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Management Lawyers Working Group

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Comments

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Hot Topic
"Future Worker"

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Statement of Charles G. Bakaly, Jr.
before the
Commission on the Future of Worker-Management
Relations

April 6, 1994

Thank you for the opportunity to testify before the Commission. I am here as a member of the informal Management Lawyers Working Group, set up to provide the Commission the views of attorneys who represent management in employment law matters.¹ I am of counsel with the law firm of O'Melveny & Myers. Currently, I am mediating complex litigation disputes. For over 38 years, I have specialized in business and employment litigation. I have been Chairman of the American Bar Association's Section on Labor and Employment Law. I have been a member of the President's Commission on National Labor Policy. In addition, I was appointed by the Governor to the California Dispute Resolution Advocacy Council and served as its Chairman. For many years, I served on the Board of the American Arbitration

¹ William J. Kilberg of our Group addressed you in February. Members of the Group include: Vincent J. Apruzzese of Apruzzese, McDermott, Mastro & Murphy; Robert S. Carabell, Senior Counsel, TRW, Inc.; William J. Curtin of Morgan, Lewis & Bockius; Charles A. Powell III of Powell, Tally & Frederick; Ezra Singer, Assistant General Counsel -- Human Resources, GTE Corporation; and Daniel Yager of McGuinness & Williams.

Association and as a member of its Executive Committee. I have also served on the Center for Public Resources Employment Dispute Commission and am presently on the Board of Dispute Resolution Services, Inc. I am also a fellow of the American College of Trail Lawyers.

In this paper, I have been asked to address the use of alternative methods to resolve today's inevitable employment-related disputes.² As we are all too aware, employment-related litigation has risen significantly since the late 1970's. It is a trend that is likely to continue as many industries, like the defense industry, suffer significant downsizing and as employment-related tort law in many states expands dramatically. As a result, employees and employers are increasingly motivated to evaluate alternatives to traditional litigation, including arbitration, mediation, facilitation, peer review, or mini-trials. These types of alternative dispute resolution methods offer exceptional advantages to both employees and employers in today's workplace. My comments herein are intended to encourage the Commission to promote the use of alternative dispute resolution in the employment arena.

One of the alternative dispute resolution practices which I have advocated for some time, and which is receiving renewed attention and endorsement, is binding arbitration of

² I wish to acknowledge the assistance of Kate W. Duchene, Esq. in the preparation of these remarks.

workplace disputes. What follows, is my evaluation of the propriety and enforceability of binding arbitration agreements utilized to this context. I have focused on arbitration, instead of some other private dispute resolution practices, because I believe arbitration is the only binding way to enforce private, binding dispute resolution and to preclude the use of courts to resolve such disputes. I recommend that both employees and employers consider entering into binding arbitration agreements as a fair, efficient, economical and practical alternative dispute resolution method.

My comments will focus generally on three matters. First, I will discuss the traditional arguments voiced in favor of and in opposition to binding arbitration of employment-related disputes by both the employees' and the employers' bar. I will then review recent judicial reaction to and enforcement of binding arbitration agreements, including a brief review of the U.S. Supreme Court's recent decision in Gilmer v. Interstate/Johnson Lane Corp.³, which brought both employees and employers relief in seeking to avoid civil litigation. Finally, I will discuss standards for drafting and implementing an effective and fair arbitration agreement. By including certain procedural and due process safeguards, an arbitration agreement can protect the parties' legal rights and provide remedies equal to and greater

³ 500 U.S. 20, 111 S. Ct. 1647 (1991).

than those afforded in civil litigation without the burdens attendant thereto.

Traditional Arguments In Favor Of And Opposition To Arbitration.

In my mind, there are two fundamental reasons to promote arbitration agreements in the employment arena. First, and perhaps most compelling in today's business environment, arbitration is a less expensive and speedier process for resolving workplace disputes with remedies not available in court. Discovery, preparation costs, and the almost inevitable full record appeal are greatly reduced in the arbitration arena.⁴ For example, many arbitration agreements provide that one deposition may be taken by each side as a matter of right; additional depositions may be taken only upon request and consent of the arbitrator. Such a practice provides both sides with a much less expensive process for resolving their grievance. There simply is not the traditional -- and expensive -- paper war that is all too familiar in civil litigation. Arbitration also provides for a less expensive trial. Since arbitration is generally quicker and more efficient than civil litigation, employees and employers can save substantial outlays in both time and money. Moreover, the remedies for employees are better than

⁴ Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647 (1991) (the discovery burden is reduced in arbitration); Madden v. Kaiser Found. Hosps., 17 Cal. 3d 699, 711 (1976) (discovery burden is reduced by "simplified procedures and relaxed rules of evidence in arbitration").

a court can give. A court cannot order specific performance of a personal service contract, but an arbitrator can order reinstatement of the employee as well as all other remedies provided in court proceedings. Finally, review of arbitration awards for either party is limited and, therefore, less expensive.

By contrast, costs in civil litigation are great. First, discovery practice can often be excessive -- a practice which particularly burdens the individual employee who must absorb such costs. Moreover, such exorbitant costs, like those associated with substantial discovery, no doubt influence the employee's decision to "take on the company" in the first place. In addition, despite the development of fast-track programs in many states, the length of time to trial is often quite long. It is not unusual for employment disputes to be litigated five years. The sheer length of time to trial imposes substantial burdens on the employee and the employer.⁵ Employment disputes also decrease productivity and demand substantial time not only for management, but also for the employee who is trying to move on with life. Simply put, the internal effect of lingering litigation can often be quite damaging.⁶

⁵ Speed benefits both parties. See, e.g., Madden v. Kaiser Found. Hosps., 17 Cal. 3d 699, 711 (1976) (the "speed and economy of arbitration, in contrast to the expense and delay of jury trial, could prove helpful to all parties").

⁶ "Private Arbitration As The Exclusive Means Of Resolving Employment-Related Disputes," Employee Relations Law Journal, Vol. 9, No. 2, p. 5 (Sept. 22, 1993).

The second compelling reason arbitration is a preferred method for resolving employment disputes is that it stands to greatly relieve the already overburdened court system in this country. Indeed, it will provide a viable and necessary means of alleviating the incredible pressure currently being placed on the court system in America. With the recent passage, or proposed passage, of the "Three Strikes" legislation in many states, the court system is bound to become even more congested than it already is. In fact, it has recently been estimated that passage of the "Three Strikes" legislation in California will increase the number of criminal cases in the court system by two-fold.⁷ The court systems can ill afford such additional pressure. Given such pressure, all reasonable and fair alternatives to traditional civil litigation -- like arbitration -- must be considered.

Despite the compelling reasons to promote arbitration in the employment arena, there are a number of arguments that have been raised in opposition. While I do not believe such arguments are meritorious in today's environment and in light of

⁷ "Measure Is No Guarantee Of Cut In Violence," The Los Angeles Times, March 8, 1994, at A 1 ("There are 5,000 criminal trials annually statewide. Prosecutors and some judges say the number of felony trials could double under 'three strikes,' forcing judges to stop handling civil cases and devote their time to criminal cases.") See also "Some Workers Lose Right To File Suit For Bias At Work," The New York Times, March 17, 1994, at A 1; Singer v. Salomon Brothers, Inc., 593 N.Y.S.2d 927 (1992) ("Arbitration is not only authorized by law but also fulfills the strong public policy favoring a decrease in the courts' burdensome caseload").

the evolution of today's arbitration agreement, they should be considered and addressed.⁶

First, opponents have decried arbitration proceedings as inherently biased in favor of the employer. They have argued, inter alia, that the arbitrators are partial, that the employer controls the proceedings, and that arbitration proceedings are too private. They have argued that certain legal remedies are not allowed and that arbitration agreements are not entered into voluntarily. Despite such claims, which have been voiced for decades, the fairness argument is no longer a real threat to doing justice, if it ever was.

⁶ In addition to the more practical opposition arguments referenced below, one commentator, Professor Charles J. Morris, has argued that nonunion arbitration procedures adopted unilaterally by companies violate Section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. §§ 151 et. seq. ("NLRA") (see Morris, "EGAPs - Arbitration Plans for Nonunion Employees," 14 Pepperdine L. Rev. 827, 834 (1987)). In essence, Professor Morris reasons that an arbitration procedure in a nonunion setting is a "labor organization" under Section 2(5) of the NLRA and, thus, any employer who implements such a plan without first bargaining with employee-selected representatives would violate Section 8(a)(2). I have argued and believe that Professor's Morris' view should not be countenanced as it is based on a strained reading of the definition of "labor organization" under the NLRA. Moreover, since the arbitration agreement suggested herein is essentially a mechanism by which an individual employee can resolve his individual grievance with the employer, it is sanctioned by Section 9(a) of the NLRA which recognizes the validity of individual contracts employers may elect to make directly with individual employees. See Charles G. Bakaly, Jr. & Jeffrey I. Kohn, Federal Preemption of State-Law Wrongful Discharge Actions by Agreements to Arbitrate, 41 Proc. N.Y.U. Ann. Nat'l Conf. Lab. § 9.04, at 9-39-43 (1988).

Numerous procedural safeguards are incorporated routinely into today's arbitration agreements which address the plaintiffs' bar's historical concern about fairness. For example, arbitration panels are more diverse and better qualified. The selection process for the arbitrator is better defined and blindly equal. For instance, by using a recognized panel of arbitrators, such as AAA or JAMS, and an equal striking system, neither side has the ability to control the arbitrator or the process. Arbitrators have also been given the authority to award punitive damages and/or emotional distress damages. Thus, an employee who sues in civil court is not getting something more. Arbitrators can order reinstatement a remedy courts cannot give to employees under the common law. Also, most agreements require the arbitrator to issue written decisions. The rulings are, therefore, public and provide an appellate record.

A second argument raised in opposition to arbitration is that it will negatively affect employee morale. Again, this argument lacks merit. Arbitration agreements are often implemented at date of hire so there is no unilateral change in conditions of employment. Arbitration is also a less costly, and less time-consuming process for employees as well. Employees too want a fast, fair procedure for resolving their disputes. Finally, if communicated appropriately, employees should understand the value of an arbitration agreement. Arbitration agreements should be fully explained so employees know the

benefits of arbitration and that both sides are relinquishing jury trial rights.

Third, employers have been concerned traditionally that arbitration will make employees more likely to pursue their disputes. This concern is too facile and ignores reality. An arbitration agreement does not create new legal rights, it simply provides a different forum for dispute resolution. As there is no guaranteed method for avoiding workplace disputes, the best either party can hope for is an efficient, fair forum to resolve such disputes as quickly as possible. Moreover, in light of recent outlandish jury awards in the employment context, it appears that filing suit is more akin to buying a lottery ticket than vindicating one's rights.

Fourth, and traditionally, opponents have argued that arbitration is not a worthwhile alternative dispute resolution method because an arbitration agreement cannot guarantee comprehensive coverage of grievances. Fortunately, this argument no longer carries much weight. Indeed, in the wake of the U.S. Supreme Court's decision in Gilmer, as outlined below, fear about the comprehensiveness of an arbitration agreement has been substantially reduced. Indeed, the rationale of Gilmer, which applied the Federal Arbitration Act (FAA) to extinguish a civil court claim under the Age Discrimination in Employment Act (ADEA), has been routinely applied to claims brought under other statutes. Numerous post-Gilmer cases have eliminated civil court

claims of all kinds of disputes in favor of arbitration -- including federal race, sex and age discrimination claims -- if the arbitration agreement is carefully drafted.'

Recent Judicial Reaction To And Enforcement Of Binding Arbitration Agreements.

In its recent seven-to-two decision, the U.S. Supreme Court in Gilmer, pursuant to the Federal Arbitration Act¹⁰, enforced an arbitration agreement that required a non-union employee to arbitrate an age discrimination claim brought under the Age Discrimination in Employment Act. As a result, the plaintiff lost his right to have a jury hear his federal discrimination claim. Prior to Gilmer, it was generally accepted that Title VII and certain other statutory employment claims were not arbitrable pursuant to the U.S. Supreme Court's holding in

⁹ See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3rd Cir. 1993) (applying Gilmer to ERISA claims); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992) (applying Gilmer to sexual harassment claim); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992) (applying Gilmer to Title VII claims); Benestad v. Interstate/Johnson Lane, 946 F.2d 1546 (11th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) (same); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307-08 (6th Cir. 1991) (applying Gilmer to Title VII and state-law claims, ordering claims to arbitration); Spellman v. Securities, Annuities & Ins. Services, Inc., 8 Cal. App. 4th 452 (1992) (race discrimination and employment claims subject to arbitration); Fabian Fin. Servs. v. Kurt H. Volk, Inc. Profit Sharing Plan, 768 F. Supp. 728, 733 (C.D. Cal. 1991) (applying Gilmer to ERISA claims); see also Boogher v. Stifel, Nicholas & Co., Inc., 764 F. Supp. 574, 576 (E.D. Mo. 1991) (applying Gilmer to ADEA claim).

¹⁰ 9 U.S.C. §§ 1 et seq.

Alexander v. Gardner-Denver Co. (holding that arbitration of contract-based claims pursuant to a collective bargaining agreement does not preclude subsequent judicial resolution of statutory civil rights discrimination claims)¹¹. In understanding why the Court reversed its traditional hostility to binding arbitration of statutory employment claims, a review of the background of the Gilmer case is helpful.

In 1981, Interstate/Johnson Lane Corp. hired the plaintiff, Gilmer, as a manager of financial services. At the time of hire, the company required that Gilmer register as a securities representative with the New York Stock Exchange (NYSE). Pursuant to the terms of the NYSE registration application, Gilmer agreed in a U-4 form to arbitrate "any controversy" he had with his employer arising out of his employment or the termination thereof.¹²

After he was involuntarily terminated in 1987 at age 62, Gilmer sued under the ADEA. In response to the suit, the company asked the district court to compel arbitration, relying on the agreement and the FAA. Gilmer objected to the request and demanded a jury trial, relying on Gardner-Denver.¹³ The district court denied the company's motion to compel arbitration.

¹¹ 415 U.S. 36 (1974).

¹² 111 S. Ct. at 1650-51.

¹³ Id. at 1651.

On appeal, however, the Fourth Circuit reversed and remanded the case, ordering the district court to compel arbitration of Gilmer's claim.¹⁴

Following the Fourth Circuit's decision, Gilmer then petitioned to the U.S. Supreme Court for review. In his petition, Gilmer argued against compelled arbitration on the grounds that compulsory arbitration of his age discrimination claim and, concomitant waiver of a jury trial was inconsistent with the purposes of the ADEA.¹⁵ Gilmer also argued that the arbitration procedures were inadequate and that the arbitration agreement itself was entered into only because of the unequal bargaining power between an employee and an employer.¹⁶ Finally, Gilmer argued that prior case law, i.e., Gardner-Denver, made clear that plaintiffs could not be compelled to arbitrate employment discrimination claims.¹⁷ The Supreme Court granted Gilmer's petition.

In ruling on Gilmer's petition, the U.S. Supreme Court chose to enforce the parties' arbitration agreement. Fundamentally, the Court determined that the FAA arbitration agreement provided sufficient procedural safeguards to protect

¹⁴ Id.

¹⁵ Id. at 1653.

¹⁶ Id. at 1654-55.

¹⁷ Id. at 1656.

the employee's rights. The Court found determinative the fact that prior case law had not been decided under the FAA, recognizing that recent FAA cases reaffirmed arbitration as a favored dispute-resolution mechanism.¹⁸ The Court in Gilmer also determined that arbitration of an ADEA claim does not contravene the purposes of the ADEA. Importantly, the Court reasoned that Congress could have but did not explicitly preclude arbitration of ADEA claims.¹⁹ The Court also found that the legislative intent behind the ADEA could be advanced by arbitration as an arbitration agreement does not preclude an employee from filing an EEOC charge, and requesting a federal government investigation.²⁰

In reaching its pivotal decision, the Court in Gilmer rejected broad-based fairness attacks on the arbitral process, suggesting that if certain procedural safeguards are present in an arbitration agreement, it will be enforceable. In so holding, the Court found that the NYSE arbitration rules provided

¹⁸ Id. at 1656-57.

¹⁹ Similar to the Court's holding in Gilmer, The Civil Rights Act of 1991 expressly provides that: "Where appropriate and to the extent authorized by law, the use of alternative dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this law."

²⁰ 111 S. Ct. at 1654. Also, it should be noted that a private arbitration agreement would not likely bind the government agency or preclude it from filing suit to enforce the statute it is charge with administering.

important safeguards against biased arbitration panels, including:

- (1) the parties to the arbitration receive the employment histories and backgrounds of the arbitrators;
- (2) each party gets one peremptory challenge and unlimited "for cause" challenges; and
- (3) the arbitrators must disclose any information that could prevent them from giving an objective and impartial decision.

The Court relied upon additional due process and practical safeguards in choosing to enforce the parties' binding arbitration agreement. First, the fact that the FAA provides a final but limited review process by allowing courts to overturn an arbitration ruling if the arbitrator is found to be corrupt or partial, compelled the Court's decision. Second, the discovery allowed as a matter of right under the agreement addressed the plaintiff's burden of proof difficulties. The Court recognized that arbitration is a tradeoff. While providing limited discovery, arbitration does allow for "simplicity, informality, and expedition" in the dispute resolution process.²¹ Third, the Court emphasized the fact that the NYSE rules do not restrict the types of relief an arbitrator can award. Fourth, the Court focused on the fact that the NYSE rules require that arbitration

²¹ Id. at 1654-55.

awards be written and that the decisions be made available to the public. In so doing, the Court rejected Gilmer's claim that arbitration of discrimination claims would limit the public's knowledge of employer's discriminatory policies, thereby repressing both the appellate review process and the development of the law. Finally, the Court rejected Gilmer's contention that the arbitration procedures did not provide for equitable relief or class actions. Instead, the Court recognized that the NYSE rules give arbitrators the power to provide equitable relief and to conduct collective proceedings.

In sum, the Court in Gilmer declared that the inherent unequal bargaining power between an employee and an employer does not dictate that all arbitration agreements are unenforceable as matter of law. Instead, absent a showing of coercion or fraud, the Court chose to adopt the FAA's stated purpose to give arbitration agreements the same force as other contracts.²² As the agreement was entered into voluntarily, provided for a fair and reasonable process, allowed all available remedies at law, and did not thwart the development of federal law, the Court enforced its terms.²³ As time passes it may be appropriate to reconsider Gardner-Denver in collective bargaining situations

²² Id. at 1655-56.

²³ While the Court did not overrule Gardner-Denver, it did distinguish the case on several grounds. First, the Court focused on the fact that pursuant to an individual arbitration agreement, the employee owned the arbitration process not the union. In Gardner-Denver, and its progeny, the union, not the employee, controlled the prosecution of the grievance.

inasmuch as now employees have more control of arbitrations and there does not now appear to be any reason to have a distinction between represented and non-represented employees.

As outlined above, the U.S. Supreme Court in Gilmer resolved a number of important issues regarding the viability of alternative dispute resolution procedures. It did, however, leave open one important issue. Specifically, the Court did not resolve the "contracts of employment" issue raised in the FAA. By its express terms, the FAA applies to "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction."²⁴ It does not, however, "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."²⁵

In the dissent in Gilmer, two justices argued that pursuant to the above-referenced express provisions of the FAA, any employment-related dispute between employees and employers is not arbitrable.²⁶ The majority opinion in Gilmer avoided analyzing this narrow interpretation of the FAA because it had

²⁴ 9 U.S.C. § 2.

²⁵ Id. § 1.

²⁶ 111 S. Ct. at 1657-60.

not been raised in the lower court.²⁷ Post-Gilmer cases which have addressed this issue have determined that the FAA Section 1 exclusion is limited to those workers engaged in the actual transportation of goods in interstate commerce.²⁸ Thus, while the Supreme Court acknowledged the "employment contract" exclusion in passing, it probably has little applicability to most employees who do not actually transport goods in interstate commerce.²⁹ However, if these issues again get to Superior Court, it would be appropriate for the Solicitor General to urge the Supreme Court not to hold that arbitration does not apply to employee contracts under the FAA.

It is undisputed that the Supreme Court's decision in Gilmer drew attention to the arbitration process. Not only did it dispel the traditional, far-reaching fairness arguments raised in opposition to arbitration, it also provided instructive

²⁷ Id. at 1651-52 n.2.

²⁸ See Corion Corp. v. Gin-Horing Chen, 124 Lab. Cases (CCH) ¶ 57220 (D. Mass. 1991), appeal dismissed, 964 F.2d 55 (1st Cir. 1992) (FAA § 1 exclusion is inapplicable to arbitration provisions in an employee manual given to a manufacturing managers who was "involved in the placement of goods in the stream of commerce but not in the actual movement of goods in interstate commerce"). At least two courts have suggested, however, that the FAA § 1 exclusion applies to all arbitration agreements that are found in employment contracts. E.g., Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 311-12 (6th Cir. 1991) ("The FAA was never meant to incorporate employment contracts with the requisite effects on interstate commerce within its scope") (dictum); Slawsky v. True Form Foundry, Corp., No. 91-1822, 1991 U.S. Dist. LEXIS 7428 (E.D. Pa. 1991).

²⁹ While sparse, the Legislative history of the FAA suggests that the drafters intended to exclude from FAA arbitration claims by transportation workers.

information as to how to draft and implement effective, binding arbitration agreements for the benefit of employees and employers alike. In the wake of the Court's decision, all parties are better positioned to implement enforceable arbitration agreements. Indeed, properly drafted arbitration agreements, like that described below, should be utilized with increasing frequency as a fair, practical and efficient alternative dispute resolution method.

Standards For Drafting And Negotiating An Enforceable Arbitration Agreement.

As I set forth in my introductory comments, one of the goals of this paper is to suggest to the Commission standards to be encouraged in order to ensure a fair, complete, and enforceable arbitration agreement for both employees and employers. With that goal in mind, outlined below is a brief summary of the critical aspects to be included in a binding arbitration agreement. While I will not address every single element of a preferred agreement, I will highlight the main components as a "best practices" guide.

First, a fair, effective and binding arbitration agreement should be drafted to enhance the likelihood of FAA coverage. Indeed, for all the reasons enunciated by the Supreme Court in Gilmer, providing for FAA coverage remains the safest method for ensuring that all disputes, including federal

discrimination claims, will be encompassed by the arbitration agreement. The Court in Gilmer settled the issue: the FAA can displace federal jury-trial rights because it provides for enough due process and procedural safeguards to ensure each party's legal rights are protected. As the Gilmer court noted: "'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.'"³⁰ The issue of whether a state arbitration statute can be applied to deprive an individual of a jury-trial right created by a federal statute has not been resolved. Thus, in order to avoid any uncertainty regarding the comprehensiveness of the agreement, arbitration agreements should provide for FAA coverage.

Second, in the wake of Gilmer, I suggest that the arbitration agreement not be included in a traditional "contract of employment." As Section I of the FAA excludes from coverage "contracts of employment," it is a better practice to draft the arbitration agreement in a separate document. As referenced above, certain courts have limited the FAA's exclusion to contracts of workers directly involved in transporting goods in

³⁰ 111 S. Ct. at 1652 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). See also Baker v. Aubry, 216 Cal. App. 3d 1259, 1268 (1989) ("Resolution of [plaintiff's] claim by arbitration does not deprive her of her substantive rights. It only changes the forum in which they will be resolved."), cert. denied, 111 S. Ct. 66 (1990).

interstate commerce.³¹ At least one other court, however, has applied the § 1 exclusion to employees who produce goods in interstate commerce.³² In addition, at least two other courts have intimated that the exclusion applies to all arbitration agreements that are located in employment contracts.³³

³¹ See American Postal Workers Union v. U.S. Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987) (postal workers excluded); Bacashihua v. Postal Service, 859 F.2d 402, 405 (6th Cir. 1988) (same); Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984) (limiting exclusion to transportation industries) (dictum), cert. denied, 469 U.S. 1160 (1985); Dickstein v. DuPont, 443 F.2d 783, 785 (1st Cir. 1971) (FAA exclusion does not apply to an account executive for a brokerage firm); Corion Corp. v. Chen, No. 91-11792-Y, 1991 U.S. Dist. LEXIS 18395, at *14 (D. Mass. Dec. 27, 1991) (no § 1 exclusion for arbitration provision in employee manual given to manufacturing manager who was "involved in the placement of goods in the stream of commerce but not in the actual movement of goods in interstate commerce"), appeal dismissed, 964 F.2d 55 (1st Cir. 1992); Dancu v. Coopers & Lybrand, 778 F. Supp. 832, 834 (E.D. Pa. 1991) ("the Partnership Agreement in this case is not excluded from the scope of the FAA. Plaintiff . . . was not in any way part of a class workers engaged in interstate transportation."); Spellman v. Securities Annuities & Ins. Serves, Inc., 8 Cal. App. 4th 452, 460 (1992) ("The narrow construction accorded section 1 of the FAA by the federal courts supports the strong national policy favoring arbitration as a means of settling private disputes").

³² United Elec., Radio & Mach. Workers of Am. v. Miller Metal Prods., Inc., 215 F.2d 221, 224 (4th Cir. 1954) ("[We are not] impressed by the argument that the excepting clause of the statute should be construed as not applying to employees engaged in the production of goods for interstate commerce as distinguished from workers engaged in transportation in interstate commerce . . .").

³³ Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 311-12 (6th Cir. 1991) ("[T]he FAA was never meant to incorporate employment contracts with the requisite effects on interstate commerce within its scope.") (dictum); Slawsky v. True Form Foundry, Corp., No. 91-1822, 1991 U.S. Dist. LEXIS 7428, at *3 (E.D. Pa. June 4, 1991) (an "arbitration clause located in a 'contract of employment' . . . is exempt from the FAA").

With the foregoing uncertainty in mind, an arbitration agreement memorialized in a separate document remains the most conservative approach to this type of alternative dispute resolution by both employees and employers. Indeed, at least one post-Gilmer case suggests that the placement of an arbitration agreement may be determinative of the enforceability issue.³⁴ Moreover, a separate agreement with an integration clause will also minimize fraudulent inducement claims. A separate agreement signed by the employee and the employer will also minimize the possibility that either party will dispute consent to the agreement.³⁵ Finally, a separate agreement avoids the risk that combining the arbitration provision with other terms and conditions of employment, like those in an employee handbook, heightens the "contract of employment" exclusion problem. In all respects, it is preferable to have a succinctly drafted, signed, separate arbitration agreement.³⁶

³⁴ Slawsky v. True Form Foundry, Corp., No. 91-1822, 1991 U.S. Dist. LEXIS 7428, at *3 (E.D. Pa. June 4, 1991) (refusing to apply Gilmer as the arbitration agreement "was located in a 'contract of employment'").

³⁵ See Strotz v. Dean Witter Reynolds, Inc., 223 Cal. App. 3d 208, 217-18 (1990) ("If a party is unaware he is signing any contract, obviously he also is unaware he is agreeing to arbitration").

³⁶ See, e.g., Diskin v. J.P. Stevens & Co., 836 F.2d 47, 51 (1st Cir. 1987) ("an intention to be bound by an arbitration clause must be affirmatively established, and will not be implied from a party's mere retention of a form containing such a provision").

Third, it is important to define what claims or disputes are covered by the arbitration agreement. An agreement drafted to encompass all disputes between the employee and the employer, regardless of whether they specifically relate to the employment relationship, lessens the argument that the agreement is an impermissible "contract of employment" within the meaning of the FAA. Moreover, as a matter of contract principle, either party is permitted to limit the scope of claims to be arbitrated.³⁷ Limitation, however, is probably not in the parties' best interests because it reduces the comprehensiveness of the agreement.³⁸ In most circumstances, both parties are better served by including the broadest definition of covered claims.³⁹ In that way, it is clear that both parties are relinquishing mutual rights.

³⁷ E.g., Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479 (1989) (contract may limit the range of arbitrable issues).

³⁸ Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985) (if some claims are arbitrable and others are not, arbitration of the former is required "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums").

³⁹ See Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877, 880-83 (9th Cir. 1992) (requiring arbitration of claims for defamation and polygraph violations), cert. denied, 113 S. Ct. 494 (1992); Bird v. Shearson Lehman/American Express, Inc., 926 F.2d 116, 117-22 (2d Cir. 1991) (claims for breach of fiduciary duty pursuant to ERISA are arbitrable), cert. denied, 111 S. Ct. 2891 (1991); Baker v. Aubry, 216 Cal. App. 3d 1259, 1265, 265 Cal. Rptr. 381 (state-law overtime claims are arbitrable), cert. denied, 111 S. Ct. 66 (1990).

Fourth, it is crucial that both parties provide adequate consideration for the agreement. A mutual promise by both the employee and the employer to arbitrate should constitute sufficient consideration in and of itself. With the recitation of such mutual consideration, employees are agreeing to give up their right to civil court and so is the employer. In other words, while covered by such an arbitration agreement, the employee cannot file a statutory claim for sex discrimination, for example, but neither can the employer file a claim in civil court for a temporary restraining order against an employee for trade secret violations.⁴⁰ Regardless of when the arbitration agreement is implemented between the parties, however, the agreement should be drafted to expressly state what consideration has been exchanged.

Fifth, the parties should define broadly who is entitled to invoke the agreement's protection. As above, the goal is to increase the comprehensive nature of the agreement. A comprehensive agreement provides both employees and employers the most peace of mind. If the parties and claims are narrowly defined, many of the arbitration agreement's benefits are lost.

⁴⁰ Hull v. Norcom, Inc., 750 F.2d 1547, 1550 (11th Cir. 1985) ("[T]he consideration exchanged for one party's promise to arbitrate must be the other party's promise to arbitrate at least some specified class of claims."); Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 350 (7th Cir. 1983) (same), cert. denied, 464 U.S. 1070 (1984); Strotz v. Dean Witter Reynolds, Inc., 223 Cal. App. 3d 208, 216 ("Where an agreement to arbitrate exists, the parties' mutual promises to forego a judicial determination and to arbitrate their disputes provide consideration for each other. Both parties give up the same rights and thus neither gains an advantage over the other."), cert. denied, 111 S. Ct. 1417 (1990).

For example, if an agreement excludes the award of punitive damages or costs to the prevailing party, the aggrieved party may try to pursue such a claim in civil court. In such a situation, either the party's claims will be severed and part will be arbitrated or, the entire arbitration might be stayed pending resolution of the court case.⁴¹ Given such a situation, both party's will have lost a major benefit of the arbitration process -- quick, fair and efficient adjudication of the dispute.

Sixth, it is critical in averting a fairness or bias challenge to the agreement to carefully select the arbitrator. The arbitrator(s) should be experienced, unbiased decisionmaker. Remember, the Supreme Court in Gilmer inferred that it might reject enforcement of an arbitration agreement that failed to include an appropriate selection process.⁴² It is not recommended to use in-house arbitrators.⁴³ A much safer alternative is to designate in the agreement a recognized forum for the arbitration, i.e., the American Arbitration Association (AAA) or Judicial Arbitration & Mediation Services, Inc. (JAMS). In so doing, the agreement should include the following

⁴¹ See, e.g., Cal. Civ. Proc. Code § 1281.2.

⁴² 111 S. Ct. at 1654-55.

⁴³ See Kaiser Found. Hospitals, Inc. v. Superior Court, 19 Cal. App. 4th 513 (1993) (Court vacated arbitrator's award given the arbitrator and the defendant's prior undisclosed relationship); Neaman v. Kaiser Foundation Hosp., 9 Cal. App. 4th 1170, 1176 (1992) (arbitrator's past involvement with party creates inference of bias); Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 824 (1981) (union representative cannot serve as the "arbitrator" of a union member's grievance against a nonmember).

safeguards: define the selection method, i.e., alternative strikes; and define qualification of the arbitrator(s), i.e., licensed to practice law or a retired judge.

Finally, in order to heighten judicial enforceability of a binding arbitration agreement, the parties should demand certain other procedural safeguards. Among such safeguards are:

- (1) Assure each side the right to representation or consultation at the arbitration. The agreement should clearly state that the employee and the employer can be represented by counsel at the hearing.
- (2) Specify the parties' right to pursue dispositive motions. It will be helpful to provide the arbitrator with authority to consider a motion to dismiss and/or a motion for summary judgment. Moreover, given the standard, the agreement should specify that such motions will be decided pursuant to the Federal Rules of Civil Procedure.
- (3) Allow any party the right to file a post-hearing brief of reasonable length and within a reasonable time.
- (4) Mandate that the arbitrator issue a written opinion. Remember, Gilmer's argument against

arbitration before the Supreme Court, i.e., an unpublished arbitration decision would circumvent the development of discrimination law and provide for ineffectual appellate review.

- (5) Allow any party to pay for and obtain a written transcript of all proceedings."
- (6) Define the arbitrator's authority to decide the issue of arbitrability. The arbitrator may also have the exclusive authority to resolve disputes relating to the interpretation, applicability, or enforceability of the agreement.
- (7) Define who pays for the arbitration. Most arbitration agreements provide that the arbitrator's fee will be shared by the parties and posted up front. This reduces the bias argument significantly on either side.
- (8) Define what discovery may be taken. As referenced earlier, many arbitration agreements allow each side one deposition of a lay witness and one deposition of any expert witness. Additional

" See Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 815, 825 (1981) (holding an arbitration agreement unenforceable because inter alia, one party was refused the right to have a written transcript prepared).

depositions may only be taken by permission of the arbitrator based on substantial need.⁴⁵

(9) Allow the arbitrator to award appropriate damages. Limitation on the arbitrator's ability to award certain damages may entitle either party to pursue such damages in court.⁴⁶ Instead of precluding them altogether, parties may consider including a standard for the arbitrator to follow in awarding punitive damages.

(10) Allow the award of attorney's fees to the extent they are allowable by contract or the statute governing the claim.

⁴⁵ Recognize that a the court may choose not to enforce an arbitration agreement which negates discovery altogether. See Gilmer, 111 S. Ct. at 1654-55 (inferring that total preclusion of discovery may render agreement unenforceable).

⁴⁶ See J. Alexander Securities, Inc. v. Mendez, 17 Cal. App. 4th 1083 (1993) (punitive damages exclusion would require civil litigation of liability for "oppression, fraud or malice"); Janmort Leasing, Inc. v. Econo-Car Int'l, Inc., 475 F. Supp. 1282, 1291 (E.D.N.Y. 1979) ("in arbitrable" claims for punitive damages under an arbitration agreement simply necessitate a separate judicial trial on the issue). See also Cal. Civ. Code § 1668 (declaring unenforceable "contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law"). But see Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1387-88 nn.17-18 (11th Cir. 1988) (punitive damages can be waived under New York and Florida law but the waiver agreement must be clear and unambiguous).

- (11) Provide for limited judicial review of an arbitrator's decision. The parties are better served by specifying a limited form of judicial review.

In closing, I encourage the Commission to endorse the use of alternative dispute resolution in the employment arena. While my comments have focused mainly on binding arbitration agreements, the policy discussion articulated herein in favor of binding arbitration applies with equal force to other private alternative dispute resolution practices. As such, all such practices should receive increased notice and support by the Administration. Indeed, whether it be mediation, peer review or arbitration, private resolution of employment disputes holds many benefits for both sides.

It is my sincere hope that the Commission recognize that a well-drafted and thought-out dispute resolution procedure, which addresses and includes substantial due process safeguards, protects the rights of both the employee and the employer in a manner just as effective as that provided in civil court. Alternative dispute practices also provide both parties with numerous valuable benefits, including a quick, efficient, less costly dispute resolution process. While I do not believe that legislation is necessary to facilitate the policy goals and standards outlined herein, I do believe that the Commission should recommend alternative dispute resolution actively to the

Administration. Not only is private dispute resolution a fair, effective cost-efficient means of resolving employee-employer disputes, but also it will provide critical relief to this country's overburdened civil court system.

Thank you.