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Mandatory Arbitration: Recent Developments After Gilmer in the Evolving Area of Dispute Resolution Through the Use of Mandatory Arbitration Agreements

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Mandatory Arbitration: Recent Developments After *Gilmer* in the Evolving Area of Dispute Resolution Through the Use of Mandatory Arbitration Agreements

Since the Supreme Court issued its ruling in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), employers have steadfastly increased the use of mandatory arbitration agreements. Employers have turned to mandatory arbitration agreements for several reasons not the least of which is the perception that arbitration provides a way to reduce legal costs. As the use of arbitration agreements has increased, the number of challenges to these agreements has also increased.

To a large extent, the Courts have decided to uphold these agreements. This tendency to uphold arbitration agreements is probably due to several factors, including but not limited to the support for arbitration evidenced by Congress and the Supreme Court through the Federal Arbitration Act, the fact that employers are drafting documents with greater care, and the practical reality that arbitration provides an overwhelmed court system with a legislatively approved method to reduce the number of cases the courts must handle. In any event, the pendulum has swung and mandatory arbitration agreements are here to stay. As such, those of us who handle labor and employment matters and litigation need to become comfortable with both the development and use of these agreements.

I. THE BACKDROP

In 1974, the Supreme Court issued its decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974). In *Gardner-Denver Co.*, the Court rejected the idea that an employee could waive his right to bring a federal cause of action because of an arbitration provision in a collective bargaining agreement and emphatically stated that “there can be no prospective waiver of an employee’s rights under Title VII.” *Gardner-Denver Co.*, 415 U.S. at 51, 94 S.Ct. at 1021.

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1This paper was prepared by Judith Sadler, a partner at the firm of Bruckner & Sykes, L.L.P. Ms Sadler primarily practices management side traditional labor law and employment law. She was assisted in the preparation of this paper by Jody Ray Mask, an associate at the firm who also practices labor and employment law.
Seventeen years later, in 1991, the Supreme Court issued its decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647 (1991). The facts in *Gilmer* are straightforward. Mr. Gilmer, who was employed in the securities industry, sued his employer and alleged a violation of the ADEA. His employer filed a motion to compel arbitration, premised on the arbitration provision in the registration application in which he agreed to abide by the New York Stock Exchange Rules. The District Court denied the motion and the employer appealed. The U.S. Court of Appeals for the Fourth Circuit reversed, holding that Mr. Gilmer was bound by the agreement. The Supreme Court affirmed the Fourth Circuit.


Once the Court reached its conclusion that individuals could be compelled to arbitrate their statutory claims under the FAA, the Supreme Court addressed three other arguments that have been and continue to be raised in challenges to arbitration agreements.

First, the Court discussed whether the enforcement of mandatory arbitration agreements would undermine the social policies advanced by the anti-discrimination statutes or interfere with the EEOC’s role in the enforcement of the ADEA. The Court concluded that there was “no inherent inconsistency between the social policies and enforcing the agreements to arbitrate age claims.” *Id.* 500 U.S. at 27, 111 S.Ct. at 1653. The Court reasoned that an individual was not precluded from filing an EEOC charge even if he was precluded from filing suit and that the EEOC had independent authority to investigate age discrimination. The Court also noted that the EEOC was not prohibited by the agreement from seeking class-wide and equitable relief. *Id.* 500 U.S. at 28-29, 111 S.Ct. at 1653.
Second, the Court discussed Mr. Gilmer’s challenges to the adequacy of the arbitration procedures. The Court rejected these challenges as a basis upon which to refuse to enforce the arbitration agreement. *Id.* 500 U.S. at 30-31, 111 S.Ct. at 1654-1655. The Court opined that these challenges reflected the suspicion that arbitration weakened the protections of the substantive law afforded would-be complainants. *Id.* 500 U.S. at 30, 111 S.Ct. at 1654. The Court found no evidence that the arbitration process would be biased or that the limited discovery provisions were insufficient to allow Mr. Gilmer a fair opportunity to prove his claim.

The Court also dismissed the argument that the proceeding was unfair because arbitrators were not required to issue written opinions. The Court disagreed that the lack of a written opinion would result in a lack of public knowledge or an inability to obtain effective appellate review. In any event, as the Court pointed out, the agreement in question required that written awards be made available to the public. Moreover, the Court noted that the law would continue to develop because judicial decisions would continue to be issued for claimants not bound by agreements.

Finally, the *Gilmer* Court addressed the issue of whether the arbitration should be set aside because of the inherently unequal bargaining power between employers and employees. The Court held that the *possibility* that there might be unequal bargaining power between employers and employees was not, in and of itself, a sufficient reason to hold that arbitration agreements were never enforceable in the employment context. The Court reminded us that the stated purpose of the FAA “was to place arbitration agreements on the same footing as other contracts. Thus arbitration agreements are enforceable ‘save upon such grounds as exist at law or in equity for the revocation of any contract.’” 9 U.S.C. §2.” *Id.*, 500 U.S. at 33, 111 S.Ct. at 1655-1656.

Recently, the Supreme Court revisited the issue of arbitration agreements or provisions in the context of collective bargaining agreements in *Wright v. Universal Maritime Serv. Corp.*, ___ U.S. ___, 119 S.Ct. 391 (1998). In *Wright*, the Supreme Court acknowledged the tension between its decisions in *Gardner-Denver* and *Gilmer*. The Court then drew a distinction between compulsory arbitration provisions contained in collective bargaining agreements negotiated by unions and compulsory arbitration provisions in an individual’s employment contract.

The *Wright* Court held that an employee’s statutory rights are not waived by an arbitration provision in the collective bargaining agreement unless the waiver is “clear and unmistakable”. *Id.* at 396. However, the Court took great care to limit its holding by stating...
that “[w]e take no position, however, on the effect of this provision in cases where a CBA clearly encompasses employment discrimination claims or in areas outside collective bargaining”. *Id.* at 297 n.2.²

II. THE CURRENT STATE OF AFFAIRS

The following is a short review of recent circuit cases upholding or refusing to uphold arbitration agreements.

A. Recent Cases Upholding Arbitration Agreements

1. First Circuit

*Bercovitch v. Baldwin School, Inc., et al.,* 133 F.3d 141 (1st Cir. 1998)

A suspeded student filed for a preliminary injunction, declaratory judgment and attorney fees against a private school alleging violations of the ADA, Rehabilitation Act and local law. The District Court denied the school’s motion to compel arbitration and granted a preliminary injunction ordering the student to be re-enrolled. The First Circuit vacated the injunction and reversed the District Court.

The First Circuit held that there was no question as to the validity of the arbitration agreement and that the agreement did, in fact, apply to the dispute in question. Citing *Gilmer*, the First Circuit noted that the burden to prove that the arbitral setting was inappropriate lies with the Plaintiff.

2. Second Circuit

(a) *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2nd Cir. 1998)

In this case, a former salesman brought an action to vacate the

²Other cases interpreting *Wright* that may be of interest are *Carson v. Gaint Food Inc.*, ___ F.3d ___, 161 LRRM 2129 (4th Cir. 1999)(Court refused to uphold arbitration agreement because CBA did not clearly and unmistakenly require the arbitration of statutory claims) and *Interstate Brands v. Bakery Drivers & Bakery Goods Vending Machines, Local Union No. 550*, 167 F.3d 764 (2nd Cir. 1999)(Rule in *Wright* that waiver in a CBA must be “clear and unmistakeable” does not apply where the statutory right at issue belongs to the employer.)
arbitrator’s award in favor of his former employer. The District Court refused to vacate the award and the employee appealed. The Second Circuit held that the award reflected a “manifest disregard for the law” and vacated it. In reaching its decision, the Second Circuit noted that agreements to arbitrate ADEA claims are enforceable against employees.

(b)  **Oldroyd v. Elmira Savings Bank, FSB, 134 F.3d 72 (2nd Cir. 1998)**

A former bank employee sued his former employer and alleged breach of contract and retaliation under the whistle blower provision of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). The Bank moved to compel arbitration. The District Court denied the motion for arbitration of the retaliation claim. The Second Circuit vacated the decision, in part, and held that the retaliatory discharge claim was within the scope of the arbitration provision and that Congress did not intend to preclude arbitration of claims under the whistle blower provision of FIRREA.

(c)  **Ermenegildo Zegna Corp. et al. v. Zegna, 133 F.3d 177 (2nd Cir. 1998)**

District Court granted Defendant’s motion to compel Plaintiff to submit to arbitration and to stay the Plaintiff’s motion to hold Defendant in contempt of a settlement agreement pending the outcome of the arbitration. The Second Circuit addressed the issue of whether the District Court’s decision was appealable. The Second Circuit held that the District Court’s order was not appealable because it arose in the context of an “embedded proceeding”. In other words, if the question at issue only concerned the arbitrability of the dispute, the case was independent. *Id.* at 182. Because the issues in the case and the analysis undertaken by the District Court went beyond the question of arbitrability, the case was typically embedded and thus not appealable. *Id.* at 182-184.

3. **Third Circuit**

(a)  **First Liberty Investment Group v. Nicholsberg, 145 F.3d 647 (3rd Cir. 1998)**

In a slightly different twist, a former employee sued his former employer to compel arbitration pursuant to his employment contract, which contained a provision to arbitrate business disputes involving NASD
members and their associates. The Third Circuit reversed the District Court and ordered the parties to arbitrate the dispute.

(b)  

**Seus v. John Nuveen & Co., Inc., 146 F.3d 175 (3rd Cir. 1998)**

A former employee sued his former employer alleging violations of Title VII and the ADEA. The District Court granted the employer’s motion to compel arbitration and the employee appealed. The Third Circuit upheld the Form U-4 arbitration agreement as valid and enforceable with respect to Plaintiff’s Title VII and ADEA claims.

The court rejected Plaintiff’s claim that the arbitration agreement was a “contract of adhesion”. The Court found that (1) the agreement was not oppressive, unconscionable or unreasonably favorable to the NASD or the brokerage firm and (2) that Plaintiff had not waived her substantive statutory rights by signing the Form U-4.

The Third Circuit concluded that a showing of fraud, duress, mistake or some other ground recognized by the law applicable to contracts generally would be necessary to have excused the District Court from enforcing the agreement. *Id.* at 184.

(c)  

**In re Prudential Ins. Co. of America Litigation, 133 F.3d 225 (3rd Cir. 1998)**

Several former sales agents sued Prudential alleging that they were fired in retaliation for refusing to participate in illegal sales practices, defamation and tortious interference. Prudential moved to compel arbitration pursuant to the arbitration provisions contained in the applications executed by the agents for registration with the NASD. The individuals agreed that the “insurance business” exception in the NASD code precluded arbitration of employment disputes that implicate insurance issues.

In evaluating the case, the Third Circuit held that (1) a “party” was not necessarily limited to a signatory of the agreement; (2) the dispute was within the scope of the agreement; and (3) the possibility that there might be inconsistent results and duplicative litigation was not justification to refuse to enforce the agreement. Relying on the presumption in favor of arbitration and construing the doubts in construction against the resisting parties, the
Third Circuit found that the parties had “only one clear expression of intent here – that employment disputes are subject to arbitration...”. Id. at 234.

4. **Fourth Circuit**

*Johnson v. Circuit City Stores, 148 F.3d 373 (4th Cir. 1998)*

A black female applicant joined suit brought by a group of current and former employees,. The Company moved the Court for an order dismissing Plaintiff’s claims on the basis that she was bound by the arbitration agreement contained in the employment application. The District Court denied the Company’s motion for summary judgment dismissing Plaintiff’s claim. The Fourth Circuit reversed the Court and concluded that the application contained a mutual promise to arbitrate disputes and that this promise constituted sufficient consideration for the arbitration agreement.

In reviewing the agreement, the Court focused on whether the agreement was supported by adequate consideration. Citing to its prior decision in *O’Neil v. Hilton Head Hospital*, 115 F.3d 272, 275 (4th Cir. 1997), the Court held that Circuit City’s agreement to be bound by the arbitration process was sufficient; it was unnecessary for Circuit City to incur any additional detriment beyond that agreement to make it enforceable.

5. **Fifth Circuit**

(a) *Maddox v. Runyon, 139 F.3d 1017 (5th Cir. 1998)*

Maddox sued his former employer, Postmaster General Runyon and two of his former supervisors and alleged that he was terminated because of his race in violation of Title VII. Maddox also alleged a *Bivens* claim and various state law contract claims. The District Court dismissed the *Bivens* claim and state law claims and held that the Title VII claim was untimely. Maddox appealed.

The Fifth Circuit affirmed. During its discussion of the timeliness issue, the Court held that Maddox’ failure to timely pursue his Title VII action within the applicable ninety-day period was not excused by the fact that the arbitration provisions of his handbook had been invoked. The Court rejected
Maddox’ argument that arbitration and EEO processes cannot be pursued simultaneously.

(b)  *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998)

A securities broker filed suit against his employer alleging retaliation in violation of Title VII because he testified against Metropolitan in a sexual harassment case brought by a fellow co-worker. Metropolitan sought summary judgment alleging that Mouton was bound by the agreement he signed with NASD to arbitrate all claims arising from his employment. The District Court denied the motion for summary judgment on the ground that a genuine issue of material fact existed as to whether the NASD code required arbitration of employment-related disputes.

On appeal, the Fifth Circuit reversed and remanded holding that the Title VII claim fell within the scope of disputes covered by the arbitration provision.

Note: These cases continue a long line of authority in the Fifth Circuit upholding arbitration agreements. For additional case law, see *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996)(Plaintiff must arbitrate her sexual harassment claims against her employer); *Miller v. Public Storage, Inc.*, 121 F.3d 215 (5th Cir. 1997)(Plaintiff must arbitrate ADA and Texas Worker’s Compensation retaliation claims).

6. Sixth Circuit


The Plaintiff filed suit alleging violations of Title VII. The District Court granted Defendant’s motion to compel arbitration. Relying on *Gilmer*, the Sixth Circuit held that Plaintiff’s Title VII claims were properly submitted to arbitration, absent a showing of one of the traditional grounds for revocation of a contract such as fraud or duress.
7. Seventh Circuit

(a) *Michalski v. Circuit City Stores, Inc.*, ___ F.3d ___, 1999 WL 274514, 79 Fair Empl. Prac. Cas. (BNA) 1160 (7th Cir. 1999)

Michalski sued Circuit City and alleged that she was terminated because of her pregnancy in violation of Title VII. She simultaneously filed a request to arbitrate on the same day. Circuit City moved to stay the proceeding or dismiss the complaint and compel arbitration. The District Court denied Defendant’s motion reasoning that Circuit City’s arbitration agreement lacked consideration sufficient to support a valid contract. Circuit City appealed.

On appeal, the Seventh Circuit reversed and remanded the case holding that the arbitration agreement entered into by the parties superseded Michalski’s right to sue in federal court. The Seventh Circuit noted that Michalski’s agreement even provided an opt-out provision that she did not exercise. With respect to the issue of consideration, the Court noted that Circuit City’s agreement to be bound by the arbitration agreement was sufficient to create an enforceable agreement.

(b) *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999)

A former securities industry employee sued her former employer alleging a violation of Title VII. The District Court denied the employer’s motion to dismiss and compel arbitration and the employer appealed.

On appeal, the Seventh Circuit held (1) that Title VII, Equal Pay Act and New York Human Rights Law claims were subject to predispute arbitration agreements; (2) that the Plaintiff failed to prove that the securities industry arbitration procedures were biased in the employer’s favor; (3) that the Plaintiff failed to prove that the arbitration procedures were inadequate to protect an individual’s statutory rights; and (4) that the mandatory arbitration process violated her rights under Article III and the Fifth and Seventh Amendments. The Court also rejected Plaintiff’s claim that the arbitration agreement was a contract of adhesion even though it was a condition of employment.
8. Eighth Circuit

*Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997)

An employee sued her former employer and alleged violations of Title VII and the Missouri Human Rights Act. The District Court dismissed and the employee appealed.

The Eighth Circuit affirmed. The Court noted that generally employee handbooks are not considered contracts; however, the Court found the arbitration clause was separate from the other provisions of the handbook and thus constituted an enforceable contract. The Court held that the FAA governed the agreement and that, as a matter of first impression, section one of the FAA should be construed narrowly and applied only to employees that are engaged directly in the movement of interstate commerce.

Note: Because some courts have found that arbitration agreements in handbooks do not constitute binding agreements, an agreement may be more defensible if it is a separate signed document.

9. Ninth Circuit

*Nghiem v. NEC Electronic*, 25 F. 3d 1447 (9th Cir.) *cert. den’d*, 513 U.S. 1044 (1994)

In a rare departure from its general refusal to enforce arbitration agreements, the Ninth Circuit held that employees who voluntarily initiate the arbitration process are bound by the process. In *Nghiem*, the Ninth Circuit rejected the employee’s argument that enforcement of the arbitral order denied his right to a jury trial under the Civil Rights Act of 1991, holding that there was no evidence that Congress intended to allow employees to escape the binding effect of arbitration they initiated.

10. Tenth Circuit

*McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998)

In a suit by a former employee against his former employer for alleged violations of the ADA, the Tenth Circuit affirmed the District Court and held
(1) that McWilliams' claims were arbitrable under the FAA and (2) that Logicon did not waive its right to demand arbitration before McWilliams' filed suit.

See Also Metz v. Merrill Lynch, Pierce, Fenner & Smith Inc., 39 F.3d 1482 (10th Cir. 1994) (Gilmer reasoning applies to Title VII claims and discussing the six factors relevant to a determination whether a party has waived its rights to enforce an arbitration agreement.)

11. Eleventh Circuit

MS Dealer Service Corp. v. Franklin, ___ F.3d ___, 1999 WL 342495 (11th Cir. 1999)

This case involved a suit by an auto buyer against an auto dealership and service corporation. The buyer alleged that she had been defrauded when she was charged an excessive amount for the service contract. The service corporation moved to compel arbitration based on the arbitration clause in the agreement between the buyer and dealer. The District Court dismissed the demand for arbitration and the service corporation appealed.

The Eleventh Circuit held that the service corporation, a non-signatory to the agreement, had a sufficiently close relationship with the dealership to justify permitting the service corporation to invoke arbitration. The Court noted that under the FAA, a non-signatory to a written agreement containing an arbitration clause could compel arbitration when a signatory to the written agreement relied on the terms of the agreement in asserting claims against the non-signatory; and when the signatory to the written agreement raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the other signatories to the contract.

12. D.C. Circuit

(a) Kropat v. Federal Aviation Administration, 162 F.3d 129 (D.C. Cir. 1998)

Kropat was suspended for thirty days without pay for disruptive and
abusive conduct on the job. He protested this action and his complaint culminated in an arbitration hearing. The panel dismissed one charge and reduced the suspension to ten days. Kropat appealed alleging that he was denied “due process” because he was not afforded the opportunity to depose the FAA’s witnesses and that he was denied “equal protection” because the employees covered by collective bargaining agreements are afforded different and allegedly greater procedural protections.

The D.C. Circuit dispatched with Kropat’s claims pointing out that Kropat failed to demonstrate how his inability to depose the FAA’s witnesses amounted to due process “particularly in light of the myriad of other procedural protections afforded him”. The Court noted that Gilmer does not hold that due process requires formal discovery prior to an arbitration hearing.

With respect to the “equal protection” claim, the Court pointed out the obvious – that an “eminently rational basis existed for the different treatment of employees who are covered by a CBA.


After his termination, Cole sued his former employer, Burns, for discrimination in violation of Title VII. Burns moved to dismiss and compel arbitration. The District Court granted the motion and Cole appealed.

In a well written opinion, the D.C. Circuit held that the arbitration agreement, which Cole signed as a condition of employment, was valid and enforceable. The Court analyzed Gilmer and concluded that the agreement in question did not undermine the relevant statutory scheme.

The Court also addressed the issue of whether an employee could be required to pay all or part of the arbitrator’s fees. The Court noted that the employee must be afforded both substantive rights and reasonable access to a neutral forum in which those rights can be vindicated. As such, the Court concluded that the employee “cannot be required to pay for the services of a judge in order to pursue their statutory rights”. Id. at 1468. Because the language in the contract was ambiguous, the Court construed the ambiguity against Burns. The Court then resolved the issue in favor of
a legal construction of the contract, redlined the provision regarding fees and upheld the arbitration agreement.

Additionally, Cole contended that the agreement should not be enforced because there would be a lack of judicial review. The D.C. Circuit discounted this argument and found that contrary to the review of awards in the context of collective bargaining, the Courts were not required to give “unlimited deference” to arbitration awards in the employment context.

B. Recent Cases Refusing To Enforce Arbitration Agreements

1. First Circuit

(a) **Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999)**

Although the Court of Appeals refused to compel arbitration in this case, the opinion itself is supportive of the process.

Rosenberg, a brokerage employee, filed suit in state court following her discharge. She alleged violations of Title VII, as amended by the 1991 Civil Rights Act (CRA) and violations of the ADEA. Defendant sought to compel arbitration. The District Court denied the motion and the Court of Appeals affirmed on the ground that the process did not meet the standards set forth in the 1991 CRA for enforcing arbitration clauses. Specifically, the Court held that Rosenberg was not bound by the arbitration agreement because she was never given a copy of the NYSE rules that defined the range of claims subject to arbitration. Finding support in the Supreme Court’s decision in *Wright v. Universal Maritime Service Corp.*, ____ U.S. ____ , 1992 S.Ct. 391, 396-97 (1998), the First Circuit concluded that arbitration would not be “appropriate” under the 1991 CRA because Rosenberg was not given at least “some minimal level of notice.... that statutory claims [were] subject to arbitration”. *Rosenberg*, 170 F.3d at 21.

(b) **Brennan v. King, 139 F.3d 258 (1st Cir. 1998)**

The Court of Appeals refused to compel arbitration in this case because it concluded that the contract terms overcame the presumption of arbitrability. *Id* at 266.
In *Brennan*, an assistant professor sued the University and various officials. He alleged a breach of contract claim and a violation of federal and state anti-discrimination laws. The District Court granted Defendant’s motion for summary judgment on the ground that Plaintiff had failed to follow the grievance procedures set forth in the employee handbook and incorporated into Brennan’s contract. The First Circuit affirmed in part, reversed in part and remanded a portion of the case.

In evaluating the issue of arbitrability, the Court noted that the arbitration provisions of the handbook did not mandate arbitration. Rather, the arbitration procedure was merely “an option that a candidate may invoke or not as he or she chooses...”. *Id.* at 266. Because Brennan had no duty to make that choice, the presumption of arbitrability was overcome by the terms of the contract. *Id.*

2. Fourth Circuit

*Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999)

Hooters brought an action to compel arbitration of Phillips’ sexual harassment claims. Phillips’ counterclaimed for violations of Title VII and for a declaration that the employer’s arbitration agreement was unenforceable. The District Court denied the employer’s motion to compel and stay the proceedings on the counterclaims and the employer appealed.

The Fourth Circuit held that predispute arbitration agreements apply to Title VII claims and that the employee could be required to arbitrate these claims. However, the Court held that the employer materially breached the arbitration agreement by promulgating egregiously unfair arbitration rules. Because of this, the employer violated its contractual obligation of good faith. The employer required that all arbitrators be selected from a list created by the employer. Moreover, the employer had unlimited discretion to place anyone it desired on the list. Additionally, the rules required employees to give the Company notice of their specific claims at the outset and to provide a list of all fact witnesses, and a brief summary of the facts known to each. On the other hand, the rules did not require the Company to give notice of its defenses or its witnesses.
The Fourth Circuit also noted that the rules permitted Hooters to cancel the agreement to arbitrate and/or modify the rules at its discretion and without notice. Because Hooters breached the arbitration agreement, the Court held that the agreement should be rescinded and the motion to compel denied.

3. Seventh Circuit

*Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997)

The Seventh Circuit concluded that an arbitration agreement is not enforceable against an employee if the employer does not provide consideration for the agreement. Here the Court found that the agreement was only enforceable against the employee and did not contain a residual agreement to arbitrate on the part of the employer. As such, the Court refused to enforce the agreement. The promise to hire the Plaintiff was not consideration sufficient to uphold the agreement because the Plaintiff was hired prior to signing the agreement. However, the Court did note that an employer who informs an already hired employee that she could continue to work only by agreeing to an arbitration clause would provide sufficient consideration to enforce an arbitration agreement.

4. Eighth Circuit

*Keymer v. Management Recruiters Intern., Inc.*, 169 F.3d 501 (8th Cir. 1999)

The Plaintiff, a former employee, alleged that he was terminated in violation of the ADEA. The employer filed a motion to stay pending arbitration, which the District Court denied. The employer appealed.

The Eighth Circuit affirmed the decision holding that the Plaintiff’s claim was excluded from the arbitration agreement under the plain language of the employment agreement stating that “controversies, disputes and matters in question regarding employer’s right to terminate this Agreement shall be specifically excluded from the foregoing mediation and arbitration procedure”. The Court found this language unambiguous and refused to consider the employer’s extrinsic evidence of its true intent.
Note: The Court applied the principle that any ambiguities in a contract are construed against the drafter. When drafting these agreements, be sure that you clearly state the scope of the agreement.

5. Ninth Circuit


Of all the circuits, the Ninth Circuit is the most hostile to the use of arbitration agreements to resolve statutory claims. Here, the Court concluded that Congress, in passing the Civil Rights Act of 1991, intended to prohibit a prospective waiver by an employee of his or her right to a judicial forum for Title VII claims.

Duffield, a broker-dealer, sued her employer for alleged violations of Title VII and California’s Fair Employment & Housing Act. Not surprisingly, Robertson Stephens & Co. moved to compel arbitration pursuant to the NASD Form U-4 agreement that all broker-dealers must sign as a condition of employment. The District Court granted the motion and Duffield appealed.

Although acknowledging the Supreme Court’s support for arbitration, the Ninth Circuit concluded that the 1991 Civil Rights Act prohibited employers from requiring employees, as a condition of employment, to waive their right to sue for future violations of Title VII. The Court noted that it was giving deference to the EEOC’s Notice dated July 10, 1997 that adopted this position. The Court, in an attempt to placate the securities industry, did hold that Form U-4 is enforceable if the employee agrees to arbitrate a claim after the claim arises. The Court also rejected Duffield’s claim that the arbitration agreement was an unconstitutional condition of employment.

(b) *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153 (9th Cir. 1998)

Mr. Kummetz sued his former employer Tech Mold Inc. and alleged violations of the ADA and Arizona Civil Rights Act. The Company moved for
summary judgment on the ground that the employee was bound by the arbitration agreement contained in the employee handbook. The District Court granted the motion and Kummetz appealed.

The Ninth Circuit reversed and remanded. The Court held that the employee did not “knowingly agree to arbitrate his employment discrimination claims” by signing the acknowledgment in the handbook. In this case, the acknowledgment did not refer to the arbitration provision or imply that the handbook contained such a provision. Although the provision provided that employees could obtain a copy of the ten page Dispute Resolution policy from the accounting office, Kummetz did not do so. Citing Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756, 762 (9th Cir. 1997), the Court held that agreements to arbitrate disputes under the ADA, at a minimum, require that “the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question”.

6. Tenth Circuit

Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F.3d 1230 (10th Cir. 1999)

A former employee sued his employer after he was terminated and alleged a violation of Title VII, the ADA and ADEA. The employer moved to compel arbitration. The District Court denied the motion and the employer appealed.

The Tenth Circuit affirmed the District Court. In its decision, the Court concluded that Mr. Shankle’s claims were, in fact, covered by the arbitration agreement. However, the Court refused to enforce the agreement because it required employees to pay one-half of the arbitrator’s fees. Even if the Company advanced the entirety of the fee, the employee remained liable for his one-half share. Both the District Court and Tenth Circuit relied on the D.C. Circuit’s opinion in Cole v. Burns Int’l Sec. Serv., 105 F.3d 1465 (D.C. Cir. 1997). The Tenth Circuit found that the imposition of a fee-splitting provision such as the one in this case effectively denied the employee a forum through which he may vindicate his statutory rights. The Court noted that Mr. Shankle would have had to pay an arbitrator between $1,875 and $5,000 to resolve his claims, that he could not afford such a fee and that it was likely that similarly situated employees would not be able to afford such a fee. As such, the Court refused to enforce the agreement. Furthermore,
the Tenth Circuit refused to “redline” the fee-splitting provision and compel arbitration because the language was unambiguous and thus not subject to interpretation.

7. Eleventh Circuit

_Paladino v. Avnet Computer Technologies, Inc._, 134 F.3d 1054 (11th Cir. 1998)

Plaintiff sued alleging violations of Title VII against his former employer who filed a motion to compel arbitration. The District Court denied the motion and the employer appealed. The Eleventh Circuit affirmed. The Court refused to compel arbitration because the agreement stated that:

“the arbitrator is authorized to award damages for breach of contract only and shall have no authority whatsoever to make an award of other damages.”

The Tenth Circuit reasoned that the agreement was not enforceable either because (1) the agreement’s confusing language failed to inform the employee that the agreement applied to statutory claims this did not cover Title VII claims or (2) the agreement, while containing language sufficient to place the employee on notice that Title VII claims were covered, failed to provide adequate remedies to promote the remedial purpose of the statute.

8. D.C. Circuit


The D. C. Circuit held that an employee was not compelled to arbitrate her state law claims pursuant to an arbitration agreement found in her application for employment with the NASD. The Court focused on the language in the agreement that stated that she was required to arbitrate any disputes she had with another member or “against a person associated with a member”. The Court held that this language was intended to apply only to natural persons so that Gardner’s employer, a corporate entity, did not fall within the definition. Thus, she was not required to arbitrate claims against her employer.
III.  THE APPLICABILITY OF THE FEDERAL ARBITRATION ACT

A.  Preemption

Occasionally the issue will be raised as to whether the FAA preempts the state arbitration act in its application to an arbitration agreement. In Southland Corp v. Keating, 465 U.S.1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), the Supreme Court held that the FAA preempts state law and that state courts may not apply state statutes that invalidate arbitration agreements.

With respect to state law discrimination claims and arbitration statutes, the Supreme Court has held, generally, that the FAA preempts state laws “which require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)(citations omitted). See also Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 (3rd Cir.), cert. denied, 118 S.Ct. 299 (1997)(the waiver of a state law right to a judicial forum for resolution of state claims is enforceable under the FAA.)

B.  Applicability

Section 1 of the FAA excludes from its coverage “contracts of employment of seamen, railroad employees, or any other class or workers engaged in foreign or interstate commerce.” 9 U.S.C.§ 1. With the exception of the Ninth Circuit, the courts that have reviewed section 1 of the FAA have construed it narrowly to include only the class of workers engaged directly in interstate commerce such as seamen and railroad workers. See Rosenberg v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 170 F.3d 1 (1st Cir. 1999); Seus v. John Nuveen & Co., 146 F.3d 175 (3rd Cir. 1998), cert. denied, 119 S.Ct. 1028 (1999); Cosgrove v. Shearson Lehman Bros., 105 F.3d 659 (6th Cir. 1997); Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361 (7th Cir. 1999); Patterson v. Tenet Healthcare Inc., 113 F.3d 832 (8th Cir. 1997); McWilliams v. Logicom, Inc., 143 F.3d 573 (10th Cir. 1998); Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F.3d 1230 (10th Cir. 1999); Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997).

IV.  JUDICIAL REVIEW OF ARBITRATION DECISIONS

In challenging arbitration agreements, opponents of these agreements have argued that they should not be enforced because courts cannot effectively review the decisions. The Gilmer Court rejected this argument as a basis upon which to strike down the arbitration agreement. The Court concluded that there would be sufficient review and
development of the law through review of cases of individuals not bound by arbitration agreements. *Gilmer*, 500 U.S. at 32, 111 S.Ct. at 1655.

The Supreme Court also addressed the contention that judicial review of arbitration decisions is too limited. Citing its opinion in *Shearson/American Express Inc. v. McMahon*, 482 U.S. at 232, 107 S.Ct. at 2340, the Supreme Court reiterated its belief that “although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue.” *Gilmer*, 500 U.S. at 32 n.4, 111 S.Ct. at 1655 n.4.

As the U.S. Court of Appeals noted in *Cole v. Burns International Security Services*, the fact that judicial review is focused does not mean that meaningful review is unavailable.” *Cole*, 105 F.3d 1465, 1486. The D.C. Circuit explained that, in addition to the grounds listed in the FAA, awards may be set aside if the award is contrary to explicit public policy or a manifest disregard of the law. *Id.*

Although the *Gilmer* Court did not specifically address the necessary requirements of an arbitration provision or agreement, the Court did note that when a party agrees to arbitrate a statutory claim, the party “does not agree to forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.” *Gilmer*, 500 U.S. at 26, 111 S.Ct. at 1652 *citing to Mitsubishi Motors Corp.*, 473 U.S. at 628, 105 S.Ct. at 3354. The courts are uniquely empowered to review these awards, particularly where a transcript is available, and to set aside the improper awards or awards where proceedings are fundamentally unfair. *Teamsters Local 312 v. Matlack*, 118 F.3d 985 (3rd Cir. 1997)(arbitration award may be set aside where there is adequate showing of fraud, partiality, misconduct, violation of specific command of law, or vagueness rendering enforcement impractical, or showing that enforcement would be contrary to public policy.)

**V. ARBITRATION AGREEMENTS AND THE EEOC**

Opponents of arbitration often argue that mandatory arbitration of individual statutory claims undermines the public policy prohibiting discrimination because the EEOC would be hampered in its ability to enforce the civil rights statutes. As previously mentioned, the Supreme Court, in *Gilmer*, addressed the argument that the EEOC’s authority to enforce the ADEA would be undermined if an individual is compelled to arbitrate statutory claims. In *Gilmer*, the Court concluded that an individual bound by an arbitration agreement is not precluded from filing a charge of discrimination. *Gilmer*, 500 U.S. at 28-29, 111 S.Ct. at 1653. The Court also noted that:
[t]he EEOC’s role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA “from any source” and it has independent authority to investigate age discrimination. See 29 C.F.R. §§ 1626.4, 1626.13 (1990).

Gilmer, 500 U.S. at 28, 111 S.Ct. at 1653. It is unlikely that the Supreme Court will deviate from this course with respect to any other civil rights statutes.

Recently, courts have grappled with the extent to which the EEOC is bound by a private arbitration agreement between an individual employee and an employer. The Circuits have split in deciding whether the EEOC may seek monetary and injunctive relief on behalf of an individual who has agreed to be bound by an arbitration agreement.

In EEOC v. Kidder, Peabody & Co., Inc., 156 F.3d 298 (2nd Cir. 1998), as a matter of first impression, the U.S. Court of Appeals for the Second Circuit held that a private arbitration agreement between an employer and an employee precluded the EEOC from seeking purely monetary relief for the employees bound by the agreement.

In this case, the EEOC sued Kidder, Peabody and alleged that it had engaged in a pattern and practice of age discrimination in terminating investment bankers over the age of 40 from its investment banking department. The employees for whom the EEOC sought monetary damages had agreed to submit all claims arising from their employment to binding arbitration.

Relying primarily on Gilmer, the Second Circuit noted that the purpose of the FAA would be undermined if an employee who signed an agreement to arbitrate could avoid arbitration by having the EEOC file suit in the federal forum on his behalf. The Court weighed the “competing public interests of allowing the EEOC to pursue actions to eradicate and prevent employment discrimination and the interest in encouraging parties to arbitrate.” Id at 303. The Court concluded that both interests are best served by permitting the EEOC to seek injunctive relief, but not monetary relief on behalf of individuals who had agreed to arbitrate their claims of discrimination. The Court did not preclude the EEOC from seeking injunctive relief or other class-wide equitable relief because the public interest in the litigation would outweigh the interest in furthering the federal policy favoring arbitration agreements.

In a footnote to the majority opinion, the Second Circuit recognized the differing legislative purposes behind the ADEA and FLSA and the distinction made between the two statutes on the issue of waiver of claims by individuals. See D.A. Schulte, Inc. v. Gangi,
328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 1114 (1946) (neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage). Because of the distinction between the two statutes, the Court limited its decision to the effect of arbitration agreements on the EEOC’s right to pursue monetary relief in suits under the ADEA, not the FLSA. *Id.* at 302, n.4.

Subsequently, in *EEOC v. Frank’s Nursery*, ___ F.3d ___, 1999 WL 235476, 79 Fair Empl. Prac. Cas. (BNA) 936 (6th Cir. 1999), the U.S. Court of Appeals for the Sixth Circuit was faced with the issue of whether the EEOC was barred from pursuing a Title VII claim because the employee waived her right to sue as part of an arbitration agreement. The EEOC filed suit on behalf of a former Frank’s employee alleging that Frank’s Nursery had engaged in unlawful employment practices by discriminating against the employee because of her race and by requiring its employees/applicants to sign and comply with an application of employment that required them to arbitrate the statutory rights afforded them by Title VII. The District Court granted Frank’s motion for summary judgment to compel arbitration and dismissed the EEOC’s complaint in its entirety. The EEOC appealed.

On appeal, the Sixth Circuit reversed the District Court. The Sixth Circuit held that the EEOC is not barred from seeking “substantive relief” such as compensatory and punitive damages and back pay with prejudgment interest. The Court noted that the legislative scheme created under Title VII affords the EEOC separate authority to pursue an action when it concludes that the public interest is best served by filing suit. The individual has no authority to contract away her right to file a charge with the EEOC or to withdraw a charge without permission of the EEOC. The Court concluded that both the clear language of the statute and the legislative background of Title VII support the conclusion that the EEOC is not “an ordinary plaintiff” that may be bound by the procedural requirements applicable to private litigants under Title VII. In a fairly detailed analysis, the Sixth Circuit went on to hold that the FAA was not applicable to the situation because the District Court had ordered the individual to arbitrate her claim, not the EEOC and, in any event, the EEOC never signed the arbitration agreement. As a non-party, the EEOC could not be bound by the agreement.

Significantly, the Sixth Circuit held that allowing the EEOC to pursue monetary and injunctive relief was not inconsistent with the purposes of the FAA or the holding in *Gilmer*. To hold otherwise would, according to the Court, undermine the EEOC’s independent right to sue in federal court to vindicate the public interest against employment discrimination. The court also reversed the District Court’s ruling that the EEOC was required to plead a class action in the same manner as an ordinary litigant. The EEOC is authorized to seek
general injunctive relief even if it only identifies one individual against whom discriminatory acts have been taken.

Opponents of arbitration agreements have also argued that the courts should not defer to the EEOC’s interpretation of the discrimination statutes. The EEOC has been critical of mandatory arbitration agreements. See EEOC Notice Number 915.002 (July 10, 1997), Subject: Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Suits As A Condition of Employment.

The degree to which agency decisions will be given deference may be influenced by the decision in a case currently pending before the Supreme Court. In *Sutton v. United Air Lines, Inc.*, No. 97-1943, the EEOC issued interpretive rules stating that an individual is disabled and thus protected by the ADA even if his or her disability is corrected artificially. This determination was based on the EEOC’s interpretation of the ADA and not public policy set by Congress. Various arguments have been made to the Court that such “interpretive rules” should be given minimal deference by the federal courts.

VI. ARBITRATION, UNIONS AND THE NLRB

An area of developing interest to employers is whether they can protect themselves from unfair labor practice charges through the use of mandatory arbitration agreements. Given the Supreme Court’s statements in *Gilmer* and *Wright*, it is unlikely that any arbitration agreement that attempts to prohibit an employee from filing a charge would be upheld. However, simply because a charge is filed does not mean that the dispute can’t be arbitrated. The Board could agree to defer its handling of the charge pending the outcome of the arbitration. All things considered, there is no strong justification for not permitting such claims to be arbitrated.

Deferral of cases to arbitration and abiding by the resulting award is not a new concept for the Board. There is precedence for permitting unfair labor practices to be arbitrated and then reviewed by the Board. See *Collyer Insulated Wire Co.*, 192 NLRB No. 837 (1971) and *Spielberg Manufacturing Co.*, 112 NLRB No. 1080 (1955). As long as the arbitration meets certain procedural requirements, the Board has deferred to the arbitration award. See *W.R. Grace & Co.*, 179 NLRB 500, 72 LRRM 1456 (1969)(NLRB defers to arbitration award upholding discharge where award was not tainted by fraud, collusion, or unfairness or repugnant to the purposes of the Act and arbitrator properly applied NLRB’s standards.) Moreover, arbitration may well provide the parties with a quicker, more efficient resolution of these matters than proceeding through the NLRB’s administrative
scheme. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280, 115 S.Ct. 834, 843, 130 L.Ed.2d 753 (1995). (arbitration is usually cheaper, faster and more simplified than litigation.) Additionally, there is often delay in obtaining a decision from the Board. See NLRB v. Ancor Concepts, 166 F.3d 55 (2d Cir. 1999). Arbitration might provide a solution to that problem.

Nor is the Board’s professed expertise in this area a justification for refusing to defer these claims to arbitration. The composition of the Board often changes. For example, in the Ancor Concepts case, the General Counsel acknowledged that eight members of the Board had at various time attempted to decide the case and it was finally decided by a Board composed of three members, two of whom were recess appointments. The courts are vested with the authority to review the Board’s decisions in labor matters and have done so for years without difficulty. See Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 843 n.9,104 S.Ct. 2778 n.9 (1984)(the judiciary is the final authority on issues of statutory construction and must reject administrative constructions that are contrary to clear congressional intent.); Bob Evans Farms v. NLRB, 163 F.3d 1012, 1017 (1998)(the final word on the law -- including the statutory interpretation -- rests with the courts.)

In three recent cases, the issue has arisen as to whether mandatory arbitration violates the employee’s rights under Section 7 of the National Labor Relations Act. In three cases, the General Counsel or the Board have concluded that ADR agreements signed by employees were violative of Section 8(a)(1) and, in two of the three cases, Section 8(a)(4) of the Act as well.

In 1995, in Bentley’s Luggage Corp., Case No. 12-CA-16658, the Company discharged an employee for refusing to sign an agreement to submit employment-related disputes to the company’s grievance and arbitration procedure before taking legal action. The General Counsel concluded that the agreement was contrary to Section 10(a) of the act, which vests the exclusive jurisdiction over unfair labor practices with the Board. By requiring employees to sign the agreement as a condition of employment, the General Counsel argued that the employer was forcing employees to subordinate their right to file an unfair labor practice charge to the employer’s internal ADR process. The case settled prior to hearing.

In 1998, in Architectural Building Products, Inc., JD(SF)-79-98, Case No. 17-CA-19326, Administrative Law Judge Charno held that a handbook provision establishing a grievance and arbitration procedure as the exclusive method for the resolution of all employment disputes was unlawful under Section 8(a)(1) and Section
8(a)(4) of the Act. The company’s grievance and arbitration procedure also provided that employees were subject to fees and costs incurred by the employer in certain circumstances. If an employee did not make a claim within five days then the employee was held to have waived his rights under the ADR procedure and to any other forum. No exceptions were taken to this decision.

In the third case, Exceptional Professional, Inc. d/b/a EPI Construction, JD(SF)-77-88, Case No. 17-CA-19272, et al., Administrative Law Judge Cracraft held that a mandatory grievance and arbitration provision in an employment application violated Section 8(a)(1) of the Act. Although this arbitration provision allowed employees the option to file a charge with the NLRB or other agency or to use the company’s grievance and arbitration procedure, the employee was subject to sanctions in the form of “reasonable” costs, expenses and attorneys fees” for improper resort to a court or agency in lieu of using the company’s voluntary procedure. As of June 17, 1999, the case is still pending before the Board and no decision had been issued.

Given these decisions, it is unclear whether the Board will agree to defer the handling of charges pending the outcome of the arbitration.

VII. CONCLUSION

The use of mandatory arbitration agreements can be an effective tool to assist employers in resolving disputes with their employees. These agreements can also be useful to the employee because they frequently provide a faster, more simplified method of resolving claims. However, in order for the system of alternative dispute resolution to work, employers must not overreach and attempt to curtail all of their individual employees’ rights and remedies or they may find that the “holy grail” they think they have clasped turns into a handful of dust.
Checklist for Compulsory Arbitration Agreements

The following are suggestions for developing a Pre-Dispute Resolution or Arbitration Agreement:

1. Have a written agreement.
2. Make the agreement part of the application process.
3. Have the agreement signed and dated by applicants for employment.
4. Condition the individual’s ability to be considered for employment on signing the agreement.
5. If the agreement is being implemented for current employees, condition their continued employment on signing the agreement.
6. Inform the employee that he/she is waiving his/her right to a trial by jury.
7. State that a jury trial is a thing of value.
8. Specify the scope of the agreement, what disputes are covered.
9. State which arbitration rules will govern the agreement (example FAA, AAA, etc.). Have a copy of the rules available if the employees want to review them.
10. Allow the applicant/employee the opportunity to consult with an attorney prior to signing.