

**BUSINESS/LEGAL STRATEGY IN ADOPTING MANDATORY ARBITRATION
AGREEMENTS FOR WORKPLACE DISPUTES**

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Most employers, no matter how conscientious, will eventually find themselves facing an employment-related lawsuit.¹ Currently, employers adopt one of two strategies when dealing with employment-based lawsuits. Some employers choose to continue current business practices and wait until they get notice of the lawsuit. Under this more passive approach, once they receive the complaint, the employers can deal with the problem in the most cost efficient and least disruptive manner possible. A second choice, frequently considered by a growing number of businesses, involves requiring that employees take all workplace disputes to binding arbitration rather than to court. This more active approach requires employees to sign mandatory arbitration agreements as a condition of employment and has recently been upheld under two United States Supreme Court cases.²

This article will: (1) discuss the change in federal law on this topic over the past thirty years; (2) discuss key state and federal cases related to mandatory arbitration; (3) discuss business/legal strategy in adopting mandatory arbitration agreements for employment-related disputes, and (4) discuss the potential for Equal Employment Opportunity Commission (EEOC) involvement in these types of cases. Even though mandatory arbitration agreements are not always popular with employees, the authors recommend their adoption. We take this position, because the agreements appear to be the most cost efficient and least disruptive way of settling employment-related disputes.

A BRIEF HISTORY OF FEDERAL CASE LAW

A review of federal law over the past thirty years reveals a reversal of opinion regarding mandatory arbitration agreements. In the 1974 case of *Alexander v. Gardner-Denver Co.*,³ the Supreme Court indicated that private arbitration could not replace an employee's right to have statutory claims heard in court. In *Alexander*, an African-American employee filed a grievance pursuant to a collective bargaining agreement. Later, after the arbitrator ruled against the employee's grievance, the

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¹ Homer C. LaRue, *The Changing Workplace Environment in the New Millennium: ADR is a Dominant Trend in the Workplace*, 2000 COLUM. BUS. L. REV. 453,476 (2000).

² *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).

³ 415 U.S. 36(1974).

plaintiff pursued a claim for racial discrimination under Title VII of the Civil Rights Act of 1964.⁴ The Supreme Court determined that a collective bargaining agreement did not supercede an employee's right to pursue a civil rights claim in court.⁵

In the 1991 case of *Gilmer v. Interstate/Johnson Lane Corp.*,⁶ the Supreme Court tackled the same issue, but in a non-union setting. In *Gilmer*, the employee, a stockbroker, signed an agreement requiring arbitration of all employment disputes. Subsequently, when the employee pursued an age discrimination claim in a judicial forum, the Supreme Court upheld the arbitration agreement as it applied to a claim under the Age Discrimination in Employment Act (ADEA).⁷ The employee lost his right to sue in court. The Supreme Court noted the distinction between the facts surrounding *Alexander* and those in the instant case, stating:

There are several important distinctions between the *Gardner- Denver* line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the issue of whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the contest of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern, therefore, was the tension between collective representation and the individual statutory rights - a concern not applicable in the present case.⁸

In 1998, the Court again addressed this issue, in *Wright v. Universal Maritime Service Corp.*⁹ In *Wright*, the Supreme Court held that any union- negotiated waiver of an employee's statutory rights to a judicial forum must be "clear and unmistakable."¹⁰ The Court indicated that, under certain circumstances, pre-dispute arbitration clauses for statutory claims could be binding in collective bargaining contracts.¹¹

⁴ 42 U.S.C. §2000 *et seq.*

⁵ *Alexander*, 415 U.S. at 46.

⁶ 500 U.S. 20 (1991).

⁷ 29 U.S.C. §621 *et seq.*

⁸ *Gilmer*, 500 U.S. at 30.

⁹ 525 U.S. 70(1998).

¹⁰ *Id.*

¹¹ See *Safrit v. Cone Mills Corp.*, 248 F.3d 306 (4th Cir. 2001), where the appellate court found that the union had the right to include the arbitration of statutory disputes in the collective bargaining agreement.

In 2001, the Supreme Court reversed a Ninth Circuit case, *Circuit City v. Adams*,¹² where the lower court had found an arbitration agreement invalid and remanded it for reconsideration. In *Circuit City*, the Supreme Court held that the Federal Arbitration Act of 1952 (FAA)¹³ prevails over California law and prevents states from requiring a judicial forum for resolution of claims that the contracting parties agreed to resolve by arbitration. In *Circuit City*, California's anti-discrimination law broadened the provisions of federal law by extending protection to gays and lesbians. Circuit City Stores hired St. Clair Adams, a gay man, as a computer salesperson. At his hiring, Adams signed an employment application that included the following provisions:

I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort.¹⁴

Two years after he was hired Adams asserted that Circuit City forced him out of his job by harassment based on his sexual orientation. Adams filed an employment discrimination case against Circuit City in California state court. Circuit City then filed an action in the United States District Court to enjoin Adam's state lawsuit and to compel binding arbitration. The Court of Appeals for the Ninth Circuit ruled all employment contracts in California beyond the reach of the FAA. Thus, the binding arbitration agreement that the Circuit City employee signed did not prevent the employee from pursuing his statutory claims under applicable state law. This interpretation by the Ninth Circuit differed from the majority of other Circuits. Circuit City appealed to the U.S. Supreme Court. The Supreme Court reversed the Ninth Circuit, stating that the FAA exempts employment contracts only for transportation workers. The holding in *Circuit City* allowed a mandatory arbitration agreement, provided certain procedural safeguards protected an employee's right to a fair hearing on the dispute.

After the Supreme Court remanded the case to the district court, the latter issued an order compelling arbitration.¹⁵ The Ninth Circuit, however, determined that

¹² 532 U.S. 105(2001).

¹³ 9 U.S.C. §1 *et seq.*

¹⁴ *Circuit City*, 532 U.S. at 1306.

¹⁵ *Circuit City Stores v. Adams*, on remand from the U.S. Supreme Court, DC No. CV-98-00365-CAL. *Circuit City Stores v. Adams*, 1998 U.S. Dist. LEXIS 6215 (N.D. Cal. Apr. 29, 1998), *rev'd*, *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002); *cert. denied*, 535 U.S. 1112 (2001).

the arbitration agreement was unconscionable under state law and that the agreement did not bind the employee.¹⁶ The Supreme Court refused to grant certiorari, so the appellate court's decision stands. The Ninth Circuit looked to California contract law in making its decision. Under that law, a contract is unenforceable if it is both procedurally and substantively unconscionable.¹⁷ The appellate court opined that the arbitration agreement was procedurally unconscionable, because "it is a contract of adhesion: a standard-form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely."¹⁸ The court went on to say that the employee was required to sign the arbitration agreement or he could not work for Circuit City and few applicants are in a position to refuse a job because of an arbitration agreement.¹⁹

The appellate court also found the Circuit City arbitration agreement substantively unconscionable.²⁰ The court based its decision on four reasons: First, the agreement requires the employee to use arbitration, but it does not require Circuit City to use arbitration in any complaints it may have involving the employee.²¹ Second, the remedies available under the Circuit City arbitration agreement are limited to injunctive relief, up to one year of back pay and up to two years of front pay. Compensatory damages and punitive damages are limited in an amount up to the greater of the amount of back pay and front pay awarded or \$5,000.00.²² The court noted that in a civil suit the plaintiff would be eligible for, among other things, more punitive damages and damages for emotional distress.²³ Third, the Circuit City arbitration agreement required the employee to pay half of the arbitrator's fees. The court explained that such requirements are illegal, because they place undue restrictions on a plaintiff's access to adjudication of his statutory claims.²⁴ Fourth, the Circuit City agreement imposes a one-year statute of limitation on arbitration claims, thus depriving the plaintiff of the benefit of filing subsequently for continuing violations.²⁵

In the latest Supreme Court case regarding arbitration of statutory disputes, *EEOC v. Waffle House, Inc.*,²⁶ the Court addressed the role of the EEOC. In *Waffle House*, the employer claimed that the EEOC could not bring an independent action against it for a violation of the Americans with Disabilities Act,²⁷ because the

¹⁶ *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002).

¹⁷ *Id.* at 874.

¹⁸ *Id.* at 895.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 896.

²³ *Id.*

²⁴ *Id.* See also *Cole v. Bums Intern Security Services*, 323 U.S. App. D.C. 133, 105 F.3d 1465 (D.C. Cir. 1997).

²⁵ *Id.*

²⁶ 534 U.S. 279 (2002).

²⁷ 42 U.S.C. §12101 *et seq.*

employee had agreed to mandatory arbitration for all workplace claims. The Fourth Circuit Court of Appeals held that the EEOC could bring an independent action against the employer, but only for injunctive relief. The Circuit Court specifically eliminated the possibility of recovering related damages such as back pay, and other such losses.²⁸ The U.S. Supreme Court reversed the Fourth Circuit and stated that mandatory arbitration agreements do not prevent independent actions by the EEOC for employee damages, including back pay, reinstatement and other losses.²⁹

Thus, the past thirty years reveal an interesting evolution in the U.S. Supreme Court's position on mandatory arbitration agreements. The Court's initial reaction in *Alexander*, indicating that private arbitration agreements could not replace an employee's right to have statutory claims heard in court, has given way to its current position in *Circuit City*, which affirms such agreements. Yet, the Court has been careful to reserve the authority of the EEOC to bring its own cause of action on behalf of an employee, even when the employee has used arbitration.

KEY STATE AND FEDERAL CIRCUIT CASES ON MANDATORY ARBITRATION

Since the U.S. Supreme Court has upheld the legality of mandatory arbitration agreements, the focus in the state and lower federal courts has shifted to determining the validity of specific arbitration agreements. These courts seek to establish if the contracts are fair in form and provide for procedural and substantive due process. Of these cases, several "key" cases have evolved regionally at the state court level. In the Midwest, several Michigan cases provided guidance. In the East, cases in Connecticut and New Jersey further develop this issue; in the South, Alabama's, and in the West, California's courts have also tackled the challenges related to *enforceable* mandatory arbitration agreements.

In *Heurtebise v. Reliable Business Computers*,³⁰ the Michigan Supreme Court reviewed the issue of the enforceability of a pre-dispute mandatory arbitration clause contained in an employee handbook. In *Heurtebise*, the employee signed a receipt for an employment handbook when she was hired. The handbook included a company grievance procedure that ended with binding arbitration. The employment handbook also contained standard language to the effect that the employment handbook did not constitute a contract and that the employer reserved the right to change any policy at any time. Upon termination, Heurtebise filed a lawsuit in circuit court, alleging sex discrimination in violation of the Michigan Elliott-Larson Civil Rights Act.³¹ The employer answered the lawsuit by asking the court to dismiss the case for lack of jurisdiction and require mandatory arbitration, as outlined in the employment handbook. The circuit court denied the employer's motion. However, the Court of Appeals reversed and upheld the mandatory arbitration clause in the

²⁸ 193 F.3d 805 at 812 (1999); see also Adele Rapport, *EEOC v. Waffle House: Private Arbitration Agreements Cannot Bar the Agency from Proceeding*, 12 Lab. & Empl. Lawnotes- St. Bar OF Mich., No. 1, at 1 (Spring 2002).

²⁹ *Id.*

³⁰ 452 Mich. 405, 550 N.W.2d 243 (1996), *cert. den.*, 520 U.S. 1142 (1997).

³¹ Mich. Comp. Laws Ann. §37.2102 *et seq.*

employment manual. Subsequently, the Michigan Supreme Court reversed the Court of Appeals.

In its decision, the Michigan Supreme Court explained that, because the employment manual stated that the handbook did not constitute a contract, and the employer reserved the right to change the handbook at any time, the handbook was not a binding contract.³² Therefore, the binding arbitration clause contained in the manual was not enforceable. The Michigan Supreme Court held that the binding arbitration procedure would have been enforceable, if the employer had entered into an agreement with the employee separate and apart from the employment handbook.

In *Baptist Health System, Inc. v. Mack*,³³ the Alabama Supreme Court was also asked to determine whether an arbitration agreement was a contract binding on the employee. The employer in this case did not include the specifics of its arbitration agreement in the employee handbook, but rather provided each employee with a document entitled "Dispute Resolution Program." The document stated in part,

The Program is binding on all employees. This means that your decision to accept employment or continue employment after receiving notice of this Program, will mean that you have agreed to and are bound by the terms of the Program. If you remain employed or accept employment, this document constitutes a binding contract between you and BHS. Likewise, the terms of this Program are binding on BHS. This Program precludes an employee and BHS from going to court to have disputes heard by a judge or jury.³⁴

The employee claimed that there was no binding contract to arbitrate employment disputes. Her employer contended, however, that, since she received the Program document, signed a form acknowledging receipt of the document, and continued her employment, she was bound by the agreement to arbitrate. The Alabama Supreme Court applied a three-part analysis to determine whether the contract was binding. First, the court said the language must be specific enough to constitute an offer. Second, the offer must have been communicated properly, though a handbook or some other means. Third, the employee must have accepted the offer by continued employment after notice of the arbitration requirement.³⁵ The court determined that the employee was bound by the arbitration agreement, because the language was specific, in that it clearly informed the employee that she was required to use arbitration as a condition of employment. She was given the document to review, she

³² *Heurtebise*, 550 N.W.2d at 248.

³³ *Baptist Health System, Inc. v. Mack*, 860 So.2d 1265 (Ala. 2003).

³⁴ *Id.* at 1268.

³⁵ *Id.* at 19.

freely signed an acknowledgment form stating she received the document and she continued her employment with full knowledge of the arbitration requirement.³⁶

A Connecticut Superior Court also addressed the validity of an arbitration agreement, in *Powers v. United Healthcare*,³⁷ The employee in this case signed an arbitration agreement, but later claimed it unenforceable because she signed it unilaterally four days after she signed all of the forms given to her on her first day of employment. In addition, she claimed to have been confused by the arbitration agreement which read in part as follows:

Internal Dispute Resolution/Employment Arbitration Policy. These policies provide the opportunity for prompt and objective review of employment concerns. I understand that the United-Health Group Employment Arbitration Policy is a binding contract between the United-Health Group and me to resolve all employment-related disputes, which are based on a legal claim through final and binding arbitration. I agree to submit all employment-related disputes based on legal claim to arbitration under United-Health Group's policy.³⁸

The Connecticut court sided with the employer, stating:

The arbitration provision was not an addition but an intrinsic part of her employment agreement as it was with all agreements with employees of defendant. Although the acknowledgment form contains several other matters in addition to the arbitration provision, review of the document refutes plaintiff's claim that the document was confusing and that the arbitration paragraph was not sufficiently highlighted. In any event, she had already received a copy of the Employees Handbook, containing essentially the same language the week before, so the provision in the acknowledgment was not new. (She also received a letter mentioning the arbitration policy). In this case full notice and acknowledgment of the arbitration provision took place within the orbit of the formal start of employment....³⁹

In the New Jersey Supreme Court case of *Martindale v. Sandvik, Inc.*, the court reviewed an arbitration agreement and opined that the question of enforceability "is determined not on the basis of whether the arbitration agreement is contained in an application for employment or in an employment contract, but rather

³⁶ *Id.* at 23.

³⁷ *Powers v. United Healthcare*, 2001 Conn. Super. LEXIS 711 (Conn. Super. Ct. 2001).

³⁸ *Id.* at 3.

³⁹ *Id.* at 4.

⁴⁰ *Martindale v Sandvik, Inc.*, 173 N.J. 76; S00 A.2d 872 (2002).

whether the arbitration provision qualifies as a valid and enforceable contract.”⁴¹ The court found that acceptance of employment or continuance of employment was sufficient consideration to bind the employee to an arbitration agreement.⁴² The court rejected the employee’s claim that the arbitration provision was too vague and ambiguous. The arbitration agreement that the employee signed was contained in the pages of the employment application and read:

As a condition of my employment, I agree to waive my right to a jury trial in any action or proceeding related to my employment with Sandvik. I understand that I am waiving my right to a jury trial voluntarily and knowingly, and free from duress or coercion. I understand that I have a right to consult with a person of my choosing, including an attorney, before signing this document. I agree that all disputes relating to my employment with Sandvik or termination thereof shall be decided by an arbitrator through the labor relations section of the American Arbitration Association.⁴³

The New Jersey court found this language to be clear and unambiguous and sufficiently broad to encompass the employee’s statutory causes of action. The court also found it critical that the employee was given an opportunity to ask questions about the arbitration process. She was encouraged to consult others, including an attorney, before signing the document, and she was not rushed in any way to sign the document.⁴⁴

Another Michigan case, decided by the Michigan Court of Appeals, *Rembert v. Ryan’s Family Steak Houses*,⁴⁵ established certain requirements for arbitration of statutory dispute contracts. The *Rembert* decision, decided by a conflicts panel, overturned an earlier Court of Appeals panel that held pre-dispute mandatory arbitration clauses void and unenforceable as a matter of public policy (see *Rushton v. Meijers*⁴⁶ and the earlier *Rembert*⁴⁷ case). In the updated *Rembert* case,⁴⁸ the court went on to state specifically the requirements of a valid, binding, pre-dispute arbitration clause. First, the court explained that the clause must make clear that the agreement to arbitrate is a valid, binding contract that covers statutory claims. Second, the court stated that the statute itself must not preclude such predispute arbitration agreements and, third, the mandatory arbitration clause must waive “no substantive rights.”⁴⁹ This means that an employee who agrees to arbitrate

⁴¹ *Id.* at 87.

⁴² *Id.* at 88.

⁴³ *Id.* at 81.

⁴⁴ *Id.* at 97.

⁴⁵ 596 N.W.2d 208 (1999).

⁴⁶ 570 N.W.2d 271 (1997).

⁴⁷ 75 N.W.2d 287 (1997), vacated pursuant to Mich. Ct. Rule 7.215(H).

⁴⁸ *Rembert*, 596 N.W.2d at 214.

⁴⁹ *Id.*

a statutory claim “does not forgo the substantive rights afforded by the statute,” even though the matter is heard by an arbitrator instead of a judge.⁵⁰ Fourth, the mandatory arbitration clause agreement must afford “fair procedures.”⁵¹

As for procedural fairness, the court in *Rembert* set out the following requirements: First, the arbitration procedures must be “fair so that the employee may effectively vindicate his statutory rights.”⁵² Second, the court outlined a number of specific steps to assure fairness in the arbitration procedure:

Clear notice to the employee that he is waiving the right to adjudicate discrimination claims in a judicial forum and opting instead to arbitrate these claims. (2) The employee has the right to be represented by counsel. (3) There must be a neutral arbitrator.

(3) Reasonable discovery must be allowed. In addition, the arbitrator may permit the taking of depositions for use of evidence.

(4) A “fair arbitral hearing” which allows the arbitrator subpoena powers to summon witnesses. (6) A written arbitral award that outlines the findings of fact and the conclusions of law upon which the decision was rendered.⁵³

The court further explained that arbitration decisions can be rejected only when the reviewing court finds that the “arbitrator’s legal error is so material and so substantial as to have governed the award, and but for which the award would have been substantially otherwise.”⁵⁴

In regard to attorney fees and court costs for arbitration, the court in *Rembert* found that a claimant may request attorney fees if allowed under the civil rights act alleged to have been violated.⁵⁵ In addition, the court found that, while procedural fairness did not require that the employer pay arbitration costs, the Michigan Arbitration Act allowed the claimant to request such a remedy. The court explained, “The cost of the arbitration proceedings may be taxed as in civil actions, and if provisions for the fees and expenses of the arbitrator has not been made in the awards, the court may allow compensation for the arbitrator’s services as it deems just. The arbitrator’s compensation is a taxable cost in the action.”⁵⁶

A case similar to *Rembert* is *Armendariz v. Foundation Health Psychcare Services, Inc.*,⁵⁷ in which the Supreme Court of California found that employees can be compelled to arbitrate antidiscrimination claims, if the arbitration permits an employee to vindicate his or her statutory rights in a procedurally fair manner. The

50. *Id.* at 217.

51. *Id.* at 211.

52. *Id.* at 228.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. 24 Cal.4th 83, 6 P.3d 669,99 Cal. Rptr. 2d 745 (2000).

58. *Id.* at 90.

court found that there were five minimum requirements for the lawful arbitration of such rights, which are: (1) there must be a neutral arbitrator, (2) there must be adequate discovery, (3) the award must be written, (4) there must be the same relief available as would be available in a court of law, (5) the employee may not be required to pay the arbitrator's fees or expenses.⁵⁹

OTHER KEY FEDERAL COURT CASES

Like the state courts, the federal courts also carefully review arbitration agreements and arbitration rules and procedures. In regard to arbitration agreements, the threshold question for review is whether the agreement to arbitrate was voluntary and intentional.⁶⁰ The Eighth Circuit Court of Appeals grappled with this issue in *Patterson v. Tenet Healthcare, Inc.*⁶¹ The arbitration agreement in this case was on the last page of the personnel handbook. It was subsequently separated from the handbook, signed by the employee, and given to her employer. The employee, who wanted to proceed with a discrimination claim in court, asserted that, since the agreement was incorporated into the handbook, it was non-binding. The court, however, disagreed for the following reasons:

First, the arbitration clause is separate and distinct. It is set forth on a separate page of the handbook and introduced by the heading, “**IMPORTANT! Acknowledgement Form.**” This page is removed from the handbook after the employee signs it and is stored in a file. In addition, there is a marked transition in language and tone from the paragraph preceding the arbitration clause to the arbitration clause itself. Although the preceding paragraph discusses the company's reservation of its “right to amend, supplement, or rescind” any handbook provisions, the arbitration clause uses contractual terms such as “I understand,” “I agree,” I “agree to abide by and accept,” “condition of employment,” “final decision,” and “ultimate resolution.” We believe that the difference in language used in the handbook and that employed in the arbitration clause would sufficiently impart to an employee that the arbitration clause stands alone, separate and distinct from the rest of the handbook. The reservation of rights language refers to the handbook provisions relating to employment, not to the separate provisions of the arbitration agreement.⁶²

⁵⁹ *Id.* at 102.

⁶⁰ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985).

⁶¹ 113 F.3d 832 (8th Cir. 1977).

⁶² *Id.* at 835.

The *Patterson* case was later discussed by the Eleventh Circuit in *Ramirez de Arellano v. American Airlines*,⁶³ where the court did not find the arbitration provision before it binding. In *Ramirez de Arellano*, the employee had signed a form that said that he read and understood the handbook, but there was no specific reference to the arbitration provision in the handbook. The Eighth Circuit said that, in order for an arbitration agreement to be binding, there must be adequate notice to an employee that he is waiving his statutory rights.⁶⁴ The court distinguished this case from *Patterson* by noting that the arbitration provision in the *Patterson* case was separated from the handbook for the employee to sign, and the agreement specifically notified the employee that she was required to use arbitration as a condition of the contract.⁶⁵

The court in *Ramirez de Arellano* went on to review American's arbitration process and found it invalid, too:

First, with respect to notice, we are not convinced that Ramirez's application for a hearing was inappropriately denied for un timeliness because it appears that American may have been equally, if not more, to blame for the late filing. Second, there was no opportunity for discovery. See *Hoteles Condado Beach v. Union de Tronquistas Local 901*, 763 F.2d. 34, 39 (1st Cir. 1985) (instructing that an arbitrator must afford each party an adequate opportunity to present both evidence and argument); see also *Williams v. Katten*, 1996 U.S. Dist. LEXIS 18301, 1996 WL 717447, at 4-5, (N.D. Ill. Dec. 9, 1996) (discussion of permissible parameters of limited discovery in an arbitration proceeding). Third, the decision maker was not a disinterested party, but rather an American managerial employee. See *Employers Ins. of Wausau v. National Union Fire Ins. Co.*, 933 F.2d 1481, 1491 (9th Cir. 1991) (stipulating that fair arbitration proceedings must include non-biased decision makers).⁶⁶

The Sixth Circuit Court of Appeals also addressed the validity of an arbitration agreement in *Floss v. Ryan's Family Steak Houses, Inc.*⁶⁷ and found it to be an illusory promise. *Floss* involved two consolidated discrimination claims by employees of Ryan's Family Steak Houses. Plaintiff Kyle Daniels claimed⁶⁸ wrongful termination in violation of the Americans with Disabilities Act (ADA). Plaintiff Sharon Floss claimed intimidation and harassment by management, because she filed a complaint alleging a violation of the Fair Labor Standards Act (FLSA). As a

⁶³ *Ramirez de Arellano v. American Airlines, Inc.*, 133 F.3d 89 (11th Cir. 1997).

⁶⁴ *Id.* at 91.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 211 F.3d 306 (6th Cir. 2000)

⁶⁸ 42 U.S.C. §12101 *et seq.*

⁶⁹ 29 U.S.C. §201 *et seq.*

condition of employment, both plaintiffs signed an agreement with Employment Dispute Services, Inc. (EDSI). EDSI is a private company that provides neutral parties for arbitration panels. The agreement required all employment disputes with the employer to be filed with EDSI. When the plaintiffs filed lawsuits against their employer, the employer filed a motion to compel arbitration. In the *Floss* cases, the district court ruled the arbitration agreement non-binding. The Court of Appeals for the Sixth Circuit stated that it had “serious reservations” about the EDSI arbitration agreement, but found that it did not need to address the specific merits of the agreement, because it involved an illusory promise.⁷⁰ The court noted that “EDSI has reserved the right to alter the applicable rules and procedures without any obligation to notify much less receive consent from Floss and Daniels ... Without mutuality of obligation, the agreement lacks consideration, and, accordingly, does not constitute an enforceable arbitration agreement.”⁷¹

A more recent case, *Geiger v. Ryan’s Family Steak Houses, Inc.*,⁷² from the Southern District of Indiana, discusses the same employer and the same EDSI agreement. The plaintiffs in this case, employees Frederica Geiger and Deborah Saddler, alleged that the manager of the restaurant sexually assaulted them. Additionally, plaintiffs maintained that the employer failed to stop the harassment, in violation of Title VII of the Civil Rights Act of 1964.⁷³ The defendant moved to dismiss the case based on the arbitration agreement signed by both employees during the application process. The agreement read, in part:

In order for you to be considered for employment at Ryan’s Family Steak Houses Inc., you must agree to the terms and conditions in the attached Job Applicant Agreement to Arbitration of Employment Related Services (Arbitration Agreement). Your failure to sign and accept the Arbitration Agreement and its related EDSI Rules and Procedures will terminate the job application process. A copy of the EDSI Rules and Procedures is provided to you with this application package.⁷⁴

The Indiana federal district court judge struck down the arbitration agreement in this case, primarily for three reasons: (1) The EDSI rules provided only limited discovery and required claimants to pay various adjudication fees. The court believed these restrictions unlawfully limited the plaintiffs’ access to justice for statutory claims. (2) The court had serious doubts about whether the plaintiffs could have understood the complex arbitration agreement, and (3) EDSI could amend the

⁷⁰ *Floss*, 211 F.3d at 315.

⁷¹ *Id.* at 316.

⁷² 134 F. Supp. 2d 985 (S.D. Ind. 2001).

⁷³ 42 U.S.C. §2000 *et seq.*

⁷⁴ *Geiger*, 134 F. Supp. 2d at 990.

arbitration rules and procedures at any time without notice to the plaintiff. The court thought this provision made the agreement an illusory contract.⁷⁵

In South Carolina, the Fourth Circuit Court of Appeals reviewed an arbitration agreement between an employee and Hooters restaurant. In the case of *Hooters of America, Inc. v. Phillips*, the court held the agreement “utterly lacking in the rudiments of even-handedness.”⁷⁶ In *Phillips*, the employer had conditioned eligibility for raises, transfers, and promotions upon employees signing an agreement to arbitrate all employment disputes, including discrimination and sexual harassment claims. The employee in this case asserted that a Hooters official had grabbed and slapped her buttocks. When she informed her manager, she was told to “let it go.” When her attorney informed Hooters that the official’s actions were a violation of Title VII, Hooters told the attorney that the employee was required to arbitrate the matter. The Fourth Circuit disagreed, stating that, while the arbitration agreement was valid, Hooters materially breached the agreement, by promulgating rules so unfair as to “constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith.”⁷⁷

The primary problems the court found with the arbitration rules were as follows: First, Hooters had too much control over who was placed on the list of arbitrators and nothing restricted the employer from removing from the list arbitrators who failed to rule in its favor.⁷⁸ Second, Hooters was allowed to move for summary dismissal, but an employee was not.⁷⁹ Third, Hooters, but not the employee, was allowed to record the hearing.⁸⁰ Fourth, Hooters was allowed to bring a motion in court to vacate an arbitral award, but the employee was not.⁸¹ Fifth, Hooters, but not the employee, was allowed to cancel the agreement to arbitrate and to modify the rules of arbitration, at any time, without notice.⁸²

In summarizing this section of the paper, it should be noted that the law regarding the arbitration of statutory disputes is evolving rapidly in both state and federal courts. In each of the cases reviewed, the court expressly stated that arbitration is a valid and reasonable method of resolving employment disputes involving statutory claims if the contracts and the arbitration procedures are drafted properly. The courts, regardless of jurisdiction, have been cautious in their review of specific contract provisions and continually warn employers of the following: First, employees must be clearly advised of the statutory rights they are waiving or the

⁷⁵ *Id.* at 999. For other cases involving same arbitration agreement and employer, see *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 953 (8th Cir. 2001); *Penn v. Ryan's Family Steak Houses, Inc.*, 95 F. Supp. 2d 940 (N.D. Ind. 2000); and *Family Steak Houses, Inc. v. Regelin*, 735 So.2d 454 (Ala. 1999). See also *Recent Case: Employment Law Arbitration, Seventh Circuit Refuses to Enforce Third Party Employment Arbitration Agreement for Lack of Consideration*, 115 HARV. L. REV. 2066 (2002).

⁷⁶ 173 F.3d 933, 935 (4th Cir. 1999)

⁷⁷ *Id.* at 938.

⁷⁸ *Id.* at 939.

⁷⁹ *Id.* at 939.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

arbitration contract will be deemed void. Second, the arbitration procedures drafted by the employer must be fair or they will not be enforced.

**BUSINESS/LEGAL STRATEGY IN ADOPTING MANDATORY ARBITRATION AGREEMENTS FOR WORKPLACE
DISPUTES**

Assuring that the Arbitration Process is Fair

The courts have spoken: mandatory arbitration agreements are legal; however, they must be “fair.” How, then, are employers and their legal counsel to draft and implement such agreements? How is the mandated “fairness” to be achieved? How are the rights and responsibilities of the parties best carried out? To answer these questions, a more detailed discussion of the elements of “fairness,” as it relates to mandatory arbitration agreements, is needed.

As discussed in the previous section, the courts have described fairness as it applies to such agreements in some detail. These details include the fact that fairness requires that the agreement be “clear” and include the employer (*Rembert*), it must be legal (*Martindale*), and it must be entered into in good faith (*Phillips*). Additionally, several organizations have also suggested standards of fairness. For example, in 1994, the “Dunlop Commission” issued six guidelines that would insure fairness for employees in the arbitration process.⁸³ These guidelines include: (1) Both the employer and the employee participate in the process of selecting a qualified arbitrator. (2) Both parties to the arbitration process should pay the arbitrator’s fee; however, the employee’s portion should be in proportion to the employee’s salary. (3) The arbitration procedure should allow the employee the opportunity to fairly obtain the information needed to support the employee’s claim (4) Awards and remedies should be comparable to remedies allowed in litigation. (5) The arbitrator’s decision should be in writing, stating the facts and reasoning that leads to an understandable conclusion. (6) Any judicial review must ensure that the arbitrator’s decision was a proper application of the appropriate legal doctrines.

Additionally, in 1995, the *Due Process Protocol* was issued by a task force of representatives from various organizations concerned with labor issues and employee rights.⁸⁴ This Protocol was later adopted by such organizations as the American Arbitration Association (AAA), the American Civil Liberties Union, the American Bar Association Labor and Employment Section, the National Academy of

⁸³ Dunlop Commission on the Future of Worker-Management Relations, *Final Report* (Dec. 1994), available at <http://www.ilr.cornell.edu/library/downloads/keyWorkplaceDocuments/DunlopCommissionFutureWorkerManagementFinalReport.pdf>. (last visited June 10, 2003).

⁸⁴ Task Force on Alternative Dispute Resolution in Employment, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship* (1995), available at <http://www.adr.org/index2.l.jsp?JSPssid=15717&JSPsrc=upload%5CUVESITE%5CfocusArea%5Cemployment%5Cprotocol.html>.> (last visited June 12, 2003).

Arbitrators, and the National Society of Professionals in Dispute Resolution.⁸⁵ The *Due Process Protocol* recommended the following: (1) Mandatory arbitration agreements with employees should be brought to the attention of the employee and “knowingly made.”⁸⁶ (2) Employees have a right to select their own representative in the arbitration process. (3) Arbitrators should be neutral and qualified. (4) Arbitrators should be able to award remedies similar to those allowed in litigation. (5) There should be fair discovery, with the employee having fair access to any relevant information. (6) The parties to the arbitration process should share expenses. (7) Judicial review should be limited.⁸⁷

The American Arbitration Association (AAA), in addition to endorsing the *Due Process Protocol*, also adopted its own AAA rules.⁸⁸ The AAA has announced that the AAA will not be involved in any arbitration case that does not meet the standards set forth in the *Due Process Protocol* and AAA’s own guidelines.⁸⁹

Generally speaking, arbitration agreements should incorporate the elements of fairness described in the cases and organizational guidelines listed above. In conclusion, the savvy practitioner addressing this issue should review such cases and guidelines before drafting, to assure that the agreement will bind both the parties equally.

INSURING PROPER COMMUNICATION OF THE ARBITRATION PROCESS TO THE EMPLOYEE

A second issue crucial to those seeking to draft and enforce binding mandatory arbitration agreements relates to proper communication. More specifically, employees must receive proper communication of the details of the arbitration process. By properly communicating these details, employers ensure themselves of the validity of the employee’s acceptance of the agreement and greatly enhance the chances that the agreement will withstand subsequent judicial challenges.

“Under classical contract law, courts were reluctant to inquire into the fairness of an agreement.”⁹⁰ American courts favored allowing the parties the freedom to form their own contract. However, at times courts can be “sensitive to the

⁸⁵ American Arbitration Association, *A Due Process Protocol for Mediation and Arbitration of Statutory Dispute Arising Out of the Employment Relationship*, at http://www.adr.org/index2.1.jsp?JSPssid=15769&JSPsrc=upload\LIVESITE\Rules_Procedures\ProtocolsV.V.\focusArea\employment\protocol.htm (last visited June 15,2004).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ American Arbitration Association, *AAA’s Employment ADR Rules*, at http://www.adr.org/index2.1.jsp?JSPssid=15727&JSPsrc=upload\LIVESITE\Rules_Procedures\ADR_Guides\AAA221current.htm#AAemployment (last visited on June 15,2004).

⁸⁹ American Arbitration Association, *AAA’s Policy on Employment ADR*, at http://www.adr.org/index2.1.jsp?JSPssid=15727&JSPsrc=upload\LIVESITE\Rules_Procedures\ADR_Guides\AAA221current.htm#AAemployment (last visited on June 15,2004).

⁹⁰ Jane P. Mallor, A. James Bames, L. Thomas Bowers, Arien W. Langvardt, Jane Mallor & Arlen Langvardt, *Business Law: The Ethical, Global, and E-Commerce Environment* 335 (12th ed. 2003).

fact that superior bargaining power often led to contracts of adhesion (contracts in which a stronger party is able to determine the terms of a contract, leaving the weaker party no practical choice but to adhere to the terms).⁹¹ Often, contracts of adhesion were found to be unconscionable.

When an employer demands that all employees agree to a process of mandatory arbitration to settle all workplace disputes as a condition of employment or continued employment, many employees, or their legal representatives, see such “agreements” as contracts of adhesion, because the employee has no choice but to accept the terms if he/she wants a job.

Also, employees have challenged the mandatory arbitration process, claiming there never was a valid employee acceptance of such a process. Without a proper acceptance, the employee is not subject to mandatory arbitration.⁹²

While courts have consistently upheld the validity of pre-dispute mandatory arbitration agreements, there have been several cases that rejected these agreements, if due process or adequate employee remedies were not met.⁹³ For example, in a recent California case, the court found the employer’s arbitration process unconscionable, because it did not allow the employee any discovery rights or the right to recover any attorney fees and related expenses.⁹⁴

What is the employer’s best strategy to meet these challenges? First, the employer must adopt an arbitration process and procedure that gives the employee substantially the same fundamental rights an employee would have if the employee litigated the dispute. Second, the employer should fully communicate the arbitration policy to each employee or new hire and enter into a separate contract with each employee. The policy should not merely be included in the employment manual. In addition, it is recommended that each employee be advised to consider obtaining an independent legal opinion regarding the nature of the binding arbitration agreement.

Based on current court cases, an employer who follows this strategy should be able to successfully withstand any employee challenge to the mandatory arbitration process.

CHALLENGES BY THE EEOC

As previously mentioned, pre-dispute mandatory arbitration agreements do not prevent the EEOC from pursuing claims on behalf of the employee independently.⁹⁵ The EEOC enforces Title VII of the Civil Rights Act of 1964, as amended, which prohibits employment discrimination based on race, color, religion, sex, or national origin;⁹⁶ the Age Discrimination in Employment Act, which protects

⁹¹ *Id.*

⁹² Richard Reuben, *No Consent, No ADR*, 19 CAL. Law. 42,44 (1994).

⁹³ *Supra* note 75.

⁹⁴ *Matiejewski v. Alpha Systems Lab Inc.*, 73 Cal. App. 4th 1372 (1999).

⁹⁵ *EEOC v. Waffle House Inc.*, 534 U.S. 279 (2002).

⁹⁶ *Supra* note 4.

workers 40 years of age and older;⁹⁷ the Equal Pay Act;⁹⁸ and the Americans with Disabilities Act.⁹⁹

In a press release commenting on the *Waffle House* decision, an EEOC representative stated, “a private arbitration agreement between an individual and that individual’s employer does not prevent the EEOC from filing a court action in its own name and recovering monetary damages for the individual.”¹⁰⁰

Thus, the question becomes “Is it likely the employer will face an EEOC legal action as well as arbitration?” Statistically, it appears that most employers are unlikely to face an EEOC action.¹⁰¹ Approximately 10% of the complaints filed with the EEOC are deemed to have reasonable cause, but the EEOC files an action in only about 5% of this 10%, or less than 0.5% of the cases. For example, a review of EEOC reports during fiscal year 2000 reveals the following: The EEOC received 79,896 complaints, of which 8,248 were deemed to have “reasonable cause.” Yet, in that year, the EEOC only brought 329 enforcement actions. The same trend held true for fiscal year 2001, when the EEOC received 80,840 complaints, 8,924 were deemed to have “reasonable cause” and only 431 enforcement actions resulted.¹⁰²

While the likelihood that the EEOC will file suit against a particular employer is small, another potential problem an employer faces is that the employee can potentially receive two different recoveries: one under the arbitration system and one in the EEOC action. What will happen if the employee wins \$100,000 from the arbitrator but later recovers only \$20,000 in the EEOC action? Presumably, the EEOC pursued the employee’s claim believing that the employee needed the protection of the agency above and beyond the mandatory arbitration clause. If the court states that the employee is entitled to only \$20,000, will the employee be required to give back \$80,000 of the arbitration award? Supreme Court Justice Clarence Thomas asked essentially this question in the *Waffle House* case.¹⁰³

While it is possible the EEOC will file an action on behalf of an employee, statistics indicate it is unlikely in most cases. Thus, the employer who relies on mandatory arbitration to settle employment disputes need not worry excessively about a related EEOC action.

CONCLUSION

There is a growing trend of employers adopting pre-dispute mandatory arbitration agreements. Both CBS News and the *Washington Post* report that approximately ten percent of all workers are currently covered by mandatory

⁹⁷ *Supra* note 7.

⁹⁸ 29 U.S.C. §206 *et seq.*

⁹⁹ *Supra* note 27.

¹⁰⁰ EEOC, Press Release, Jan. 15, 2002.

¹⁰¹ *Equal Employment Opportunity Commission Retains Its Role Despite Arbitration Agreement*, Thelen Reid Report No. 59, Jan. 25, 2002, at <http://www.thelenreid.com/articles/report/rep59_idx.htm> Oast visited June 15, 2003).

¹⁰² <www.eeoc.gov/stats/charges.html> (last visited June 15, 2003).

¹⁰³ *Supra* note 95.

arbitration agreements.¹⁰⁴ Both sources also suggest that such agreements are becoming increasingly popular with employers. A 1995 study found that 57% of 111 large manufacturing firms had instituted some form of ADR to manage workplace conflict.¹⁰⁵ In addition, a GAO study indicated that 52% of large, private employers used ADR methods for nonunion employees.¹⁰⁶ The growing popularity of such mandatory arbitration agreements is due to cost savings, time savings, and “saving face” (*i.e.*, avoiding unwanted publicity).

Employers can often successfully implement mandatory arbitration agreements by explaining the following to employees: (1) Employees give up no substantial rights; (2) employer costs are kept down, thus safeguarding a more efficient business, which can provide improved job security and benefits for employees; (3) employee disputes are resolved more quickly and less formally with less publicity; and (4) studies indicate that employees win their cases in arbitration more often than they win verdicts at jury trials.¹⁰⁷ Should a business adopt predispute mandatory arbitration agreements for workplace disputes? The answer to that question is generally “yes,” because of the potential for cost savings, more efficient problem resolution, and the avoidance of bad publicity. The authors speculate that, within 15 years, pre-dispute mandatory arbitration agreements will become “standardized” and the majority of employers will take advantage of this procedure to manage workplace disputes.

¹⁰⁴ CBS News, *Supreme Court. No Waffling on Discrimination Suit*, (Jan. 15, 2002) at <supremecourts<http://www.cbsnews.com/stories/2002/01/15/supremecourt/main324412.shtml>> (last visited June 16, 2004); Sarah Schafer & Charles Lane, *High Court Upholds Forced Arbitration Clauses Keep Workers From Filing Suits*, WASH. POST, March 22, 2001, at A01.

¹⁰⁵ Lisa B. Bingham, Kiwhas Kim & Susan Summers Raines, *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341 (2002); Peter Feville & Denise Chachere, *Looking Fair or Being Fair: Remedial Voce Procedures in Nonunion Workplaces* 21 J Mgt 21,33,37 (1995).

¹⁰⁶ Gen. Accounting Office, *Employment Discrimination: Most Private Sector Employers Use ADR* GAO/HEHS-095-150, at 21 (1995).

¹⁰⁷ Rogers, Theodore, *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633 (2001).