same definition of adhesion in the context of a pre-dispute arbitration provision included in a stock brokerage agreement between a ninety-five year-old widow investor and a brokerage house.[123] The court said that the provision was adhesive because the investor was faced with an industry-wide practice of including pre-dispute provisions in standardized brokerage contracts. In effect, the investor faced the possibility of being excluded from the securities market unless she accepted the agreement with the pre-dispute clause. In addition, plaintiff had no opportunity to negotiate the terms of the pre-dispute clause—it was presented on a "take-it-or-leave-it-basis."[124]

A year later, in *Arrowhead School District No. 75 v. Klyap*,[125] the court applied its unconscionability analysis, not in the context of a contract defense, but in determining whether a contract's 20% liquidated damages provision was lawful. The court held that the validity of a liquidated damages provision is governed by the same standards applicable to the contract defense of unconscionability, and then applied its unconscionability analysis.[126] It determined that the liquidated damages provision was a contract of adhesion because it was included in a form contract presented to teacher Klyap by the School Board on a "take-it-or-leave-it basis," with no "meaningful choice regarding the [contested] provision."[127] The court observed that there was no negotiation on the provision, and, had Klyap sought to bargain the provision, "the School would likely have rejected his proposal and simply hired a different teacher. . . ." (there were eighty applicants).[128]

The Montana Supreme Court's definition of adhesion is clear: an adhesion contract "is a contract whose terms are dictated by one contracting party to another who has no voice in its formulation."[129] This take-it-or-leave-it approach is particularly onerous when the weaker party is presented with an industry-wide practice and there are no alternatives but to enter into the contract.[130]

122. *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1 (Mont 2002).

123. *Id.* at 7.

124. *Id.*; *see also Denton v. First Interstate Bank of Com.*, 142 P.3d 797, 803 (Mont. 2006).

125. *Arrowhead Sch. Dist. No. 75 v. Klyap*, 79 P.3d 250 (Mont. 2003).

126. *Id.* at 263, 265.

127. *Id.* at 265.

128. *Id.*

129. *Denton*, 142 P.3d at 803.

130. *Kloss v. Edward D. Jones*, 54 P.3d 1, 8 (Mont 2002).

However, the court has been clear that "form" contract language offered by the stronger party alone is not sufficient to constitute adhesion. In *Denton v. First Interstate Bank of Commerce*, the court determined that a form loan agreement tendered by the bank to the borrower and co-signor was not a contract of adhesion. Unlike the ninety-five-year-old widow in *Kloss*, the co-signor was a "sophisticated business person" who had "studied" the proposed agreement, the transaction was entered at his behest, there was no evidence that the defendant bank would not have negotiated the offending clause if the plaintiff had sought negotiation, and finally, that if plaintiff had sought negotiation, the bank would have negotiated the contract because plaintiff was such a valued client.[131]

In the employment context, many employees are sophisticated and are more than capable of negotiating the terms of their employment agreement, including a pre-dispute arbitration clause, despite the fact that the employer may have superior overall bargaining power. Alternatively, an employer who presents pre-dispute arbitration, especially to non-sophisticated employees, on a take-it-or-leave-it basis, will probably have the provision struck. To combat this, the employer may, in its efforts to make the provision known and understood,[132] offer additional consideration for an employee to accept the pre-dispute provision. In such a setting, the employee may reject the consideration and refuse to sign. Alternatively, it may be anticipated that most employees will accept the consideration and sign.

b. Is the Arbitration Provision within the Reasonable Expectation of the Challenging Party?

Assuming the court concludes that the offending contract or contract provision is adhesive, the second step in the unconscionable analysis is to determine whether the adhesive clause or contract was beyond the "reasonable expectation" of the challenging party.

In *Kloss*, the court determined that a pre-dispute arbitration provision was adhesive,[133] and then concluded that the adhesive

131. *Denton,* 142 P.3d at 803.

132. *Infra* section II.D.1.c.

133. *Id.* at 7–8; *see also Denton*, 142 P.3d at 803 (stating that the contracts in *Kloss* were adhesion contracts because, among other things, "they were standardized form contracts prepared by [the brokerage house], and [the plaintiff] had no meaningful opportunity to negotiate the terms of the contracts").

language was unconscionable because it was not within "the reasonable expectation" of the plaintiff.[134] In support of the latter conclusion, the court stated that it was the practice of the parties that the widow did not read her brokerage agreements; the widow relied upon the broker to explain any significant provisions within such an agreement; the widow, in conformity with this practice, did not read the brokerage agreement at issue; the broker did not note or explain the pre-dispute clause; and finally, the broker owed the widow a fiduciary duty to explain the brokerage agreement.[135]

In *Klyap*,[136] the court again visited the "reasonable expectation" test, this time with regard to the validity of a 20% liquidated damages provision in a contract. The court concluded that the provision was valid because (1) the provision was within Klyap's reasonable expectation because he was familiar with the employment needs of the school,[137] and (2) the amount of damages the school would suffer upon his breach would be difficult to prove.[138]

In *Denton*,[139] the court concluded that the promissory note between the bank and the borrower/co-signor was within the co-signor's reasonable expectation because he was a "sophisticated business person who had studied the proposed agreement, [and] the transaction was entered at his behest."[140]

c. *Additional Criteria to Determine Reasonable Expectation*

Generally, for a pre-dispute arbitration clause in the non-union-management context[141] to be within the reasonable expectation of an employee or prospective employee, the clause must be

134. *Kloss*, 54 P.3d at 8.

135. *Id.* at 10 (not reaching whether the provision was unduly oppressive, unconscionable or against public policy due to the finding that the provision was not within the plaintiff's reasonable expectation).

136. *Arrowhead Sch. Dist. No. 75 v. Klyap*, 79 P.3d 250 (Mont. 2003).

137. *Id.* at 267 (noting that Klyap knew when he breached his employment contract that a small, rural school would have difficulty replacing him in his coaching and teaching positions so close to the start of a school year).

138. *Id.*

139. *Denton v. First Interstate Bank of Com.*, 142 P.3d 797 (Mont. 2006).

140. *Id.* at 803.

141. *See La Fournaise v. Mont. Developmental Ctr.*, 77 P.3d 202, 205 (Mont. 2003) (stating that "collective bargaining agreements arise only after the public employer and the exclusive representative of the union have met their legal duties to bargain collectively and in good faith . . . no standardized form of agreement exists in this case and neither contracting party dictated the terms of the [contract] to the other. Consequently, the requirements for a contract of adhesion . . . have not been met." (citation omitted)).

in writing, be conspicuous, and by its language reasonably inform an employee of its presence and its terms, and the employer must be willing to discuss its implications.

Courts have found the following practices to represent employer procedural unfairness: (1) the terms are "set forth in such a way that an average person could not understand them";[142] (2) the agreement is included in employees' paycheck envelopes;[143] (3) the agreement is posted on the employer's website, and the employer is unable to prove that its employees are aware of it;[144] (4) the employer sends the agreement via a mass e-mail;[145] (5) the employer prepares the agreement in English for Spanish-speaking employees;[146] (6) the employer gives the employee an insufficient amount of time to consider the pre-dispute agreement before signing it;[147] (7) the agreement is buried among many employment-related forms[148] or "hidden in a maze of fine print";[149] (8) the agreement refers to arbitration rules to which the employee is denied access;[150] and (9) the employer refuses to respond to em-

142. *Zuver v. Airtouch Communs., Inc.*, 103 P.3d 753, 760–61 (Wash. 2004).

143. *Compare Tinder v. Pinkerton Sec.*, 305 F.3d 728, 736 (7th Cir. 2002) (enforcing arbitration agreement) *with Buckley v. Nabors Drilling USA, Inc.*, 190 F. Supp. 2d 958, 965 (S.D. Tex. 2002) (refusing to enforce arbitration agreement).

144. *Acher v. Fujitsu Network Communs., Inc.*, 354 F. Supp. 2d 26, 37 (D. Mass. 2005).

145. *Campbell v. Gen. Dynamics Govt. Sys. Corp.*, 321 F. Supp. 2d 142, 149 (D. Mass. 2004) (holding that an employer's mass e-mail message to employees was insufficient notice).

146. *Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937, 939–41 (S.D. Tex. 2001) (refusing to enforce the arbitration agreement); *see also Am. Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 538–39 (5th Cir. 2003) (refusing to enforce an agreement involving an illiterate borrower in a consumer arbitration case).

147. *Zuver*, 103 P.3d at 761. A similar consideration requires employers to afford employees a reasonable period of time to opt out of signed provisions. *See e.g. Cir. City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002) (holding an arbitration agreement that gave employee the ability to opt out of arbitration was not procedurally unconscionable); *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 383 (S.D.N.Y. 2002) (refusing to enforce the arbitration agreement where employer gave employee only a few minutes to review a single-spaced agreement).

148. *See e.g. Berger v. Cantor Fitzgerald Secs.*, 942 F. Supp. 963, 967 (S.D.N.Y. 1996) (refusing to enforce the arbitration agreement); *Maye v. Smith Barney Inc.*, 897 F. Supp. 100, 108 (S.D.N.Y. 1995) (enforcing the arbitration agreement); *see also Shaffer v. ACS Govt. Servs., Inc.*, 321 F. Supp. 2d 682, 687 (D. Md. 2004) (refusing to enforce the arbitration clause contained on one page of a seventy-one page employee guidebook).

149. *Zuver*, 103 P.3d at 760 (quoting *Schroeder v. Fageol Motors, Inc.*, 544 P.2d 20, 23 (Wash. 1975)).

150. *E.g. Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 936 (4th Cir. 1999) (refusing to enforce the arbitration agreement where the arbitration rules were contained in a separate document to which employees were not given access until after a dispute had arisen); *cf. Tarulli v. Cir. City Stores, Inc.*, 333 F. Supp. 2d 151, 157–58 (S.D.N.Y. 2004) (finding the

ployee questions or concerns about the agreement.[151] An additional consideration is whether the employer had an affirmative duty to note and explain the pre-dispute arbitration provision in the first instance, in which case an employee need not inquire about the provision—rather, the employer has the obligation to raise the issue.[152]

d. The Reasonable Expectation Test May Be Both Objective and Subjective

Finally, the "reasonable expectation" test is potentially both subjective (whether the pre-dispute clause is within the reasonable expectation of the particular plaintiff)[153] and objective (whether the pre-dispute clause is within the reasonable expectation of a reasonable person).[154] A pre-dispute clause not within the reasonable expectation of a reasonable person is valid, if the individual plaintiff actually knew and understood the provision.[155] Alternatively, if the plaintiff did not know or understand, but a reasonable person employed in the same position would have known and understood, absent the defendant's knowledge of plaintiff's reduced capacity, plaintiff may not complain.[156] Consequently, the duty on the employer, absent plaintiff's actual knowl-

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arbitration agreement is not unconscionable where agreement stated that the applicant must request a copy of the arbitration rules if she had not received a copy).

151. *Zuver*, 103 P.3d at 761 (stating that the employee "had ample opportunity to contact . . . [the employer or its attorney] with concerns or questions").

152. In the non-employment context, specifically a stockbroker's duty to a client, the Montana Supreme Court determined that the broker had a fiduciary duty to disclose and explain the pre-dispute arbitration clause in the account agreement. *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 9 (Mont. 2002); *see also Willems v. U.S. Bancorp Piper Jaffray, Inc.*, 107 P.3d 465, 468–69 (Mont. 2005) (suggesting that the relevant question in the context of pre-dispute employment arbitration is whether an employer ever had a "fiduciary duty" to an employee).

153. *Denton v. First Interstate Bank of Com.*, 142 P.3d 797, 803 (Mont. 2006) (finding no contract of adhesion where the plaintiff was not unsophisticated as was the plaintiff in *Kloss*, and where the plaintiff had "studied the contract prior to signing it"); *Kloss*, 54 P.3d at 3, 8 (examining the reasonable expectation of the ninety-five year-old widow).

154. *Zigrang v. U.S. Bancorp Piper Jaffray, Inc.*, 123 P.3d 237, 241 (Mont. 2005). The inquiry into an investor's reasonable expectations in an adhesion contract consists only of an analysis of the investor's objectively reasonable expectations from the investor's perspective—from the layman perspective, not that of the sophisticated stockbroker. "[T]he mere presence of an arbitration provision in an investment agreement, though conspicuous, does not bring the provision within the reasonable expectations of an investor in every instance." *Id.* at 241–42. For a critique of the Montana Supreme Court's use of subjective criteria in deciding "reasonable expectation," see Burnham, *supra* n. 117.

155. *Denton*, 142 P.3d at 803.

156. *Id.*

edge, is to make the pre-dispute provision known to the reasonable person working the position. If plaintiff has diminished capacity, and the employer is aware of this situation, the employer must make special efforts to inform plaintiff.

2. *Substantive Unconscionability*

The third step in the Montana courts' analysis of unconscionability is to determine whether the challenged language is oppressive, overly harsh or against public policy. If so, and if the contract is adhesive, even if the pre-dispute clause is within the challenging party's reasonable expectation, the clause is voidable. This is what many courts refer to as substantive unconscionability.

In *Iwen*,[157] (involving the yellow pages advertisement contract), the court determined that the pre-dispute arbitration provision was unduly oppressive (unreasonably favorable to the defendant) because it was "completely one-sided." The contract required the plaintiff arbitrate contract disputes whereas the defendant could choose a judicial forum.[158] This contract characteristic is widely accepted as constituting substantive unconscionability.[159]

a. Criteria to Determine Substantive Unconscionability

In *Kloss*, the Montana Supreme Court struck the pre-dispute clause because it was not within the plaintiff's reasonable expectation. However, it suggested eight criteria for determining future questions of substantive unconscionability.[160] These criteria can be reduced to the following five factors:

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157. *Iwen v. U.S. W. Direct*, 977 P.2d 989 (Mont 1999).

158. *Id.* at 995–96.

159. *Infra* n. 165.

160. *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 8–9 (Mont. 2002) (indicating the criteria are only examples). The eight criteria are:

1. Are potential arbitrators disproportionately employed in one or the other party's field of business?
2. Do arbitrators tend to favor "repeat players" as opposed to workers or consumers who are unlikely to be involved in arbitration again? In other words, is there a tendency by arbitrators to avoid decisions which will result in the loss of future contracts for their services?
3. What are the filing fees for arbitration compared to the filing fees in Montana's district courts?
4. What are arbitrator's fees? Do they make small claims prohibitive? Do they discriminate against consumers or workers of modest means?

1. Whether the arbitrator or potential arbitrator is biased and has a conflict of interest. For example, whether the arbitrator is disproportionately employed in the employer's field of business, or tends to favor employer "repeat players" (usually the employer).[161]
2. Whether the cost of arbitration is excessive compared to judicial litigation—in effect, whether the total cost of arbitration is oppressive or otherwise precludes the particular employee from availing herself of arbitration.
3. Whether the arbitration proceeding is "shrouded in secrecy so as to conceal illegal, oppressive or wrongful" employer practices.
4. Whether arbitrators are bound by the facts and law.
5. Whether employees have the right to discover the facts necessary to prove their claims.[162]

b. Additional Criteria to Determine Substantive Unconscionability

Other courts have cited and relied upon the criteria suggested in *Kloss*,[163] as well as the following additional criteria:

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5. Are arbitration proceedings shrouded in secrecy so as to conceal illegal, oppressive or wrongful business practices?
6. To what extent are arbitrators bound by the law?
7. To what extent are arbitrators bound by the facts?
8. What opportunity to claimants have to discover the facts necessary to prove a claim such as a company's business practices?

Id.

161. Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 Ohio St. J. on Dis. Res. 165, 190, 190 n. 187 (2005) ("Unlike union-management arbitration, where both parties are repeat players, in the non-union-management context only the employer has the potential to be a repeat player. The concern with repeat players is that such a player has better information on potential arbitrators and that arbitrators may tend to favor the repeat player to assure repeat business.").

162. *Kloss*, 54 P.3d at 9.

163. Factor 1 (arbitrator bias): *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–39 (4th Cir. 1999) (finding that the arbitrator selection process was biased because, among other things, the employer unilaterally controlled the pool of arbitrators); *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 283 (3d Cir. 2004) (finding that a geographical exclusion of arbitrators did not create a biased arbitrator selection process); *see also* Bales, *supra* n. 161, at 193–94 (discussing whether disclosure of a conflict of interest is sufficient to cure the conflict); Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. Miami L. Rev. 949, 960–61 (2002); Harding, *supra* n. 1, at 454.

Factor 2 (cost of the arbitration process): *Ingle v. Cir. City Stores, Inc.*, 328 F.3d 1165, 1177 (9th Cir. 2003) (finding a $75 filing fee rendered arbitration agreement unenforceable); *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 765 (5th Cir. 1999) (enforcing arbitral award on plaintiff); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000) (determining that, where "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs"). Since *Green Tree*, courts have evaluated

fee-splitting provisions on a case-by-case basis, and have required employees to demonstrate that they cannot afford the cost of arbitration. *E.g. Faber v. Menard, Inc.*, 367 F.3d 1048, 1053 (8th Cir. 2004); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 608 (3d Cir. 2002); *Spinetti v. Serv. Corp. Intl.*, 324 F.3d 212, 216 (3d Cir. 2003); *Morrison v. Cir. City Stores*, 317 F.3d 646, 668–70 (6th Cir. 2003); *Adler v. Fred Lind Manor*, 103 P.3d 773, 785 (Wash. 2005) (holding that the employee plaintiff must present "specific information about the arbitration fees he will be required to share and why such fees would effectively prohibit him from bringing his claims"); *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 992 (Cal. 2003) (upholding *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000) (holding employers must pay all arbitration costs)); *Shankle v. B-G Maint. Mgt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999) (stating that mandatory fee splitting that required an employee to pay half of the fees of the arbitration (between $1,875 and $5,000 including the cost of the arbitrator) denied him access to effective forum); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 557–59 (4th Cir. 2001) (adopting a case-by-case approach to plaintiff's allegation that the cost of arbitration was excessive when he was earning $115,000 per year and could not demonstrate that contested cost—fee-splitting—would cause him financial hardship).

Factor 3 (concealment): *Zuver v. Airtouch Communs., Inc.*, 103 P.3d 753, 765 (Wash. 2004) (agreeing with the employer that confidentiality provisions were widespread in arbitration agreements, but holding that such a provision was substantively unconscionable because it hindered employees' ability to prove a pattern of discrimination or to take advantage of prior arbitral findings). The court also noted that "keeping past findings secret undermines an employee's confidence in the fairness and honesty of the arbitration process and thus, potentially discourages that employee from pursuing a valid discrimination claim." *Id.*

Factor 4 (facts and law): *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (stating that, in the adjudication of statutory rights, the only difference between arbitration and judicial adjudication is the forum). Clearly, the arbitration process must afford an opportunity for the fair presentation of evidence, and the arbitrator must make fact findings based on that evidence. Similarly, the arbitrator must be true to the law in the arbitration of statutory or common law rights and obligations. However, as the Montana Supreme Court has recognized, courts may not second-guess arbitrator findings of fact or conclusions of law. *Supra* n. 101.

Factor 5 (discovery): Employees have the right to discover the facts necessary to prove their claims. Most courts have resolved this issue by enforcing arbitration clauses that give the arbitrator discretion to permit or limit discovery, but refusing to enforce clauses that impose absolute limitations on discovery (e.g., each party is limited to one eight-hour deposition) or that forbid discovery altogether. *See Wilks v. Pep Boys*, 241 F. Supp. 2d 860, 864–65 (M.D. Tenn. 2003) (enforcing an arbitration agreement that presumptively limited each party to the deposition of one witness and one expert, but permitted the arbitrator to order additional depositions upon a showing of "substantial need"); *Walker v. Ryan's Fam. Steak Hs., Inc.*, 289 F. Supp. 2d 916, 925–26 (M.D. Tenn. 2003) (refusing to enforce an arbitration agreement that limited each party to one deposition and permitted the arbitrator to order additional depositions only "in extraordinary fact situations and for good cause shown" (internal quotation marks omitted)); *Williams v. Katten, Muchin & Zavis*, 1996 WL 717447 at *4 (N.D. Ill. Dec. 9, 1996) (enforcing arbitration award in favor of employer despite employee's argument that the arbitrator only permitted her to depose one of the four witnesses she sought to depose); *Contl. Airlines, Inc. v. Mason*, 87 F.3d 1318, *2 (9th Cir. 1996) (table) (enforcing an arbitration clause, noting that "[t]here is nothing that shocks the conscience about an arbitration procedure that does not provide for discovery"); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 299 (5th Cir. 2004).

1. Whether the arbitration agreement allows an employer access to the courts for its claims against the employee, but requires the employee to arbitrate.[164]
2. Whether the employer retains the unilateral right to modify the arbitration agreement.[165]
3. Whether the employer provides separate consideration to an existing employee when the employer seeks to include a pre-arbitration clause in the existing contractual relationship.[166]
4. Whether the employer-initiated arbitration agreement imposes a statute of limitations shorter than that imposed by law.[167]

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164. *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (finding arbitration agreement enforceable where one party had option of litigating in court but other party was required to arbitrate); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130–32 (7th Cir. 1997) (refusing to enforce agreement by which employee, but not employer, agreed to arbitrate all future claims); *Cir. City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1108 (9th Cir. 2003) (holding that even where the arbitration clause requires both parties to arbitrate, "because the possibility that [the employer] would initiate an action against one of its employees is so remote," arbitration clauses are unenforceable unless employer can show the arbitration clause is bilateral (quoting *Ingle*, 328 F.3d at 1174)); *see also Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 344 (Ky. App. 2001) (finding a consumer arbitration agreement unenforceable when it applied only to claims brought by the consumer against the company, and not vice-versa); *Iwen v. U.S. W. Direct*, 977 P.2d 989, 996 (Mont. 1999).

165. *Hooters of Am., Inc.*, 173 F.3d at 939–40 (finding an arbitration agreement that gives the employer the right to unilaterally modify arbitral procedures is unenforceable); *Floss v. Ryan's Fam. Steak Hs., Inc.*, 211 F.3d 306, 315–16 (6th Cir. 2000) (holding the (employer's) right to alter the arbitration without notice or consent renders arbitration agreement unenforceable); *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) (holding "the unfettered right [of one party] to alter the arbitration agreement's existence or its scope is illusory"); *Blair*, 283 F.3d at 604 (holding the employer's unilateral right to modify the arbitrator's procedures upon notice to employee is enforceable).

166. *Harmon v. Philip Morris, Inc.*, 697 N.E.2d 270, 272 (Ohio App. 8th Dist. 1997) (finding no consideration where arbitration agreement required employees to arbitrate claims against the employer but not vice-versa); *cf. Dantz v. Am. Apple Group, LLC*, 123 Fed. Appx. 702, 710 (6th Cir. 2005) (unpublished) (finding consideration present where both employer and employee agreed to arbitrate claims against each other); *Batory v. Sears, Roebuck & Co.*, 124 Fed. Appx. 530, 533 (9th Cir. 2005) (unpublished) (concluding employer's agreement to be bound by the arbitral decision is consideration); *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 734–36 (7th Cir. 2002); *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004) (finding continued payment of the employee's salary is sufficient consideration); *see also* William L. Corbett, *Resolving Employee Discharge Disputes under the Montana Wrongful Discharge Act (MWDA), Discharge Claims Arising Apart from the MWDA, and Practice and Procedure Issues in the Context of a Discharge Case*, 66 Mont. L. Rev. 329, 340–41 (2005).

167. *Compare Ingle*, 328 F.3d at 1175 (holding that an arbitration provision imposing a one year statute of limitations is unenforceable) *with Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 230–32 (3d Cir. 1997) (holding arbitration agreement imposing a one year statute of limitations is enforceable).

5. Whether the arbitration provision contains a venue provision for a designated forum unreasonably difficult for the employee.[168]
6. Whether the provision prohibits employment claims as class actions.[169]
7. Whether the pre-dispute clause limits the arbitrator's remedial authority in a manner inconsistent with the authority authorized by law.[170]
8. Whether the arbitration provision prevents the award of attorney fees to a prevailing employee, or authorizes the award of fees to the employer inconsistent with that provided by law.[171]
9. Whether the arbitrator is competent to decide the case.[172]

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168. *Domingo v. Ameriquest Mortg. Co.*, 70 Fed. Appx. 919, 920 (9th Cir. 2003) (unpublished) (holding that arbitration agreement requiring an employee in Hawaii to arbitrate a claim in California is invalid); *Carter*, 362 F.3d at 299–300 (enforcing arbitration agreement containing venue selection clause because all the employees lived near the designated venue); *Ciago v. Ameriquest Mortg. Co.*, 295 F. Supp. 2d 324, 330 (S.D.N.Y. 2003) (holding the validity of a venue clause that would require a New York employee to arbitrate in California is a matter for the arbitrator).

169. *Compare Mantor*, 335 F.3d at 1107; *Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1118 (Cal. 2005) (holding waiver of class actions renders arbitration clause unenforceable) *with Adkins v. Lab. Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Gentry v. Super. Ct.*, 37 Cal. Rptr. 3d 790, 794 (Cal. App. 2d Dist. 2006) (holding waiver of class actions does not render arbitration clause unenforceable); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?* 42 Wm. & Mary L. Rev. 1 (2000).

170. An employer's attempt to restrict employee statutory remedies collides with the Supreme Court's *Gilmer* prescription that arbitration of statutory claims is merely a change of forum not a change of substance. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Alexander v. Anthony Intl., L.P.*, 341 F.3d 256, 267 (3d Cir. 2003) (striking an arbitration agreement limiting an employee's statutory remedies).

171. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (holding that a prevailing employer in a Title VII case may only be awarded attorney fees where the employee's lawsuit was "frivolous"). The Court reasoned that allowing the routine award of attorney fees to prevailing employers would undermine Title VII by deterring employees from bringing claims. Unresolved is the enforceability of arbitral provisions in which an employee waives the right to recover attorney fees and arbitral awards that either deny attorney fees to a prevailing claimant or that award attorney fees to a losing claimant. *Id.* at 422. *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001), *vacated*, 294 F.3d 1275 (11th Cir. 2002) (denying enforcement of arbitration agreement requiring fee-splitting between the parties); *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 584–85 (7th Cir. 2001) (holding that an arbitrator's refusal to award attorney fees to the prevailing party as authorized by state law cannot be vacated or modified for "manifest disregard" of the law); *Musnick v. King Motor Co.*, 325 F.3d 1255, 1260–61 (11th Cir. 2003) (enforcing a "loser pays" provision in an arbitration agreement); *Manuel v. Honda R&D Ams., Inc.*, 175 F. Supp. 2d 987, 994–95 (S.D. Ohio 2001).

172. This factor contains both procedural and substantive issues of unconscionability. From a procedural perspective, a reasonable expectation of a party entering into an agreement to arbitrate disputes is that the arbitrator will meet some minimum standards of competence. Often this is obtained by indicating the arbitrator will be chosen through an arbitration service provider. In this way arbitrator competence is delegated to a neutral disinterested service provider. Certainly, if the parties name the arbitrator, while it does

10. Whether a "union-management" pre-dispute arbitration agreement requires the arbitration of statutory or common law employment claims.[173]

c. *Consequence of a Finding of Substantive Unconscionability*

If the pre-dispute provision is substantively unconscionable, a final issue is whether the entire pre-dispute agreement, or only the unconscionable portion, should be struck. To avoid this situation, the pre-dispute agreement should contain a severability clause.[174] In the absence of a severability clause, when a court finds a contract provision to be void, illegal, or unconscionable, it strives to give effect to the intent of the parties by striking the offending language and enforcing the agreement.[175] When the contracting parties include a severability clause, courts are even more inclined to strike the clause.[176]

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not assure competence, absent non-disclosure, bias, or prejudice, the reasonable expectation test is probably met. From a substantive perspective, an arbitration proceeding is not fair if the arbitrator is not competent to understand the factual or legal issues in dispute, or not competent to decide the type of procedural rulings that are necessary to assure procedural fairness. If the decision-maker (arbitrator) is not competent to hear and decide the substantive issues in arbitration, the process is unduly oppressive, unconscionable or against public policy. An example occurs when the parties agree to arbitration and the issues to be decided are complicated claims (such as those brought under the Employee Retirement Income Security Act, common law or statutory wrongful discharge, gender, age and disability discrimination, or common law claims of defamation and infliction of emotional distress) and the arbitrator selected by the service provider is a retired high school teacher-coach with no legal background, no employment law experience and little or no arbitration experience. While American Arbitration Association arbitrators are far more qualified, the question is, what if that was your arbitrator? Does such a decision-maker conform to the legitimate expectations of both parties? Is such a decision-maker capable of rendering a decision that complies with the minimums of substantive unconscionability, particularly when it appears that lack of arbitrator knowledge, training, and experience favors the non-moving party (in the employment context, the employer)?

173. The Court has not clearly resolved this issue, but has stated that such a waiver, to be effective, must be "clear and unmistakable." *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998).

174. *E.g. Zuver v. Airtouch Communs. Inc.*, 103 P.3d 753, 758 (Wash. 2004) ("In case any one or more of the provisions of this [agreement] shall be found to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained in this [agreement] will not be affected . . . . The provisions of this [agreement] regarding trade secrets and confidential information and arbitration shall survive the termination of your employment.").

175. *Id.* at 767; *Adler v. Fred Lind Manor*, 103 P.3d 773, 788 (Wash. 2004).

176. *Zuver*, 103 P.3d at 768.

E. Waiver of the Judicial Forum

In *Kloss*, a plurality of the Montana Supreme Court also determined that even if a pre-dispute arbitration provision is not procedurally or substantively unconscionable, it may nevertheless be struck if it is not clear that the employee waived his right to a judicial forum.[177] Justice Nelson wrote in his plurality opinion:

> A waiver of a fundamental right (jury trial and judicial forum) must be proved to have been made voluntarily, knowingly and intelligently—typically by the party seeking the waiver. For a fundamental right to be effectively waived, the individual must be informed of the consequences before personally consenting. And the waiver will be narrowly construed.[178]

The plurality ruled that in applying these principles, a court must consider a totality of overlapping and non-exclusive factors.[179] Similarly, the U.S. Supreme Court requires that courts be vigilant against compelling arbitration of legal rights unless the individual who seeks to avoid the pre-dispute arbitration provision clearly has waived her right to the forum provided by law.[180] This is true even in union-management disputes.[181] The Ninth

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177. *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 14–17 (Mont. 2002) (Nelson, J., concurring). Justices Trieweiler, Leaphart and Cotter joined Justice Nelson in his concurring opinion. *Id.* at 10, 17.

178. *Id.* at 15 (citations omitted); *VanDyke Constr. Co. v. Stillwater Mining Co.*, 78 P.3d 844, 847 (Mont. 2003) ("[A] waiver is a voluntary and intentional relinquishment of a known right, claim or privilege, which may be proved by express declarations or by a course of acts and conduct which induces the belief that the intent and purpose was waiver."); *Stewart v. Covill & Basham Constr. L.L.C.*, 75 P.3d 1276, 1278 (Mont. 2003).

179. *Kloss*, 54 P.3d at 15. The factors are

> [w]hether there were any actual negotiations over the waiver provision; whether the clause was included on a take-it-or-leave-it basis as part of a standard-form contract; whether the waiver clause was conspicuous and explained the consequences of the provision (*e.g.* waiver of the right to trial by jury and right of access to the courts); whether there was disparity in the bargaining power of the contracting parties; whether there was a difference in business experience and sophistication of the parties; whether the party charged with the waiver was represented by counsel at the time the agreement was executed; whether economic, social or practical duress compelled a party to execute the contract (*e.g.* when a consumer needs phone service and the only companies providing that service require execution of an adhesion contract with a binding arbitration clause before service will be extended); whether the agreement was actually signed or the waiver provision separately initialed; whether the waiver clause was ambiguous or misleading; and whether the party with the superior bargaining power lulled the inferior party into a belief that the waiver would not be enforced.

Id.

180. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998).

181. *Id.*

Circuit Court of Appeals and other courts have required that a waiver of the judicial forum must be "knowing and voluntary."[182]

Indeed, ADEA[183] provides that an employer-initiated "separation and release" agreement (whereby employer and employee agree that the employee voluntarily quits and waives all rights or claims against the employer arising out of the employment relationship) is invalid unless the employee makes a "knowing and voluntary" waiver of her ADEA rights.[184] ADEA prescribes specific criteria that must be met to establish such a waiver.[185] While

182. *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994); *Adler v. Fred Lind Manor*, 103 P.3d 773, 789 (Wash. 2004) (noting that the Washington state constitution contained a right to a jury trial and consequently a waiver of that right must be "knowingly, voluntarily and intelligently" given). The *Adler* court held that by "knowingly and voluntarily agreeing to arbitration, a party implicitly waives his right to a jury trial by agreeing to an alternative forum, arbitration," and the failure of the arbitration clause to include a jury waiver provision is not critical because, "the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." However, the court remanded the issue back to the trial court to determine whether the employee "knowingly and voluntarily" entered the arbitration agreement. *Id.* The court said that if the evidence on remand demonstrated that the employer

> threatened to fire him if he refused to sign the agreement despite the fact he raised concerns with its terms or indicated a lack of understanding, then the evidence here would not support . . . [the employer's] claim that . . . [the employee] knowingly and voluntarily agreed to arbitration, and thus implicitly waived his right to a jury trial. However, if as [the employer] contends, its representative explained the document and offered to answer Adler's concerns or questions, Adler's claim fails.

Id. See also Zuver, 103 P.3d at 769 (refusing to consider the issue of the constitutional right to jury trial and access to courts because employee failed to raise these issues before the trial court); *Kloss*, 54 P.3d at 11–17 (Nelson, J., concurring) (detailing the Montana Constitutional right to a jury trial and right to access the courts). However, under the Supremacy Clause of the U.S. Constitution, state law, regardless of how favored and its place of origination (state constitution, state legislature or common law), to the extent it conflicts with federal law, is preempted. The U.S. Supreme Court has made it quite clear there are some concerns with pre-dispute arbitration, and that states may invalidate pre-dispute arbitration contracts on the same basis that are applicable to other contracts. If a citizen may relinquish a constitutional right by a "voluntary, knowing and intelligent" waiver, the Montana Court may not impose a higher standard regarding the waiver of such right in the context of an arbitration contract. To do so clearly puts the Montana Court at odds with the U.S. Supreme Court, the principles of federalism of the U.S. Constitution, and more than a hundred years of state and federal jurisprudence. *Drs. Assocs. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

183. 29 U.S.C. § 621 (Supp. 1965–1968).

184. For a good Montana case illustrating general "release and waiver" language, read *Old Elk v. Healthy Mothers, Healthy Babies, Inc.*, 73 P.3d 795, 796 (Mont. 2003).

185. 29 U.S.C. § 621. ADEA states that for an employee to waive any right or claim under ADEA the waiver must be "knowing and voluntary" and will not be considered as such unless "at a minimum":

> (1)(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

these criteria are codified in the ADEA, they are based on federal court decisions regarding employee "waiver of legal rights." Consequently, the ADEA standards have become the criteria that employer counsel should consult in drafting not only employee separation and release agreements, but any agreement where an employee waives legal rights, including waiver of a judicial forum.

III. CONCLUSION

Almost all labor-management collective bargaining agreements contain a pre-dispute arbitration provision. Indeed, arbitration of labor-management disputes is the norm, and generally only involves the construction and application of the parties' "private" law agreement. In these situations, judicial intervention is rare.

If, however, the labor-management parties include in their agreement language requiring the employer to comply with spe-

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(B) the waiver specifically refers to rights or claims arising under this chapter;
(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled:
(E) the individual is advised in writing to consult with an attorney prior to executing the agreement:
(F)

(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;
(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;
(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

* * *

(3) In any dispute that may arise over . . . the validity of a waiver . . . the [employer] shall have the burden of proving . . . that a waiver was knowing and voluntary. . . ." *Id.* at § 626(f)(1), (f)(3).

cific statutory employee rights, judicial intervention is more likely. The U.S. Supreme Court, while generally enforcing arbitration as the exclusive remedy of statutory rights claims, is concerned that the process not lessen employees' substantive rights and that employees clearly waive their right to a judicial tribunal.

Arbitration of non-union-management disputes is of more recent origin. In particular, pre-dispute arbitration provisions, which require the arbitration of "any and all" disputes, have become prominent only during the last decade. These pre-dispute arbitration provisions have garnered much judicial attention. If an employer desires to enter into a pre-dispute arbitration agreement with its employees and potential employees, it may do so if it follows the above procedural and substantive standards.

If, however, the employer wants to use arbitration to gain some advantage over the employee, and takes advantage of its increased bargaining power to do so, the courts will find a way to strike the arbitration agreement. The ball is clearly in the employers' court: if they want pre-dispute arbitration, they must be willing to "bend over backwards"[186] to make it procedurally and substantively fair.[187]

186. Rick Bales & Reagan Burch, *The Future of Employment Arbitration in the Nonunion Sector*, 45 Lab. L.J. 627, 634 (1994).

187. Bales, *supra* n. 161, at 197 ("[A]s some unscrupulous employers continue to find new and inventive ways to tilt the arbitral playing field in their favor, courts should uphold their responsibility to ensure fair arbitral processes by refusing to enforce lopsided arbitration agreements.").