

Pace Law Review

Volume 32
Issue 1 *Winter 2012*


Article 3

January 2012

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Recommended Citation

Griffin Toronjo Pivateau, *Private Resolution of Public Disputes: Employment, Arbitration, and the Statutory Cause of Action*, 32 Pace L. Rev. 114 (2012)

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Private Resolution of Public Disputes: Employment, Arbitration, and the Statutory Cause of Action

Griffin Toronjo Pivateau*

I. Introduction

The Supreme Court recently reaffirmed its commitment to honoring arbitration clauses in employment agreements. In *Rent-A-Center, West, Inc., v. Jackson*,¹ the Court found that courts should treat arbitration agreements in the employment context in the same manner as arbitration agreements found in any commercial contract. The *Rent-A-Center* result was not surprising. In recent years, the Supreme Court has faced the issue of mandatory arbitration agreements numerous times and, in virtually every case, favored arbitration.² The Court has proved willing to cast aside or ignore precedent in its pursuit of a pro-arbitration policy.³

The *Rent-A-Center* case, like almost all employment claims, did not arise out of the employment agreement that contained the arbitration clause. Instead, the plaintiff, Antonio Jackson, alleged racial discrimination and retaliation. Jackson's employer moved to dismiss the action and compel arbitration, citing the arbitration clause in Jackson's employment agreement. This agreement provided for arbitration of all disputes arising out of Jackson's employment with Rent-A-Center, including claims for discrimination.⁴ The agreement also stated that "[t]he Arbitrator, and not any federal, state, or local court or agency,

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1. 130 S. Ct. 2772 (2010).

2. *See e.g.*, 14 Penn Plaza, L.L.C. v. Pyett, 129 S.Ct. 1456 (2009) (endorsing mandatory labor arbitration, instead of litigation, to resolve statutory claims of unlawful age-based employment discrimination brought by labor union-represented employees).

3. *See id.* at 1474 (Stevens, J., dissenting) (prefacing his dissent with the comment that his "concern regarding the Court's subversion of precedent to the policy favoring arbitration prompt[ed] . . . additional remarks.").

4. *Rent-A-Center*, 130 S.Ct. at 2775.

shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.”⁵

Jackson argued that the arbitration agreement was unconscionable, rendering it unenforceable. Rent-A-Center responded that Jackson had agreed that the arbitrator would have exclusive authority to resolve any dispute about the enforceability of the agreement. Therefore, the Court lacked authority to hear Jackson’s unconscionability claim. In the end, the Supreme Court sided with Rent-A-Center. The Court found that, for a court to hear a claim of unconscionability where the parties have agreed to have an arbitrator decide all issues, a plaintiff must establish that the provision delegating questions of arbitrability to the arbitrator is itself unconscionable.⁶

Following *Rent-A-Center*, it seems certain that all challenges to the fairness of mandatory arbitration clause terms will be decided not by courts, but by arbitrators. Arbitrators themselves will decide whether the arbitration process is flawed.⁷ After *Rent-A-Center*, employers may design their own arbitration scheme, confident that questions regarding the fairness of the scheme will not be heard by the courts but by the arbitrators. The law will now provide little oversight on employers in their use of mandatory arbitration clauses in employment agreements.

These arbitration clauses will encompass not just disputes arising from the employment agreement, but statutory claims as well. Because employees have a right to the protection of public statutes, consigning important statutory claims to private arbitration carries huge risks. Society should question the wisdom of relegating almost all employment claims to private processes. Are public interests satisfied “when public laws are enforced in the private fora”?⁸

In favoring arbitration clauses in employment agreements, the Supreme Court has relied on general contract principles.⁹ Essentially, the Court has found that, if an employee has agreed to have his statutory discrimination heard in a private forum, then that employee should stick

5. *Id.*

6. *Id.* at 2780.

7. *Id.* at 2778.

8. Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293, 295 (1999).

9. *Rent-A-Center*, 130 S. Ct. at 2776.

with the deal.¹⁰

But relying on general contract principles to decide a matter involving the employment relationship is disingenuous. In fact, the standard employment agreement bears little relationship to the traditional contract. It is not the employment agreement, but statutes that furnish the majority of the duties and obligations of an employment relationship. Numerous areas of the employment relationship are constrained by public law and therefore not subject to contract. The typical employment agreement governs relatively minor areas—things like salary and benefits. The most important aspects of the employment relationship—occupational safety and health, minimum wage, overtime pay, discrimination—exist independently and cannot be waived in contract.

In essence, the employment relationship exists on a continuum. At one end of the spectrum lie those areas that are solely governed by contract. At the other end of the spectrum lie those rights that are granted by statute. How should society construe the ability of employer and employee to choose an alternative forum? Is it a matter of contract? Or is a judicial forum a right that is neither waivable nor modifiable?

We know that the current judicial consensus favors the contractual approach, treating arbitration agreements as if they were governed solely by contract principles. In contrast, many people argue that mandatory arbitration agreements should be placed outside the scope of contract and banned outright.¹¹ Therefore, society faces a difficult choice. It must ask itself whether the benefit of permitting parties to choose an alternative dispute resolution mechanism outweighs the burden placed on society by the possibility that the choice may render public law meaningless.

In this Article, I argue that one option doesn't have to exist to the exclusion of the other. I believe that arbitration agreements fall somewhere along the middle of the rights/contract continuum. My understanding of the nature of arbitration agreements relies on a previously existing area of employment law.

There is a particular aspect of the employment relationship that, while open to contract, remains subject to constraints imposed by the

10. *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)) (explaining that parties should be held to their agreements to arbitrate).

11. See Lisa Blomgren Bingham & David Henning Good, *A Better Solution to Moral Hazard in Employment Arbitration: It Is Time to Ban Predispute Binding Arbitration Clauses*, 93 MINN. L. REV. HEADNOTES 1 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1905680.

law. A noncompete agreement permits an employee to contract with his employer to not work for a competitor following the termination of the employment relationship. This right to contract away the right to compete is, however, narrowly construed by the court system. A court may not enforce a noncompete agreement unless the agreement meets a standard of reasonableness. I propose that this same analysis be applied to arbitration agreements. It is my position that a predispute, mandatory arbitration agreement should not be enforced unless it meets certain requirements that together make the agreement reasonable. This standard of reasonableness will protect the interests of all parties: the employer, the employee, and society as a whole.

In Part II of this Article, I discuss the problems created by the use of mandatory arbitration clauses in employment agreements. Part III examines the fallacy behind applying general contract principles to arbitration agreements in the employment context. In Part IV, I outline a proposal to constrain the use of mandatory arbitration as a means of resolving employment disputes. My proposed legislative solution is designed to address the concerns raised by the continued use of mandatory arbitration clauses in employment agreements.

II. There Is a Problem with Arbitration Clauses in Employment Agreements

A. *The Employment Relationship and Mandatory Arbitration Agreements Are in Conflict*

A tension exists between mandatory arbitration agreements and employment relationships. This tension results from the nature of the disputes heard in arbitration. In an ordinary commercial arbitration proceeding, the issues addressed stem from the contract itself. The terms of the contract give rise to the claims and defenses to be heard by the arbitrator. In the arbitration of employment disputes, it is more likely that the dispute stems from an alleged violation of a statutory right. In an employment arbitration, the claims and defenses derive from rights granted by either statute or the common law.

Through the years, courts have acknowledged the different nature of employment arbitration and often struggled with the issue. When first faced with the question of arbitration of statutory employment rights, the

Supreme Court found that an employee's agreement to arbitrate contract claims did not waive any rights to pursue statutory claims in court.¹² Later, the Court would reverse direction and permit employees to agree to arbitrate statutory claims.¹³

Arbitration, even commercial arbitration, had a long road to legitimacy. Prior to passage of the Federal Arbitration Act (FAA or the "Act") in 1925, the judicial system was hostile to arbitration.¹⁴ The idea of a privatized court system seemed wrong—how could a judicial system work if the parties were able to contract their way out of it?¹⁵ In an effort to combat judges' hostility to arbitration agreements and the resulting privatization of disputes, Congress created a statutory scheme designed to overcome judicial resistance to arbitration.¹⁶ The FAA required courts to enforce arbitration agreements—to compel parties to arbitration when an arbitration agreement existed, and to enforce arbitral awards. The FAA was the first step to a national policy favoring arbitration.¹⁷ The FAA's success is evident as mandatory arbitration has gone from pariah to favored status.

The drafters of the FAA intended the legislation to put arbitration agreements on the same footing as other contracts.¹⁸ To that end, section 2 of the FAA, the "primary substantive provision of the Act,"¹⁹ states that arbitration agreements in contracts involving commerce are "valid,

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

13. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). For the purposes of this Article, these three cases, as a unit, are referred to as the *Mitsubishi Trilogy*. For a discussion of the *Mitsubishi Trilogy*, see *infra* Part II.B.

14. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974). See also Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 516 (2009).

15. Many regarded the mandatory arbitration agreement as an attempt to avoid the jurisdiction of the court. See John E. Taylor, Note, *Helping Those Who Help Themselves: The Fourth Circuit's Treatment of Agreements to Arbitrate Statutory Employment Discrimination Claims in Brown v. ABF Freight Systems, Inc. and EEOC v. Waffle House, Inc.*, 79 N.C. L. REV. 239 (2000). See also Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates And The Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L. 597, 600 (2009).

16. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

17. See *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

18. Marcantel, *supra* note 15, at 602.

19. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

irrevocable, and enforceable.”²⁰ Section 2 further requires courts to enforce arbitration agreements according to their terms,²¹ “save upon such grounds as exist at law or in equity for the revocation of any contract.”²² The FAA provides that petitions to compel arbitration may be brought before “any United States district court which, save for such agreement, would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between the parties.”²³

The FAA also made suitable provisions for judicial enforcement of arbitral awards. The FAA permits a party to seek enforcement of arbitration agreements in federal court.²⁴ The Act provided a method for prevailing parties to file a motion for confirmation of the award by a federal court, and an opportunity for judicial review to confirm, vacate, or modify arbitration awards.²⁵ The FAA forms, for the most part, a single federal law of arbitration and preempts state arbitration laws to the extent those laws conflict with the FAA.²⁶

B. *Judicial Treatment of Arbitration in Employment Has Changed*

Arbitration in the employment context has a confused history. The FAA did not mention employment arbitration or employment

20. 9 U.S.C. § 2 (2006).

21. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

22. § 2.

23. § 4.

24. *Id.* Specifically, the statute holds:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

Id.

25. §§ 9-11.

26. *See Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (holding that while states may “regulate contracts, including arbitration clauses, under general contract law principles,” section 2 of the FAA preempts state law from placing the arbitration clauses on “unequal footing” with other terms in the agreement).

agreements. The Supreme Court first addressed the question of employment arbitration in a case involving collective bargaining. In *Textile Workers Union of America v. Lincoln Mills of Alabama*, the Supreme Court decided that federal courts could enforce arbitration clauses contained in collective bargaining agreements.²⁷ The *Lincoln Mills* Court, however, did not rely on the FAA. Instead, the Court permitted arbitration of employment disputes, at least in the collective bargaining sense, based on language found in the Labor-Management Relations Act of 1947.²⁸ The Court found that arbitration of legal disputes was an integral component of the negotiation process, and that a court should have little to say in the context of a negotiated agreement between union and management. The *Lincoln Mills* decision left open the question as to what courts would say about the use of mandatory arbitration agreements in non-union employment relationships.

In 1964, Congress enacted Title VII, which prohibited employment discrimination on the basis of race, color, religion, sex, and national origin.²⁹ Later federal statutes extended legal protection to age,³⁰ pregnancy,³¹ and disability.³² These employment rights were gained not through the collective bargaining process, but instead through statute. The statutes also granted to employees, as well as prospective employees, statutory causes of action. Title VII freed employees, at least in some small part, from some of the constrictions of the employment-at-will doctrine, which provides that employers may lawfully “dismiss their employees at will . . . for good cause, for no cause or even for cause morally wrong.”³³ Passage of antidiscrimination legislation gave employees a weapon—providing them with the ability to sue their employers and have their complaints heard in federal court.

Around this time, state courts also began to test the limits of the employment-at-will doctrine. This recognition of employee rights, whether gained through statute or judicial decision, resulted in an increase in employment litigation.³⁴ Employers, feeling threatened by the

27. 353 U.S. 448, 458 (1957).

28. *Id.*

29. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006).

30. See Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2006).

31. See Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006).

32. See Americans with Disability Act of 1990, 42 U.S.C. §§ 12101-12213 (2006).

33. *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519-20 (1884).

34. Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44

court system's willingness to side with employees, attempted to minimize their exposure to adverse verdicts. Many employers, seeking to evade the judicial system, began to include mandatory arbitration clauses in their employment agreements. These clauses typically required arbitration of all workplace disputes, including those arising out of statutory claims.

The insertion of mandatory arbitration clauses in employment agreements was controversial. Courts expressed their skepticism of the arbitration process and the attempts by employers to avoid jurisdiction. In the first test of the arbitration clause in a non-union employment agreement, the Supreme Court found that agreement to a mandatory arbitration process could not prevent a plaintiff from asserting statutory rights.

In *Alexander v. Gardner-Denver Co.*,³⁵ an employee brought a statutory discrimination claim in federal court, following arbitration of a contract claim. The same facts underlay both the statutory and contract claims. The Court held that an arbitration of the contract claim did not prevent subsequent litigation of the employee's statutory discrimination claim. The Court refused to accept the employer's argument that the petitioner waived his cause of action under Title VII, making it clear that "there can be no prospective waiver of an employee's rights under Title VII."³⁶ The Court went on to note, "waiver of these rights would defeat the paramount congressional purpose behind Title VII."³⁷

More importantly, by agreeing to arbitration of contract rights, a party does not waive right to a judicial forum to hear statutory claims. "[M]ere resort to the arbitral forum to enforce contractual rights constitutes no such waiver."³⁸ The *Alexander* Court expressed its belief that an arbitration proceeding did not provide a substitute forum for the resolution of statutory employment claims. The Court distrusted the arbitration process to handle such weighty issues, citing "the informality of arbitral procedures, the lack of labor arbitrators' expertise on issues of substantive law, and the absence of written opinions."³⁹

The *Alexander* Court recognized that an employee making a claim

BRANDEIS L.J. 415, 419 (2006) [hereinafter Bales, *Employment Arbitration*].

35. 415 U.S. 36 (1974).

36. *Id.* at 51.

37. *Id.*

38. *Id.* at 52.

39. *See id.* at 56-58.

under Title VII asserted a statutory right separate from the contract. An arbitrator lacked the power to hear statutory claims. As the Court stated:

If an arbitral decision is based “solely upon the arbitrator’s view of the requirements of enacted legislation,” rather than on an interpretation of the collective-bargaining agreement, the arbitrator has “exceeded the scope of the submission,” and the award will not be enforced. . . . [T]he arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.⁴⁰

The Court would, however, lose its distrust of arbitration schemes to deal with statutory disputes, as the Supreme Court changed its initial negative view. In three cases, the Court “reversed a longstanding presumption that employment claims were exempt from the FAA.”⁴¹ In these cases, referred to now as the *Mitsubishi Trilogy*,⁴² the Court enforced arbitration agreements that extended to the following statutory claims: antitrust, securities, and racketeering laws. The Court stated, “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 *Mitsubishi Trilogy* signaled the Court’s altered view of the arbitration process.

Even after *Mitsubishi*, however, an important question remained—whether the rights granted under Title VII and similar anti-discrimination statutes could be consigned to arbitration. The Court seemed to answer that question in *Gilmer v. Interstate/Johnson Lane Corp.*⁴⁴ There the Court found that a mandatory arbitration agreement, executed at the commencement of employment, bound a nonunion financial services

40. *Id.* at 53-54 (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

41. Kenneth F. Dunham, *Great Gilmer’s Ghost: The Haunting Tale of the Role of Employment Arbitration in the Disappearance of Statutory Rights in Discrimination Cases*, 29 AM. J. TRIAL ADVOC. 303, 307 (2005).

42. See cases cited *supra* note 13.

43. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

44. 500 U.S. 20 (1991).

worker. The Court held that the plaintiff could not litigate in court his allegation that he was terminated for unlawful age discrimination in violation of the federal Age Discrimination in Employment Act of 1967.⁴⁵

In *Gilmer*, the Supreme Court found that the FAA permitted an employer to require a non-union employee to arbitrate, rather than litigate, a federal age discrimination claim.⁴⁶ In doing so, the employee was not waiving any substantive rights. “By 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.”⁴⁷ According to the Court, objections of unconscionability and procedural unfairness could be addressed on a case-by-case basis. The Court decided that employment arbitration agreements would be enforced absent “the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract.”⁴⁸

Despite the *Gilmer* decision, at least some doubt remained regarding the applicability of the FAA to employment agreements. The arbitration agreement in *Gilmer* was not part of an employment agreement.⁴⁹ The FAA specifically excludes from the Act’s coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁵⁰ Therefore, the argument existed that the text of the FAA itself precluded the application of the statute to arbitration clauses found in employment agreements. Given the traditional broad interpretation of “interstate commerce,”⁵¹

45. *Id.*

46. *Id.* at 26.

47. *Mitsubishi*, 473 U.S. at 628.

48. *Gilmer*, 500 U.S. at 33 (quoting *Mitsubishi*, 473 U.S. at 627) (internal quotation marks omitted).

49. *Id.* at 23.

50. 9 U.S.C. § 1 (2006). *See also* Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1345 (1997) (noting that since the arbitration agreement in *Gilmer* “was part of a registration process with the New York Stock Exchange, rather than a contract of employment directly between *Gilmer* and his former employer, the Court was able to avoid construing the reach of the exclusion in § 1 of the FAA.”).

51. *See, e.g.*, *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act). In that case, the Court elaborated:

The power of Congress over *interstate commerce* is not confined to the regulation of *commerce* among the states. It extends to those

most employees would presumably be excluded from the Act's coverage.

The Supreme Court confronted this issue in *Circuit City Stores, Inc. v. Adams*⁵² and found that the FAA's proscription of the Act's application should be read narrowly. In *Circuit City*, the plaintiff signed an employment agreement containing a mandatory arbitration clause.⁵³ When an employment dispute arose, the trial court compelled arbitration.⁵⁴ The United States Court of Appeals for the Ninth Circuit overturned, finding that the text of the FAA excluded most employment disputes.⁵⁵ The Supreme Court disagreed.

In *Circuit City*, the Supreme Court held that the exemption in the FAA concerned only employment contracts of seamen, railroad employees, and those "actually engaged in the movement of goods in interstate commerce."⁵⁶ This interpretation indicated that the limiting text of the FAA was directed only to transportation workers.⁵⁷ For all other employees, claims arising out of statutory violations could be consigned to arbitration.⁵⁸ The Court reasoned that any other interpretation would make the exemption superfluous.⁵⁹ Following *Circuit City*, employers could routinely include arbitration clauses in employment agreements, subject only to general contract defenses.

activities intrastate which so affect *interstate commerce* or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate *interstate commerce*.

Id. at 118 (emphasis added) (citing *McCulloch v. Maryland*, 17 U.S. 316 (1819); *United States v. Ferger*, 250 U.S. 199 (1919)).

52. 532 U.S. 105 (2001).

53. *Id.* at 110.

54. *Id.*

55. *Id.*

56. *Id.* at 112 (quoting *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997)) (internal quotation marks omitted).

57. *Id.* at 109 (the Court clearly stated that they "decide[d] that the better interpretation is to construe the statute, as most of the Courts of Appeals have done, to confine the exemption to transportation workers.").

58. *See id.* at 109, 113.

59. *Id.* at 113.

C. *The Potential for Abuse Requires Oversight of Arbitration in Employment*

Given the Supreme Court's continued support of the concept, and the perceived advantages of arbitration, one may question why mandatory arbitration in the employment context is problematic. After all, employees can always refuse to agree to the mandatory arbitration clauses. Moreover, in a perfect world, employees could negotiate the scope and applicability of the clause. Employees retain their right to general contract defenses—most importantly the defense of unconscionability. Why then should we as a society exhibit concern about employment arbitration?

In fact, a number of policy reasons justify the limited use of mandatory arbitration clauses in the employment agreements. First, the decision to arbitrate employment disputes is often made on a unilateral basis. No opportunity exists for employees to provide input regarding the functioning of the arbitration process. Instead, employers create arbitration systems “with no employee input, often in secret, and then spring the procedure on employees.”⁶⁰ Often, employees are not provided with guidance on arbitration—either the concept or the actual procedure.⁶¹ Employees are likely unfamiliar with the judicial process and are therefore uncertain as to the meaning of selecting arbitration as the final means of dispute resolution.⁶² Because of this lack of knowledge, the employee “is in no position to bargain or shop for a better term”⁶³

Agreement to any arbitration proceeding should be knowing and voluntary.⁶⁴ Voluntariness, however, likely means something different in the employment context than in a commercial setting. Some courts have noted that agreements to employment arbitration may often be considered involuntary, because arbitration clauses are included in

60. Martha Halvordson, *Employment Arbitration: A Closer Look*, 64 J. MO. B. 174, 174 (2008).

61. *Id.*

62. 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, 57 (1997).

63. *Id.*

64. See e.g., *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832-33 (4th Cir. 1986); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 756 (6th Cir. 1985); *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977).

standard form employment agreements.⁶⁵ Employees are presented with the agreement on “a take it or leave it, and be fired/not hired, basis.”⁶⁶ “Employees ‘must either ‘‘agree’’ to waive their right to litigate and use the . . . arbitration procedure or lose their jobs.”⁶⁷

Compulsory arbitration may not be compatible with the public policies at stake in employment. Anti-discrimination laws safeguard the rights of employees to be free from discrimination on the basis of race, sex, age, and disability. These rights are not negotiable. Although employees may decide to ignore violations of the law or they may settle their differences privately, they may not contractually waive such rights.⁶⁸ The law provides public schemes, both through administrative procedures and litigation, for enforcement.⁶⁹ Legislation provides an entire schedule of remedies.⁷⁰

Finally, there is a question as to whether private arbitration schemes are equipped to deal with statutory discrimination claims. Employment discrimination remains a problem; laws aimed at eliminating employment discrimination have not solved America’s discrimination problems. White women and minorities of both sexes remain not only behind white males, “but have regressed recently in wages, representation in management, and representation in jobs in line for promotion to management.”⁷¹ While equal opportunity in employment

65. See Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 57-58 (1997).

66. Christina Semmer, *The “Knowing and Voluntary” Standard: Is the Sixth Circuit’s Test Enough to Level the Playing Field in Mandatory Employment Arbitration?*, 2 J. DISP. RESOL. 607, 613 (2008).

67. See Halvordson, *supra* note 60, at 174.

68. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (stating that the Court believes that “it is clear that there can be no prospective waiver of an employee’s rights under Title VII.”). See also Enforcement Guidance on Non-Waivable Employee Rights under Equal Employment Opportunity Commission (EEOC) Enforced Statutes, EEOC Notice No. 915.002 (1997), available at <http://www.eeoc.gov/policy/docs/waiver.html>.

69. See generally 42 U.S.C. §§ 2000e to 2000e-17 (2006).

70. See generally *id.*

71. Marcia L. McCormick, *The Truth Is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193, 194 (2009). Interestingly, McCormick goes on to note the following facts from the statistics:

Black women . . . earn sixty-three percent of what white men earn,
and Latina women earn only fifty-two percent of what white men

may have improved since passage of Title VII, underlying problems remain and the statistics are clear. These statistics cannot be explained simply by facially neutral factors.⁷²

Whatever the cause of the continued lag in employment statistics, whether the problem lies with the statute or its enforcement model,⁷³ mandatory private arbitration, as it is currently practiced, is not the answer. The process of shunting employment discrimination claims off to private arbitration panels—with non-standardized procedures, questions of fairness, questions of due process, and a lack of transparency—seems certain to perpetuate the problem of employment discrimination.

III. The Supreme Court Erred in Relying on Contract Principles

A. *The Employment Relationship Is Complex*

The employment relationship represents “one of the most complex and important relationships in modern society.”⁷⁴ The employment relationship, like the employment agreement that memorializes it, is almost inherently asymmetrical. The agreement is not the result of a bargain struck between equals.⁷⁵ The majority of employees are not able to change any terms of the employment agreement, including the arbitration clause.⁷⁶ The employer need not pay any additional consideration for the arbitration agreement; courts routinely construe

earn. . . . Additionally, the number of women of all colors in corporate officer posts and in the pipeline for those posts at Fortune 500 companies has fallen in the past two years. Women of color make up just two percent of those corporate officer posts.

Id.

72. *See id.* 194-95.

73. *See id.* at 194-96. The continuing problem may actually be a result of ineffectual enforcement by the Equal Employment Opportunity Commission (EEOC). Perhaps, as some claim, the problem lies squarely with the ability of the EEOC to create accountability on the part of those making employment decisions. McCormick sums up this frustration, stating, “The current model, with the EEOC writing compliance guidelines, encouraging mediation and occasionally acting as prosecutor, is not working.” *Id.* at 195.

74. Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 351 (2008).

75. *Id.* at 379.

76. *Id.* at 379-80.

continued employment as adequate consideration.⁷⁷ Employers have sole control of all documents, agreements, policies and other terms of the employment relationship.⁷⁸

In a commercial contract, the parties agree to arbitrate disputes arising out of the subject matter of the contract. The contract will contain the rights and obligations of the parties, and the arbitration agreement provides the forum that will adjudicate disputes related to those rights and obligations.⁷⁹ The employment agreement is different. In the employment agreement, the arbitration clause is “immaterial to the core of the transaction.”⁸⁰ While the employment agreement may contain provisions regarding salary and benefits, the employer has likely not insisted on a mandatory arbitration agreement to resolve disputes about salary and benefits. Instead, the employer intends to obtain the employee’s consent to submit future statutory claims to an arbitration proceeding.

At one time, courts viewed the employment relationship as a matter of contract—a “private economic relationship.”⁸¹ The modern employment agreement is, however, a contract only in the broadest sense of the word. The employment agreement may contain terms and conditions of employment, but those terms and conditions are subject to, and constrained by, external law. The rights and duties of the parties to the employment agreement are much more likely to be defined by statute, or by the common law, than by the employment agreement.⁸²

For instance, Title VII and similar antidiscrimination statutes impose severe limitations on employers, not only in the making of employment agreements, but in all aspects of employment and

77. See, e.g., *Ex parte* McNaughton, 728 So.2d 592, 596 (Ala. 1998) (explaining that “an employer’s providing continued at-will employment is sufficient consideration to make an employee’s promise to his employer binding.”). See also *Mattison v. Johnston*, 730 P.2d 286, 289 (Ariz. Ct. App. 1986) (noting that nationally, courts have found that “the continuation of employment for a substantial period of time . . . establishes consideration for a restrictive covenant.”).

78. See Fineman, *supra* note 74, at 380.

79. See e.g., JUDICIAL ARBITRATION & MEDIATION SERVS. INC., JAMS CLAUSE WORKBOOK: A GUIDE TO DRAFTING DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS (2011), available at <http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf>.

80. Schwartz, *supra* note 62, at 56.

81. McCormick, *supra* note 71, at 197.

82. *Id.*

employment decisions.⁸³ But discrimination laws are only one aspect of the extensive regulation of employment by legislation; there are numerous other examples of state control over the employment relationship. Hours and wages, two of the key elements of any employment relationship, are restricted by statute. An employee may not contract to work for less than the minimum wage, or agree to work overtime without the statutorily mandated pay addendum.⁸⁴ The workers' compensation scheme prohibits negligence suits against one's employer.⁸⁵ Occupational health and safety is a matter of government regulation, not of individual contractual choice.⁸⁶ Social security and federal income tax withholding are matters governed by statute, not by contract.⁸⁷ The time and manner of wage payments is subject to state law, not contract.⁸⁸

B. *The Public Nature of Employment Law Creates Tension with Private Arbitration*

To a large extent, "employment law consists of the competing paradigms of rights and contract."⁸⁹ In any employment dispute, conflicts are likely to arise between the aspects of employment that are governed by contract and those governed by public law. The employment relationship is, in one sense, based in contract: an individual agrees to work for an employer, and certain terms of that work, e.g., salary or benefits, will be dictated by the agreement, whether implicit or express.⁹⁰ But the contract relationship occurs within boundaries. Numerous external laws limit the contract relationship. These external laws acknowledge rights and grant entitlements. These laws limiting contract

83. *Id.*

84. See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206-207 (2006).

85. See e.g., *Ward v. Bechtel Corp.*, 102 F.3d 199, 203 (5th Cir. 1997) (holding that the Texas Worker's Compensation Act "provides the exclusive remedy for injuries sustained by an employee in the course of his employment as a result of his employer's negligence").

86. See Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. §§ 651-700 (2006).

87. See, e.g., *RAM v. Blum*, 533 F. Supp. 933 (S.D.N.Y. 1982).

88. See, e.g., CAL. LAB. CODE § 207 (Deering 2011).

89. Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 380 (2006).

90. *Id.*

rights within the employment relationship are present for public policy purposes, designed to serve the public interest and values.⁹¹

In *Gilmer*, the Court noted that the purpose of the FAA “was to place arbitration agreements on the same footing as other contracts.”⁹² In favoring arbitration agreements, the Supreme Court relied on general contract principles, i.e., because the parties made an agreement to arbitrate, they “should be held to it.”⁹³ According to this reasoning, parties must arbitrate their employment-related claims because they agreed to arbitrate their claims.

But citing traditional contract principles to support arbitration is disingenuous. As we have seen, the modern employment agreement is only tangentially related to traditional notions of contract. Numerous state and federal statutes, as well as the common law, constrain the employment agreement. While courts may still view employment as a contractual relationship, the ability of the parties to contract is severely constricted.

Employment disputes are, to a large part, public conflicts.⁹⁴ The interests involved in the typical employment arbitration claim are the interests of society. The law decrees that employees belonging to certain protected classes may be free of discrimination in conjunction with their employment. The law provides remedies for those who have been discriminated against. It is the public who created and defined the rights of the parties to the employment. Society dictated which activities give rise to the claim, and society dictated the appropriate remedy given to the injured.

In contrast, the disputes arising out of commercial contracts concern only the interests of the parties involved in the contract. A public court may eventually hear the dispute, but the important issues at stake are those issues set forth in the contract. The scope of the conflict, the basis for the claim, and perhaps even the remedies themselves are provided by the contract. The parties to a contract create their rights. Such rights are subject to waiver or modification by the parties themselves. The claims between the parties are private, not public.⁹⁵

91. *Id.*

92. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

93. *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) (internal quotation marks omitted).

94. *See generally* Edwards, *supra* note 8, at 294.

95. *Id.*

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At seen herein, the employment-at-will doctrine has boundaries. The employment relationship is a hybrid entity. Current employment law is dictated as much by statute as it is by the terms of the employment agreement. Overlaying the employment-at-will doctrine with statutorily mandated rights created a system that is based in both contract and rights.

IV. The Employment Arbitration Agreement Should Be Limited

A. *The Law Already Limits the Terms of an Arbitration Agreement*

I propose that the ability of the parties to enter into an arbitration agreement be limited. This is not a revolutionary position. Limiting the ability of the parties to contract to arbitration terms has already occurred. Arbitration terms are currently constrained in three ways: by the language of the FAA, state contract law, and the statute underlying the dispute.

First, the FAA itself limits the effect of the arbitration agreement. While the FAA expressly states that arbitration agreements “shall be valid, irrevocable, and enforceable,” the Act permits courts to modify or vacate arbitration awards. Sections 10 and 11 provide the grounds for vacatur and modification.

Section 10 of the Act permits a court to vacate an arbitration award under certain conditions:

- (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption by the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of another misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.⁹⁶

96. 9 U.S.C. § 10(a) (2006).

Under section 11, the grounds for modifying or correcting an award include “evident material miscalculation,” “evident material mistake,” and “imperfect[ions] in [a] matter of form not affecting the merits”⁹⁷ Together these provisions protect the parties and provide base line requirements of fairness.⁹⁸

The FAA also permits arbitration agreements to be challenged upon any basis that would permit a contract to be challenged. The Act preserves the right of the parties to challenge the arbitration agreement “upon such grounds as exist at law or in equity for the revocation of any contract.”⁹⁹ Thus, parties may still bring claims based on any ground that would allow a party to challenge a contract.¹⁰⁰

Finally, the underlying statute may (at least indirectly) limit the rights of parties to agree to arbitration terms. The Supreme Court has indicated that arbitration terms must meet a certain standard of fairness. In *Gilmer*, the Court held that a valid arbitration agreement must permit the plaintiff to “effectively . . . vindicate” his substantive statutory rights.¹⁰¹ While precise definition is not possible, “effective vindication” would seem to mean that the arbitration process must maintain the same rights and remedies that substantive law would provide to the plaintiff.¹⁰² The parties may waive the forum in which to hear the dispute; they may not waive the substantive law applying to the dispute.¹⁰³

In these three important ways, the law already constrains arbitration agreements. Therefore, the limitations that I propose herein are consistent with pre-existing laws. My proposal is not about altering fundamental notions of freedom of contract. As shown, employers are already constrained in their right to contract regarding arbitration. All I suggest is altering the extent to which the law will restrain the parties.

97. § 11(a), (c).

98. See § 10(a) (containing the grounds for vacatur of arbitration awards).

99. § 2.

100. Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J. L. REFORM 783, 801 (2008) (explaining that “unconscionability” is a difficult concept for the purposes of the statute, however, as it provides little guidance for courts). Antoine notes that while courts have often addressed unconscionability, their decisions have been “widely diverse.” *Id.*

101. *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, 637 (1985)) (internal quotation marks omitted).

102. *Id.* at 26.

103. *Id.*

B. *A Place Exists for Mandatory Arbitration*

While I argue for constraint, I do not suggest that arbitration agreements be banned outright. Others would disagree. Many have proposed the absolute elimination of predispute, mandatory arbitration in the employment context.¹⁰⁴

[Banning arbitration] rescues public law that has been put at risk by the unchecked growth of mandatory arbitration. It regulates the “wild west” processes creative counsel are designing to manage risk on behalf of their clients. It brings us back from almost two decades of a laissez faire, failed approach to balancing the great value of binding arbitration with the potential for its abuse in the hands of the economically powerful.¹⁰⁵

Nor is the movement to prohibit arbitration agreements in the employment relationship merely academic. The proposed federal Arbitration Fairness Act, which first surfaced in 2007, was defeated, and revisited again in 2009, prohibited most predispute arbitration agreements between companies and individuals.¹⁰⁶ The proposed statute was sweeping, prohibiting the use of arbitration agreements in “employment, consumer or franchise disputes as well as disputes arising under statutes intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.”¹⁰⁷ In such matters, the parties would be limited to postdispute arbitration agreements.

Broad proposals that would eliminate all mandatory arbitration agreements are not the solution.¹⁰⁸ There is no need to ignore the

104. See, e.g., Bingham & David, *supra* note 11.

105. *Id.* at 2-3.

106. For the original text of the document, see Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007).

107. Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 268-69 (2008).

108. See *id.* As discussed by Rutledge, the proposed legislation would invalidate arbitration in many contexts, including presumably disputes in the securities industry. The new law would apply not only prospectively, to end the use of such agreements

potential benefits of arbitration. Arbitration has its advantages. Arbitration is meant to remedy a system weighed down with cost and delay, and it may lead to the resolution of claims at lower cost and with greater speed. Some estimate that litigating a typical employment case can range from five thousand dollars to more than two hundred thousand dollars, while the average cost of arbitrating an employment dispute is twenty thousand dollars, including attorneys' fees. Others have suggested that litigation is an unlikely choice for employees making less than sixty thousand dollars per year.¹⁰⁹ "It will cost a lawyer far less time and effort to take a case to arbitration; at worst, claimants can represent themselves or be represented by laypersons in a less formal and intimidating forum."¹¹⁰

Perhaps a more compelling case is the matter of time. Employees who bring a claim must also anticipate delays in having a case heard. The employee must often first pursue an administrative remedy before filing suit.¹¹¹ Administrative agencies and the court system both struggle to

following its enactment, but also to "any dispute or claim that arises on or after" the enactment date. *Id.* at 269. Presumably arbitration agreements that have been in place for years, and may have been fairly negotiated, would be rendered unenforceable by the bill.

109. St. Antoine, *supra* note 100, at 791.

110. *Id.* at 792.

111. See 42 U.S.C. § 2000e-5(e)(1) (2006). More precisely, the statute requires that claims made under this law:

[S]hall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Id. See also *Rallins v. Ohio State Univ.*, 191 F Supp 2d 920 (S.D. Ohio 2002) (finding that a gender discrimination claim under Title VII of the Civil Rights Act of 1964 failed because the plaintiff did not file the allegations with the EEOC in accordance with the requirements of 42 U.S.C. § 2000e-5(e)(1)).

hear claims. A case that goes to trial will take a minimum of several months to resolve, and is likely to go on for years if appealed. An arbitration proceeding is likely to take much less time.¹¹² Arbitration also guarantees that employees will have their complaint heard. An employee who brings his claim in court may be surprised to find that his complaint did not survive the procedural minefield that exists before a claim may reach trial.

The private nature of the arbitration forum might appeal to employees as well as employers. Potential plaintiffs may see some comfort in the privacy protections of the arbitration process. An employee reluctant to air his grievances in public may prefer a forum that provides protection from public embarrassment.¹¹³

In short, arbitration of employment disputes should continue as a supplemental scheme for the resolution of employment disputes, including those that arise under statutory law. "It is an alternative that offers the promise of a less expensive, more expeditious, less draining and divisive process, and yet still effective remedy."¹¹⁴ As will be discussed in greater detail below, it is possible to create an arbitration process that preserves the benefits of arbitration, while proving mindful of the public policies underlying statutory employment law.

C. *Contract Rights in Employment Can Be Restricted*

We must develop the means to constrain arbitration agreements in a way that permits the continued use of such agreements, while at the same time addressing potential problems. Rather than eliminating predispute arbitration agreements, I propose that the ability of the parties to enter into arbitration agreements be constrained. The law would continue to permit employers to insist on arbitration agreements, but only subject to certain limitations.

These reforms must take place on the federal level. It is clear from recent precedent that the Supreme Court is "enamored with arbitration"¹¹⁵ and is unlikely to tolerate any judicial or state restriction

112. Halvordson, *supra* note 60, at 178.

113. See Rutledge, *supra* note 107, at 267-77.

114. Estreicher, *supra* note 50, at 1349.

115. Richard A. Bales, *How Can Congress Make a More Equitable Federal Arbitration Act*, 113 PENN ST. L. REV. 1081, 1085 (2009) [hereinafter Bales, *Federal Arbitration*].

on the use of arbitration agreements. The Supreme Court has consistently ruled that the FAA preempts state laws that are aimed at arbitration agreements.¹¹⁶ State legislatures may not act in a way that limits or otherwise restrain agreements to arbitrate. Federal courts have routinely construed the FAA so as to prevent encroachment by state law.¹¹⁷ Putting any sort of constraints on arbitration agreements will therefore require Congress to act. Without Congressional action, there is simply no way to change the law of arbitration.

Fortunately, precedent exists for how the law could restrain contractual rights to enter into an arbitration agreement. Arbitration agreements could be viewed in a similar manner to another type of clause often found in employment agreements. The covenant not to compete, known more familiarly as the noncompete agreement, inhabits a shadow area in the employment relationship—a middle ground between areas governed by contract terms and those areas subject to rights granted by the law.¹¹⁸

A noncompete agreement is “an agreement, generally part of a contract of employment or a contract to sell a business, in which the covenantor agrees for a specific period of time and within a particular area to refrain from competition with the covenantee.”¹¹⁹ The noncompete agreement is known by other names, most notably as a “covenant not-to-compete,” a “restrictive covenant,” or a “non-compete clause.”¹²⁰ These terms are interchangeable and all refer to an employment contract or provision purporting to limit an employee’s power upon leaving his or her employment, to compete in the market in which the former employer does business.¹²¹

Like arbitration agreements, noncompete agreements are not meant to punish the employee.¹²² Instead, they are meant to protect the

116. *Id.*; see also *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

117. Bales, *Federal Arbitration*, *supra* note 115, at 1085. See also *Doctor’s Assocs. v. Cassorotto*, 517 U.S. 681, 687 (1996) (explaining that “Congress precluded states from singling out arbitration provisions for suspect status.”).

118. See generally Estlund, *supra* note 89.

119. BLACK’S LAW DICTIONARY 364 (6th ed. 1990).

120. As no substantive difference exists among the names, this Article refers to such covenants as “noncompete agreements.”

121. *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 909 n.1 (W. Va. 1982).

122. See *Superior Gearbox Co. v. Edwards*, 869 S.W.2d 239, 247 (Mo. Ct. App. 1993).

employer from unfair competition.¹²³ Noncompete agreements arguably protect an employer's customer base, trade secrets, and other information vital to its success. From this perspective, noncompete agreements encourage employers to invest in their employees. An employer does not wish to invest in an employee only to see the employee take the skills acquired, or the company's customers, to another employer. Logically, the employer will invest more in the employee if measures are in place to guard against the employee's movement to a competitor.

As with arbitration agreements, courts traditionally viewed noncompete agreements with disfavor, believing that the agreements contravened public policy.¹²⁴ In time, just as with arbitration agreements, courts grew more accepting of the agreement.¹²⁵ Nevertheless, the court system did not embrace the noncompete agreement with the same fervor as it has attached to the mandatory arbitration agreement. Instead, the law continues to restrict the use of noncompete agreements for any purpose other than for legitimate business purposes.¹²⁶ To ensure the purpose is legitimate, the law requires that a valid noncompete agreement meet a reasonableness requirement.¹²⁷

The noncompete agreement is an example of an agreement that falls

123. See William M. Corrigan & Michael B. Kass, *Non-Compete Agreements and Unfair Competition—An Updated Overview*, 62 J. MO. B. 81, 81 (2006).

124. Michael Garrison & John Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 112-13 (2008).

125. *Id.* at 114.

126. See, e.g., *Allen, Gibbs, & Houlik, L.C. v. Ristow*, 94 P.3d 724, 726 (Kan. Ct. App. 2004) (citing *Weber v. Tillman*, 913 P.2d 84 (1996)). See also M. Scott McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137, 143 (2003). McDonald notes that among the recognized protectable interests for employers are:

- (1) to protect trade secrets and confidential information of the company;
- (2) to protect customer goodwill developed for the company (customer relationships);
- (3) to protect overall business goodwill and assets that have been sold (noncompetes used in the sale of a business);
- (4) to protect unique and specialized training;
- (5) for situations in which the employer has contracted for the services of an individual of unique value because of who they are (e.g., performers, professional athletes); and
- (6) for pinnacle employees in charge of an organization.

McDonald, *supra* at 143 (internal citations omitted).

127. McDonald, *supra* note 126, at 142.

somewhere between right and contract. The noncompete agreement resembles a contract—terms dictated by agreement, supported by consideration. But, in fact, the language of the noncompete agreement does not necessarily bind parties. Unless the agreement meets a standard of reasonableness, and is constrained in several important areas, courts will refuse to enforce this “contractual” agreement.¹²⁸ The law restricts the scope of the noncompete agreement because society has decided that fundamental issues of fairness are at stake.¹²⁹ Presumably, the limitations on the noncompete agreement are so important that they may only be waived under certain conditions.

I believe that the reasonableness requirement for noncompete agreements is designed to balance the interests of all entities affected by the employer, the employee, and society as a whole. Each entity has an interest to be protected. The employee wishes to preserve his mobility; the employer wishes to protect itself from unfair competition; and society wishes to balance its interest in employed workers with a system that provides incentives for the development and training of employees. With such varied interests at hand, a noncompete agreement must be drafted in such a way as to satisfy all interested parties.

To satisfy the reasonableness requirement, the law requires that the employer establish a reason for the noncompete agreement other than preventing the employee from competing with his former employer.¹³⁰ Moreover, establishing the existence of a legitimate business interest to be protected is merely the threshold step that an employer must meet to create an enforceable agreement.¹³¹ The scope of the noncompete agreement must not be greater than the business interest at stake.¹³² Almost all courts apply a similar standard of reasonableness in deciding whether to enforce a noncompete agreement.¹³³

A noncompete agreement will be enforceable only “if the restraint imposed is not unreasonable, is founded on a valuable consideration, and

128. Tracy L. Staidl, *The Enforceability of Noncompetition Agreements When Employment Is At-Will: Reformulating the Analysis*, 2 EMP. RTS. & EMP. POL'Y J. 95 (1998) (noting that “[m]ost courts will not enforce covenants unless their terms are reasonable.”). See also T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1 (2005).

129. See generally Anenson, *supra* note 128.

130. Garrison & Wendt, *supra* note 124, at 115.

131. See *id.*

132. *Id.* at 118.

133. *Id.* at 117-18. See also Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 910-11 n.1 (W. Va. 1982).

is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public.”¹³⁴ Many states follow the test set forth in the Restatement (Second) of Contracts, which takes into consideration the following factors: (1) whether the restriction is greater than necessary to protect the business and goodwill of the employer; (2) whether the employer’s need for protection outweighs the economic hardship which the covenant imposes on the departing party; and (3) whether the restriction adversely affects the interests of the public.¹³⁵

Once a court determines that the noncompete agreement protects a legitimate business interest, it will then examine the agreement to ensure that it does not exceed the minimum restraint necessary to protect that interest.¹³⁶ Courts will enforce agreements only where they are “strictly limited in time and territorial effect and. . . [are] otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee.”¹³⁷ To be enforceable, agreements must be reasonable in three ways: scope (referring to the subject matter of the agreement), duration, and geography.¹³⁸

D. *Arbitration Agreements Should Be Based on a Standard of Reasonableness*

The law restricts contractual freedom for noncompete agreements. Why does society tolerate this contractual restriction? It is likely because society recognizes the competing interests involved in a noncompete agreement and attempts to balance them using the reasonableness standard. In a similar vein, the law should recognize the competing interests in the use of mandatory arbitration clauses in the employment relationship. Because of the special nature of the employment

134. *W.R. Grace & Co. v. Mouyal*, 422 S.E.2d 529, 531 (Ga. 1992) (quoting *Rakestraw v. Lanier*, 30 S.E. 735, 738 (Ga. 1898)) (internal quotation marks omitted).

135. RESTATEMENT (SECOND) OF CONTRACTS § 188(1) (1981).

136. *Garrison & Wendt*, *supra* note 124, at 117-18.

137. *Palmer & Cay, Inc. v. Marsh & McLennan Co.*, 404 F.3d 1297, 1303 (11th Cir. 2005) (quoting *White v. Fletcher/Mayo/Assocs.*, 303 S.E.2d 746, 748 (Ga. 1983)) (internal quotation marks omitted).

138. *See UARCO Inc. v. Lam*, 18 F. Supp. 2d 1116, 1121 (D. Haw. 1998) (noting parameters of reasonableness inquiry). *See also Pinnacle Performance, Inc. v. Hessing*, 17 P.3d 308, 311 (Idaho Ct. App. 2001) (explaining the three factors considered by that court in a reasonableness inquiry).

relationship, society should not permit unlimited contractual freedom in regard to mandatory arbitration.

Currently, the law supports the use of mandatory arbitration agreements in the employment context. These agreements may encompass the resolution of disputes involving rights provided by external law. Following *Rent-A-Center*, the court system is unlikely to examine any allegations of unfairness regarding the arbitration process, in that the arbitration agreement assigns those allegations to the arbitrator. As a result, there is a risk that an employer could design an arbitration process so unfair that it amounts to denial of rights provided by statute. After *Rent-A-Center*, a federal court may, in most cases, no longer examine the arbitration process. Instead, it must only look to whether the arbitration agreement unfairly reserved allegations of unconscionability to the arbitrator.

The judicial system has effectively removed itself from oversight of the arbitration process. This creates a risk of abuse of the arbitration process. The arbitration agreement must be constrained. It must, however, be constrained in a way that permits continued use of arbitration agreements, while at the same time limiting the possibility of abuse. Ideally, the measure of constraint would not involve lengthy, expensive, or confused oversight by the court system.

The solution is the use of a bright line rule to constrain the arbitration agreement. Restraint could be accomplished by the use of a reasonableness standard. Under my proposal, courts should enforce mandatory arbitration clauses to the extent that the arbitration agreement is reasonable. Of course, “reasonableness” will require debate and forethought, but I would propose that the reasonableness standard should include the following aspects.

1. The Arbitration Agreement Should Provide for Voluntariness

Mandatory arbitration of statutory claims without voluntary consent is problematic. Courts have described voluntariness as the “bedrock justification” for the enforcement of mandatory arbitration agreements.¹³⁹ If future employment agreements contain clauses mandating arbitration of statutory actions, then there must be some means to ensure that the

139. *Armendariz v. Found. Health Psychcare Servs., Inc.* 6 P.3d 669, 690 (Cal. 2000).

employee knew the nature of the arbitration provision when he signed it. Therefore, the proposed reasonableness standard should provide some guarantee that the employee entered into the agreement voluntarily.

Nevertheless, any rule that is not clear will invite litigation. Lack of a bright line test for determining voluntariness will create uncertainty. The voluntariness test could also create problems with uniform enforcement of arbitration agreements. Employees who sign the same agreement may not be subject to the same enforcement. "Piecemeal application of a dispute resolution program could threaten to unravel the program for all other similarly situated employees."¹⁴⁰

I propose that the arbitration agreement be contained in a separate agreement, or at a minimum, require a separate signature line. This idea of separateness would establish that the arbitration clause facing the employee differs from the normal terms and conditions found in an employment agreement. By separating the arbitration clause from the rest of the agreement, employees would receive notice that the arbitration agreement should be considered separately from the rest of the document. Agreement to the arbitration clause could potentially have far greater consequences than any other term contained in the agreement, and therefore it is reasonable to insist on separate treatment. A separate document or signature line would provide some objective indications that the arbitration agreement was entered into knowingly and on a voluntary basis.

Alternatively, Congress could enact requirements of voluntariness using standards similar to those in the Older Workers Benefit Protection Act (OWBPA).¹⁴¹ Congress enacted the OWBPA to protect the rights and benefits of older workers.¹⁴² The OWBPA imposes strict requirements for waivers of ADEA rights and claims.¹⁴³ Under the OWBPA, "[a]n employee 'may not waive' an ADEA claim unless the employer complies with the statute."¹⁴⁴ To this end, the OWBPA creates a series of prerequisites for 'knowing and voluntary' waivers. The OWBPA sets forth eight mandatory elements for a knowing and

140. Estreicher, *supra* note 50, at 1359.

141. *See, e.g.*, Older Workers Benefit Protection Act (OWBPA) of 1990, 29 U.S.C. §§ 621, 623, 626, 630 (2006).

142. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998).

143. *See* § 626(f). *See also Oubre*, 522 U.S. at 427 (holding that the "OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers.").

144. *Oubre*, 522 U.S. at 427.

voluntary waiver of ADEA claims.¹⁴⁵

Creating an arbitration voluntariness standard similar to that in the OWBPA has several advantages. Signing such a waiver would focus an employee's attention on the potential pitfalls involved in mandatory arbitration. An OWBPA-style waiver provides another benefit. Employers would appreciate the bright line requirements of voluntariness. Inclusion of the required elements would provide a safe harbor regarding the voluntariness of an employee's agreement. An employer required to draft a waiver similar to that mandated by the OWBPA would ensure that its employees only entered into the agreement on a knowing and voluntary basis.

2. The Arbitration Agreement Should Provide Guarantees of Due Process and Fairness

It is well-established that the law does not require due process in private arbitration.¹⁴⁶ Courts have routinely found that arbitration is a

145. 29 U.S.C. § 626(f)(1) (2006). Pursuant to the law, the requirements for a valid waiver require that: (1) the waiver must be written in plain English so that the employee can understand the agreement; (2) the waiver must specifically mention that the employee is giving up his or her claims under ADEA; (3) the waiver cannot waive rights that arise after the date the release is signed; (4) the employee must receive consideration of value above anything to which employee is already entitled; (5) the employee must be advised to consult with an attorney; (6) the employee must have at least twenty-one (21) days to consider agreement; and that (7) the employee must have seven (7) days to revoke their acceptance of the agreement. If, however, the termination is part of a reduction in workforce or voluntary program that affects two or more employees, employee must also be given at least forty-five days to consider the agreement and a "release attachment" that has a list of those selected for the program (or termination) and those who are not. *See id.*

146. *See* Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185 (2006); Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1161 (2004) (noting that "[e]very federal court considering the question has concluded that there is no state action present in contractual arbitration."). *See also* Desiderio v. Nat'l Ass'n of Secs. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)) (private actors must satisfy constitutional due process standards only if there is a "close nexus between the State and the challenged action" so that the "State is responsible for the specific conduct of which the plaintiff complains" or it "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State" and that "[m]ere approval . . . is not sufficient to justify holding the State responsible for those initiatives."); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 369 (7th Cir. 1999) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)) (concluding "that the arbitral forum adequately protects an employee's statutory rights, both substantively and procedurally," as required by the Fifth Amendment's right to due process); *Duffield v. Robertson Stephens & Co.*, 144 F.3d

private process, based on agreement of the parties, and thus lacks the requisite state action to raise due process constitutional concerns.¹⁴⁷ Despite the state's review and enforcement of arbitral awards, courts have proved unwilling to find that this role would rise to the level of state action.¹⁴⁸ Without the involvement of a state actor, the parties to an arbitration agreement may not demand constitutional protections.¹⁴⁹

Nevertheless, any proposed standard for reasonableness should include provisions for due process and fairness. When a state actor is involved, the Constitution guarantees due process.¹⁵⁰ Where the law grants a right, included within that right is a remedy. A right without a remedy would render the underlying right meaningless. The law should provide the opportunity to be heard by an impartial decision maker. This process providing for notice and an opportunity to be heard should be as nonwaivable as the underlying right itself. Otherwise, it renders the underlying right meaningless. Forcing an employee into an unfair arbitration process for a statutory claim arguably deprives that employee of property without due process of law.¹⁵¹

If we are to continue to consign employment disputes to mandatory arbitration, public policy demands that certain standards of fairness be met. If in fact we cannot rely on the Constitution to provide employees with sufficient protection, then it is the responsibility of Congress to act. It should be possible to provide standards sufficient to safeguard public policy, without converting the arbitration system into a court system.

Fortunately, in determining what due process protections should be put in place, we can draw on previous attempts to create due process protocols for employment arbitration. Reliance on these pre-existing protocols will simplify the creation of due process standards.

1182, 1200-01 (9th Cir. 1998) (holding that the requisite element of state action was lacking in arbitration because there was no state action when parties signed the arbitration agreement); *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191-93 (11th Cir. 1995) (stating that because "arbitration was a private proceeding arranged by a voluntary contractual agreement of the parties . . . the arbitration proceeding itself did not constitute state action," thus the "due process challenge to the arbitration . . . must fail."); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991) (holding that a party's agreement to arbitration precludes argument that due process was denied).

147. *Buckner*, *supra* note 146, at 214-15.

148. *Id.* at 215.

149. *Id.* at 216.

150. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

151. *Estlund*, *supra* note 89, at 410.

Employment arbitration due process protocols resulted from private attempts to establish fairness in the employment arbitration context.¹⁵² Responding to fears that the arbitration was unfair, and that the judicial system had abandoned its role in ensuring open access to justice, a group of dispute resolution organizations crafted due process protocols to govern the arbitration of employment disputes.

The Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (“Employment Protocol”) stresses “standards of exemplary due process.”¹⁵³ The Employment Protocol lacks the force of law; nevertheless, many arbitration providers have voluntarily agreed to follow it.¹⁵⁴ The Employment Protocol states that parties to an employment dispute utilizing arbitration “should have the right to be represented by a spokesperson of their own choosing,”¹⁵⁵ should have “[a]dequate but limited pre-trial discovery,”¹⁵⁶ and should have experienced, diverse, independent, neutral, and knowledgeable arbitrators.¹⁵⁷

Arbitration providers may thus ensure due process through adoption

152. See *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, ALLIANCE FOR EDUC. DISP. RESOL., http://www.ilr.cornell.edu/alliance/resources/Guide/Due_process_protocol_empdispute.html (last visited Nov. 12, 2011).

153. *Id.*

154. Richard Bales, *Beyond the Protocol: Recent Trends in Employment Arbitration*, 11 EMP. RTS. & EMP. POL’Y J. 301, 302 (2007). Specifically, Bales states:

The Employment Protocol has been extremely influential. It has been adopted by the major arbitration service providers, members of which will refuse to arbitrate cases under rules inconsistent with the Protocol. It has inspired two additional Protocols, both adopted in 1998: the Due Process Protocol for Consumer Disputes (the Consumer Protocol) and the Health Care Due Process Protocol (the Health Care Protocol). The Employment Protocol has provided scrupulous employers with a model for drafting fair, ethical, and enforceable arbitration agreements. It has also guided courts in their decisions of whether to enforce particular employment arbitration agreements. The Employment Protocol remains the benchmark against which employment arbitration agreements are measured.

Id.

155. *Id.*

156. *Id.*

157. *Id.*

and enforcement of the Employment Protocol, as well as by rejecting the arbitration of claims that do not meet the due process standards set forth in the Employment Protocol.¹⁵⁸ Although the Employment Protocol may constitute a “bare minimum” of due process,¹⁵⁹ it has “helped restore the public’s perception of arbitration, leading some to believe that all disputants are given a level playing field in the arbitral process.”¹⁶⁰

There have been judicial efforts as well to define the requirements of equitability in employment arbitration. In construing proper procedural protections, the United States Court of Appeals for the District of Columbia Circuit held that an arbitration agreement must: (1) provide for neutral arbitrators; (2) provide for more than minimal discovery; (3) require a written award; (4) provide for all of the types of relief that would otherwise be available in court; and (5) not “require employees to pay either unreasonable costs *or* any arbitrators’ fees or expenses as a condition of access to the arbitration forum.”¹⁶¹

To be reasonable under my proposal, an arbitration process must ensure due process. At a minimum, to be reasonable, due process should permit the employee to choose a representative. Due process guidelines should also provide for a proportionate sharing of costs, to ensure that employees are not effectively prohibited from having their dispute heard. Due process guidelines should provide some form of information sharing, thus requiring a cost effective discovery procedure.

Arbitration qualification and selection is another potential topic area for the due process requirement. With quite complicated statutes involved, it will be important that the arbitration process provide for arbitrators who are skilled and knowledgeable. The means for selection of an arbitrator or panel will be an issue that should be included within

158. See Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. DISP. RESOL. 165, 174 (2005). The Due Process Protocol has been criticized too for its failure to provide guidance in a number of important areas. Areas to be improved include contract formation issues, barriers to access, process issues, remedies issues, FAA issues, and conflicts of interest. See *id.* at 167, 185.

159. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1045 (1996) (asserting that the protocol provides employees with “few, if any, significant process rights.”).

160. Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. DISP. RESOL. 369, 372 (2004).

161. *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (emphasis in original).

the due process guidelines.

Finally, the due process requirement should govern the arbitrator's scope of authority. If the employment agreement provides for arbitration of statutory claims, the arbitrator must have the power to award statutory remedies. If we are to ensure that parties contracting to arbitration are not waiving substantive rights, then it is important to ensure that those parties retain the right to the same remedies as they would have in the statutory forum.

3. The Arbitration Agreement Should Provide for Openness

The private resolution of public disputes raises many concerns. In its protocol describing the essence of a fair and enforceable arbitration agreement, the United States Court of Appeals for the District of Columbia Circuit proposed written decisions.¹⁶² My legislative proposal would do the same—require a written decision for any arbitral award. Without some standard of openness, citizens are unable to ensure that the public concerns are being met. Without some sort of public “scrutiny” the public has no knowledge of whether the private resolution systems are doing the same work as the courts. Was the procedure fair? Was the public interest “satisfied”?¹⁶³ Those are important questions that cannot be answered without some sort of transparency built into the dispute resolution system.

The public has an interest in seeing that its laws are enforced consistently and equitably. An arbitrator acts as both judge and jury, interpreting the law and deciding the facts. But an arbitrator has no public face; he is “neither publicly chosen nor publicly accountable.”¹⁶⁴

The common law system works in large part because it is designed to grow, to be flexible, and to adapt to a changing society. The gains made in addressing racial inequalities in the United States would likely be much less had the Title VII claims of the 1960s and 1970s been consigned to private resolution systems. And the common law can accomplish this weighty task in large part because published decisions filter throughout society. These decisions, even when not compelled by

162. *Id.*

163. *See, e.g.*, Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1089-90 (1984) (criticizing settlements instead of full adjudications, because they fail to fulfill the public law function).

164. Edwards, *supra* note 8, at 297.

the power of precedent, have influence on other courts that face similar fact patterns.

But a privatized legal system cannot provide the same atmosphere for growth and change. Virtually every decision rendered by an arbitrator is a walled garden, cut off from all but those parties involved in the decision. The American court system was not designed to function in this manner. Surely a system built on closed, opaque models cannot serve society as a whole. Diverting disputes from civil courts to arbitral forums could disrupt the development of legal doctrine.¹⁶⁵

One can understand objections to the requirement of openness. Mandatory publication of awards will certainly lead to an increase in costs, and it is the fear of costs that has largely driven the arbitration agenda. Mandatory publication would also diminish the privacy protections afforded by arbitration. Employees leery of public involvement could possibly fail to bring substantive claims for fear of having their identity published. Additionally, an argument exists that there will continue to be enough litigation to generate sufficient civil court opinions.¹⁶⁶

Nevertheless, I believe that the advantages of publication will outweigh the disadvantages. Although the court system may continue to produce sufficient legal doctrine, the evidence seems to indicate that we will see much less litigation than before. Moreover, if every arbitration panel issues a short opinion conveying its findings and publishing the award, costs should be minimal. Finally, drafters could engineer sufficient privacy protections into the system, similar to the means that courts currently address privacy concerns.

V. Conclusion

The growth of mandatory arbitration clauses in employment agreements threatens the protections provided by public law. The complexity of the employment relationship has led to much statutory control and oversight. Employment-related statutes, both federal and state, often provide a private right of action. Lawmakers knew that the

165. *Id.*

166. See Estreicher, *supra* note 50, at 1356. See also St. Antoine, *supra* note 100, at 789 (opining that “[t]he notion that the use of arbitration will inhibit the development of a body of judicial doctrine on workplace discrimination seems highly suspect in light of the very large caseload of the federal courts in this area.”).

ability of an employee to sue his employer in court was vital to making the legislation work. Litigation of employment disputes, within the judicial system, not only resolved matters for the litigants, but provided guidance to thousands of other employers and employees.

Employees have a right to the protection of public statutes. Mandatory arbitration puts those rights in jeopardy. Consigning important statutory claims to private arbitration carries huge risks. Title VII created an opportunity for millions to achieve economic integration to American society. It took a century for the promise of the Fourteenth Amendment—that all Americans are to be treated equally under the law—to become a reality. But in fact it was more than Title VII at work—the body of law generated by court cases brought pursuant to the statute played a key role in changing the world. It is a safe assumption that the United States would look much different today if all Title VII cases had been directed into private dispute resolution processes.

Nevertheless, we also know that arbitration carries important advantages. It could provide a simpler and less expensive forum for the resolution of employment disputes. The challenge that society faces lies in balancing the protections of the law and the policies underlying those protections against the advantages of arbitration. To create that balance, I believe that a standard of reasonableness should be imposed on arbitration agreements. This standard of reasonableness will protect the interests of all parties: the employer, the employee, and society as a whole.