# ALTERNATIVE DISPUTE RESOLUTION

## Table of Contents

I. ALTERNATIVE DISPUTE RESOLUTION (ADR) ........................................... 727  
   A. Conciliatory Methods ........................................................................... 727  
   B. Adjudicatory Procedures ..................................................................... 728  

II. ENFORCEABILITY OF MANDATORY ARBITRATION CLAUSES IN EMPLOYMENT .............................................................................................................. 728  
   A. Relevant Legislation ............................................................................. 728  
   B. Federal Arbitration Act (FAA) ............................................................. 729  
   C. The *Circuit City* Decision ................................................................. 730  
   D. FAA Applicable to Contracts Governed by the Interstate Commerce Clause ................................................................. 730  
   E. The *Gilmer* Decision and Arbitration of Federal Statutory Rights ................................................................. 731  
   F. Judicial Application and Extension of *Gilmer* ..................................... 732  
   H. Requirements for an Enforceable and Valid Agreement/"Gateway Matters" and the Unconscionability Argument ......................................................... 740  
   I. Due Process Protocol ........................................................................... 747  
   J. Waiver of Arbitration ........................................................................... 747  
   K. Judicial Review of Arbitration Award .................................................. 748  
   L. Alternative Appeals through the American Arbitration Association Rules ................................................................. 752  

III. MEDIATION ............................................................................................ 752  
   A. Primary Reasons for Management to Establish a Mediation Program ................................................................. 753  
   B. Nature of the Process ........................................................................... 753  
   C. Types of Grievances Appropriate for Mediation ......................................... 753  
   D. Process ................................................................................................... 753  
   E. Strengths of the Process ....................................................................... 754  
   F. Weaknesses of the Process .................................................................... 754  

IV. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) AND ADR ................................................................. 754  
   A. Formal Conciliation .............................................................................. 754  
   B. National Mediation Program ................................................................ 754  
   C. EEOC Position Regarding Mandatory Arbitration of Employment Disputes ................................................................. 755  

V. ISSUES ARISING UNDER THE RAILWAY LABOR ACT (RLA) ................................................................................................. 755  
   A. Mandatory Arbitration Agreements Not a Mandatory Subject of Bargaining Under the RLA ................................................................. 755  
   B. Court Jurisdiction Over Minor Disputes Under the RLA ............................... 755
I. ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR has traditionally offered several advantages to parties over traditional litigation. The parties may avoid substantial discovery expenses as well as attorney fees and costs associated with preparing and arguing pretrial motions, preparing witnesses and evidence, conducting the trial itself, and being subject to lengthy appeals. The parties also have flexibility in setting the time and place of ADR procedures and generally have some flexibility in the selection of available neutral mediators or arbitrators. In addition, an internal complaint procedure can be helpful in creating a feeling of job security, resulting in greater productivity and lower employee turnover.

ADR methods may be divided into two categories: conciliatory and adjudicative. Conciliatory methods are voluntary and the third party, such as a facilitator or mediator, does not have the authority to issue a decision that is binding on the parties. Rather, the parties come to voluntary agreement or fail to agree. In adjudicative processes, like arbitration, a third party may impose a final, binding solution on the parties. Some companies have implemented ADR procedures that use conciliatory methods such as mediation and peer review before getting to the point of arbitration. One large retailer has found such a program so successful in resolving problems that over a course of five years the company has taken outside litigation of employment claims to zero. See Mandatory Arbitration Ruling Failed to Create Expected Shift for Many Employers, Workers, Daily Lab. Rep. (BNA), May 3, 2007, p. C-1. Additionally, courts may utilize ADR as part of the litigation process, in order to encourage pretrial resolution of cases.

A. Conciliatory Methods. These processes are voluntary and may include a third person, such as a facilitator or mediator, whose role is to be neutral and who does not have the authority to issue a decision that is binding on the parties.

1. Conciliation. This is an informal method involving a third party, the conciliator, who encourages the parties to negotiate. The conciliator may improve communication by acting as a go-between, especially in cases in which the parties are hostile, making face-to-face negotiating difficult. Conciliators do not direct the negotiations, nor do they offer case assessment or settlement suggestions.

2. Facilitation. This method involves a third party, a facilitator, who may direct the negotiations and may intervene to keep the parties on track. Generally, facilitators do not offer case assessment or settlement suggestions.

3. Mediation. A third party, known as a mediator, takes an active role in the negotiations. Mediators generally do have the authority to manage the dialogue and may aid negotiations by pointing out strengths and weaknesses of each party’s case. Generally, mediators meet with the parties jointly at the beginning of the process and then may meet separately with each party. The mediator generally assists the parties to reach an agreement and helps them finalize a written agreement. In addition, an evaluative mediator may propose settlement options.

4. Open Door. This is an internal process allowing employees to take an issue or dispute upward through the levels of authority within the company until the issue or dispute is resolved.

5. Ombuds Program. An ombuds program allows employees to speak confidentially about their complaints to a company-employed “referee.” The ombuds may advise the employee regarding the dispute or may act as a go-between by seeking a resolution of the issue between the employee and the organization.
B. Adjudicatory Procedures.

1. Arbitration. This method is common in labor (National Labor Relations Board (NLRB) and Railway Labor Act (RLA)) as well as employment disputes under the Federal Arbitration Act (FAA). It involves an arbitrator(s), a third party, who generally issues a binding decision after hearing arguments and evidence presented by the parties. The parties can select an administered process through an arbitration provider (such as Federal Mediation and Conciliation Services (FMCS) or the American Arbitration Association (AAA)) or alternatively set the procedural rules, select the arbitrator, and define the scope of the arbitrator’s authority. A body of case law governing arbitration in labor agreements has developed over the years. In other employment areas, submission to arbitration is sometimes voluntary; however, mandatory arbitration clauses in employment contracts require the parties to arbitrate an employment-related dispute and usually preclude them from going to court.

2. Mini Trial. In this method a panel composed of the parties’ representatives reviews evidence and hears arguments. The panel then negotiates based upon its impressions from the hearing. Generally, a third party also participates in and manages the hearing, assesses the parties' cases, and mediates the settlement discussion. In the absence of a voluntary settlement, the parties retain their original options for dispute resolution, including litigation.

3. Peer Review. This method provides employees with a way to take complaints to a panel of their peers, including both managers and nonmanagement employees, often with a majority of the panel being nonmanagement employees. The process typically only applies to management decisions involving issues of discipline. Employees who have attempted to resolve a disagreement with management and still perceive that a valid disagreement exists may ask a peer review panel to review the decision.

II. ENFORCEABILITY OF MANDATORY ARBITRATION CLAUSES IN EMPLOYMENT

A. Relevant Legislation.

• The American Recovery and Reinvestment Act (ARRA) (signed February 2009): Employers cannot require employees to enter into an agreement to waive (including a predispute arbitration agreement) the rights and remedies of the ARRA’s whistleblower provision; applies to nonfederal employees who receive ARRA funds; does not include arbitration provisions in a collective bargaining agreement (CBA).

• The Department of Defense Appropriations Act of 2010 (DOD Act) (enacted on December 19, 2009): Restricts Department of Defense (DOD) contractors with qualifying contracts from requiring their employees, as a condition of employment, to arbitrate claims brought under Title VII of the 1964 Civil Rights Act as well as "related to or arising out of sexual assault or harassment." The DOD Act prevents any money appropriated in the Act from being paid to a federal contractor with a DOD contract worth more than $1 million and awarded more than 60 days after the Act’s effective date, unless that contractor agrees not to: (1) enter into agreements as a condition of employment with its employees or independent contractors requiring arbitration of Title VII claims and any sexual assault or harassment-related tort; or (2) enforce any existing agreement with an employee or independent contractor requiring arbitration of Title VII claims and any sexual assault or harassment-related torts. The Act specifically lists sexual assault and harassment-related torts to include assault and battery, intentional infliction of emotional distress, false imprisonment, and negligent hiring, supervision, or retention. The DOD Act also requires a prime contractor with a qualifying DOD contract awarded more than 180 days after December 19, 2009, to certify that it requires each subcontractor to that contract with a subcontract worth more than $1 million to agree not to enter into any new agreement or enforce any existing agreement with its employees or independent contractors to arbitrate Title VII and sexual assault or harassment-related torts. While the contractor provision applies to all
employees of the contractor, the subcontractor provision only applies to agreements with individuals performing work related to the qualifying subcontract. On December 8, 2010, the DOD issued a final rule implementing the DOD Act. The final rule is located at 48 CFR Parts 222 and 252. On June 28, 2011, the DOD extended this rule to fiscal year 2011 and subsequent fiscal years. See (76 Fed. Reg. 38,047). The DOD has also issued a rule amending the Defense Federal Acquisition Regulation Supplement to ensure contractor employees accompanying U.S. Armed Forces are made aware of the department’s definition of sexual assault (76 Fed. Reg. 38,051).

• The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) (signed July 21, 2010). The Dodd-Frank Act amended the Securities Exchange Act to prohibit the use of predispute arbitration agreements for whistleblower claims brought under the Sarbanes Oxley Act (SOX) as amended by the Dodd-Frank Act. The amendment provides that the rights granted under SOX “may not be waived by any agreement, policy, form, or condition of employment, including by a predispute arbitration agreement” and also contains a separate provision stating that “[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under [the whistleblower provisions of SOX].” Additionally, § 748 of the Dodd-Frank Act creates a whistleblower cause of action under the Commodity Exchange Act and provides that these rights and remedies “may not be waived by any agreement, policy, form, or condition of employment, including by a predispute arbitration agreement.” This section also provides that “[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.” In Santoro v. Accenture Fed. Servs., LLC, 748 F.3d 217 (4th Cir. 2014), an employee sought to apply the Dodd-Frank restrictions on arbitration to prevent enforcement of an arbitration agreement involving an Age Discrimination in Employment Act (ADEA) claim. The court held that Dodd-Frank restricts arbitration only of whistleblower claims and not employment claims under other federal employment laws.

• Fair Pay and Safe Workplaces Executive Order. Although not legislation, the President recently signed an Executive Order impacting federal contractors’ ability to implement certain arbitration agreements. On July 31, 2014, President Obama signed the Fair Pay and Safe Workplaces Executive Order, which prohibits contractors and subcontractors with contracts exceeding $1 million from requiring employees to arbitrate their Title VII or sexual assault or harassment claims. This requirement also applies to subcontracts (with the same $1 million threshold requirement). It will not apply to parties covered by CBAs or other valid arbitration contracts entered into before the contractor or subcontractor bid on the covered federal contract, unless the contractor or subcontractor is permitted to change the terms of the contract with the employee or independent contractor, or when the contract is renegotiated or replaced. It also will not apply to contracts or subcontracts for the acquisition of commercial items or commercially available off-the-shelf items. Some groups are mounting a challenge to the enforcement of this Order.

• Arbitration Fairness Act of 2013. The AFA would amend the Federal Arbitration Act (FAA) by adding a new section invalidating consumer, employment and civil rights predispute arbitration agreements. Legislation seeking to make similar amendments to the FAA has been proposed several times over the past decade but has been unsuccessful. Proponents of the AFA claim it restores the original intent of the FAA by clarifying the scope of its application and restores the rights of workers and consumers to seek justice in court. They also claim it protects the integrity of the Civil Rights Act, Equal Pay, the ADA and the ADEA, among others.

B. FAA. Congress passed the United States Arbitration Act (the Federal Arbitration Act or FAA) in 1925 to reverse the longstanding environment of judicial hostility towards enforcement of arbitration agreements and to place them on the same footing as other contracts. 9 U.S.C.A. § 1, et seq.
See also Vaden v. Discover Bank, 556 U.S. 49 (2009) (nonemployment case holding that a federal court may “look through” a § 4 petition to the underlying controversy between the parties determine whether the federal court has jurisdiction to decide a motion to compel arbitration); Marmet Health Care Center v. Brown, 132 S. Ct. 1201 (2012) (nonemployment case; overruling West Virginia Supreme Court’s decision that FAA did not pre-empt state public policy; finding the state court’s interpretation of the FAA “incorrect and inconsistent with clear instruction in the precedents”; reiterating the FAA’s pre-emption of all arbitration agreements governed by the statute).

While the statute was passed in order to deal with commercial arbitration and prior to enactment of employment rights legislation, the FAA expresses a liberal federal policy of enforcement of arbitration agreements on the same bases as other contracts. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983). For a number of years, however, the federal circuit courts declined to apply the FAA to nonunion employment matters based on the language in § 1, which excluded “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. … ” As litigation on statutory employment rights has grown both under CBAs and nonunion arbitration agreements, an increasing number of courts have applied the FAA to compel arbitration as an alternative means to litigation in the resolution of these employment disputes. In 2001, the U.S. Supreme Court resolved a question of the FAA’s applicability to employment agreements in favor of the federal policy applying a liberal policy enforcing employment arbitration agreements. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001). Additionally, see the discussion of the Supreme Court decision in Gilmer, below.

C. The Circuit City Decision. In Circuit City, 532 U.S. 105 (2001), the Court held that the language in the FAA excluding “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” does not exempt employment-related disputes, where those disputes involve common-law issues. Prior to the U.S. Supreme Court’s decision in Circuit City, all of the federal appeals courts except one (the Ninth Circuit) interpreted this exemption to be limited to transportation workers, notwithstanding the broad reference to “any other class of workers.” The Ninth Circuit had relied on the “any other class of workers” language to hold that essentially all employment contracts are excluded from the coverage of the FAA, thus finding most arbitration agreements covering employment-related disputes to be unenforceable.

In holding that employment-related disputes are not exempt from the FAA’s coverage, the U.S. Supreme Court noted that there are “real benefits” to the enforcement of arbitration agreements. The Court noted that arbitration provisions allow the parties to avoid the costs of litigation, which is particularly helpful in employment-related disputes, where the amount at issue may be relatively small. The Court also noted that arbitration can help avoid some procedural problems, such as difficult choice-of-law questions that often arise in employment-related disputes. Additionally, the Court reiterated its statement in Gilmer, discussed below, that “by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only limits their resolution in an arbitral, rather than a judicial, forum.” (emphasis supplied).

Despite its reference to Gilmer, the Court in Circuit City did not expressly address the issue of whether claims based on federal anti-discrimination laws (“statutory rights”), such as Title VII, are subject to mandatory arbitration, because Circuit City involved only state law claims. However, Gilmer provides additional legal grounds for the position that an employer can make employment contingent on the employee agreeing to resolve all employment-related disputes, including those arising from federal anti-discrimination laws, through mandatory arbitration. Thus, the courts will enforce mandatory arbitration of claims where the parties have agreed to submit such claims to arbitration, Congress has not, in the legislation, evidenced an intention to preclude a waiver of judicial remedies for the statutory right(s) involved, and the arbitration process provides the employee with the relief authorized by the statute.

D. FAA Applicable to Contracts Governed by the Interstate Commerce Clause. In Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003) (a nonemployment case), the U.S. Supreme Court clari-
fied that the FAA has broad application under the Commerce Clause. See also Allied–Bruce Termi-
nix Companies, Inc. v. Dobson, 513 U.S. 265 (1995) (Section 2 should be read broadly to extent of
the limits of Congress' Commerce Clause Power).

To be covered by the FAA, an agreement must be a “contract evidencing a transaction involving
commerce.” In Alafabco, the U.S. Supreme Court held that state courts must examine the overall
economic activity of the businesses involved, not merely the specific contract between the parties,
in determining whether an arbitration agreement is subject to the FAA.

The Court held that the FAA applies where the economic activity in question would represent “a
general practice subject to federal control.” As a result of this decision, state courts should now
look at a company’s overall business activities in making a determination as to whether a disputed
arbitration agreement is enforceable under the FAA. See Onvoy, Inc. v. SHAL, LLC, 669 N.W.2d 344
(Minn. 2003) (holding that Minnesota courts must apply the FAA to transactions that affect interstate
commerce including presumption favoring arbitration of disputes). But see Ark. Diagnostic Ctr. P.A. v.
Tahiri, 370 Ark. 157 (Ark. 2007) (purchase of supplies from out-of-state vendors, the receipt of pay-
mements from out-of-state insurance companies, the treatment of three out-of-state patients, and payment
for physician travel for out-of-state conferences were not sufficient to show that the employer
engaged in interstate business activities; the employer was a local clinic with local doctors providing
services to local patients. Additionally, the employer failed to show that the employee's job facilitated
the alleged interstate business activities.).

E. The Gilmer Decision and Arbitration of Federal Statutory Rights. The U.S. Supreme Court
has held that federal statutory rights claims can be appropriately resolved through arbitration and
that arbitration agreements covering such claims will be enforced, Rodriguez de Quijas v. Shear-
son/American Express, Inc., 490 U.S. 477 (1989) (securities law case), so long as the prospective
litigant may vindicate his or her statutory cause of action in the arbitral forum. See Green Tree
Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), and Gilmer v. Interstate/Johnson Lane Corp., 500
U.S. 20 (1991)).

1. Gilmer: The Court’s Holding and Analysis. In Gilmer, The U.S. Supreme Court held that an
ADEA claim was subject to arbitration pursuant to an arbitration clause contained in a stock ex-
change registration agreement purporting to regulate the employment relationship. The employ-
ee signed an application for securities registration with the New York Stock Exchange in which
he agreed to arbitrate under the arbitration rules of the New York Stock Exchange any disputes
between himself and his employer arising out of his employment or its termination. After his em-
ployment was terminated six years later, he sued, claiming that his discharge violated the ADEA.

Enforcing the arbitration provision, the Court stated: “having made the bargain to arbitrate, the
party should be held to it unless Congress itself has evinced an intention to preclude a waiver
of judicial remedies for the statutory rights at issue.” Gilmer, 500 U.S. at 26 (emphasis supplied).
The Court relied, in part, on a trilogy of U.S. Supreme Court cases from the late 1980's: Rodri-
guez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (arbitration agree-
ments between parties of unequal bargaining power are enforceable); Shearson/American Ex-
press, Inc. v. McMahon, 482 U.S. 220 (1987) (judicial review of arbitration award is limited but
sufficient to ensure that arbitrators comply with the requirements of the statute at issue); and
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (Congress did not
intend that ADEA preclude arbitration or other nonjudicial resolution of claims). In these cases,
the Court endorsed arbitration as an effective and efficient means of dispute resolution in em-
ployment cases.

The Court emphasized that the FAA establishes a federal policy favoring arbitration that “is at
bottom a policy guaranteeing the enforcement of private contractual arrangements.” Mitsubishi
Motors Corp., 473 U.S. at 625. See also Armijo v. Prudential Ins. Co. of Am., 72 F.3d 793 (10th
Cir. 1995) (directing three insurance agents to arbitrate claims of race, sex, and national origin
discrimination and holding that any ambiguity in their securities registration forms should be re-
solved in favor of arbitration); Circuit City Stores, Inc., 532 U.S. at 122-23 (a “party does not forgo
the substantive rights afforded by the statute; it only submits to their resolution in an arbitral,
rather than a judicial, forum”). The Court also stated that the party resisting arbitration bears the
burden of proving that Congress intended to preclude arbitration of the statutory claims at issue
or that the claims at issue are unsuitable for arbitration. Gilmer, 500 U.S. at 26.

2. CBAs Distinguished. In Gilmer, the U.S. Supreme Court examined legislative history and
concluded that nothing in the ADEA suggests a congressional intent to preclude a waiver of
judicial remedies for statutory rights in the arbitration of age discrimination claims. The Court
distinguished Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), and similar decisions as
arising out of CBA contract-based claims and not under the FAA. In Gardner-Denver, the Court
held that an arbitration procedure in a CBA, which related to contract-based claims, did not bar
separate Title VII, Fair Labor Standards Act (FLSA), or § 1983 claims. In Gilmer, the Court noted
that Gardner-Denver and other similar cases were different because they involved arbitration of
collectively bargained rights with a limitation on the arbitrator to focus only on such CBA rights
and remedies. The Court concluded the arbitration agreement did not involve an agreement to
arbitrate statutory claims or provide to the arbitrators authority to resolve statutory claims. How-
ever, the U.S. Supreme Court also expressed its support for the arbitration process of statutory
claims, because of the benefits of “simplicity, informality, and expedition.” See the discussion
below for more information regarding CBA arbitration of statutory rights.

F. Judicial Application and Extension of Gilmer.

247 (2009), the Supreme Court held that an arbitration provision in a CBA, which clearly and
unmistakably required union members to arbitrate ADEA claims, is enforceable as a matter of
federal law. The Court’s five to four decision reiterates its prior holding in Gilmer v. Interstate/
Johnson Lane Corp. that nothing in the ADEA precludes arbitration of age discrimination claims.
The Court rejected arguments that Gilmer does not apply in the collective bargaining context,
holding that nothing in the law suggests a distinction between the status of arbitration agree-
ments signed by an individual employee and those agreed to by a union representative. “This
Court has required only that an agreement to arbitrate statutory anti-discrimination claims be
‘explicitly stated’ in the collective-bargaining agreement.” Id. at 258.

Addressing Justice Souter’s dissenting opinion, which argued that discrimination claims such as
those under Title VII and the ADEA are different from the rights guaranteed under a CBA, the
majority opinion emphasized that agreeing to arbitrate Title VII and ADEA claims is not the same
as agreeing to waive the substantive rights guaranteed by those laws. “Thus … the voluntary
decision to collectively bargain for arbitration does not deny those statutory anti-discrimination
rights the full protection they are due.” Id. at 256, fn.5.

The Court further held that the CBA’s arbitration provision is fully enforceable under the Gardner-
Denver line of cases. The Court held that Gardner-Denver and the line of cases following it do
not control the outcome of this case because, unlike those cases, the CBA involved in 14 Penn
Plaza expressly covered both statutory and contractual discrimination claims.

A federal trial court refused to apply an arbitration provision in a collectively bargained agree-
ment to an employee’s Americans with Disabilities Act (ADA) claims against his employer in Ko-
arbitration under broad language in the bargaining agreement with the Teamsters. The court held
that the grievance and arbitration provisions were not “clear and unmistakable” waivers of statu-
tory protections because the agreement did not mention “discrimination” and the broad language
could not constitute a waiver of the employee’s right to statutory remedies. The court refused to
rely on Penn Plaza because the arbitration provision in Kovac did not include clear and unmis-
takable language to require employee-union members to arbitrate statutory claims. Instead, the

2. **Title VII Claims.** Despite EEOC opposition to mandatory arbitration clauses (see EEOC Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997), http://www.eeoc.gov/policy/docs/mandarb.html, by 2003 all but one of the federal appeals courts had held that mandatory arbitration agreements of Title VII claims could be enforced. See *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992), and other circuit court cases cited therein; *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 310 (6th Cir. 1991). In 2003, in *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003), the full Ninth Circuit explicitly overruled its 1998 decision in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), in which the court had held that the 1991 Civil Rights Act prohibits mandatory arbitration of Title VII claims. The Luce, Forward decision brings the Ninth Circuit in line with other federal appeals courts. More importantly, the decision contains an in-depth analysis of the 1991 Civil Rights Act, which illustrates that mandatory arbitration is consistent with the purposes of the 1991 Civil Rights Act.

a. **Discharge for Refusal to Sign Mandatory Arbitration Agreement is Not Cause for Retaliation Claim Under Title VII.** In *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307 (11th Cir. 2002), the Eleventh Circuit held that Title VII does not prohibit mandatory arbitration of claims and found that an employer’s termination of employees for failure to sign an arbitration agreement did not constitute retaliation under Title VII.

b. **Title VII Arbitration Award Basis for Dismissing Retaliation Claim.** The Second Circuit dismissed a Title VII claim of retaliation and discriminatory discharge where an independent arbitrator had previously found insufficient evidence to support the discrimination claims. See *Collins v. New York City Transit Auth.*, 305 F.3d 113 (2d Cir. 2002). In Collins, the plaintiff had gone through all the grievance steps and binding arbitration and the Board, in a 14-page opinion, upheld the discharge.

c. **EEOC Right to Bring Independent Action.** The U.S. Supreme Court in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), held that an agreement to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief such as back pay, reinstatement and damages. While this case contained ADA claims, the Court’s decision indicates that an arbitration decision will not foreclose the power of the EEOC to bring independent actions to enforce statutory protections. See also *EEOC v. SWMW Mgmt.*, 2009 WL 1097543 (D. Ariz. April 21, 2009) (denying employers’ motion to compel arbitration of former employees’ claims when none of the individual employees were parties to the action – EEOC was the only plaintiff; additionally, pursuant to Waffle House, the court “may not stay the proceedings and could not order a stay even if some of the former employees had intervened.”).

The Eighth Circuit has held that the U.S. Supreme Court’s decision in Waffle House does not preclude arbitration of an individual employee’s Title VII claims. See *EEOC v. Woodmen of the World Life Ins. Soc’y*, 479 F.3d 561 (8th Cir. 2007). In Woodmen, the court held that neither Title VII nor Waffle House precluded an employee from arbitrating her dispute with her employer. Additionally, since the employee signed an agreement to arbitrate all employment-related disputes, the court held that the FAA required arbitration of the employee’s claims. Thus, the court ordered that the employee’s cross-claims against the employer she filed as an intervenor in the EEOC’s enforcement action be stayed and those claims submitted to arbitration. *But see EEOC v. Physician Servs.*, P.S.C., 425 F. Supp. 2d 859, 861-62 (E.D. Ky. 2006) (relying on statement by the U.S. Supreme Court in Waffle House that “an employee has no independent cause of action” when the EEOC has filed an enforcement action to relieve an employee of her agreement to arbitrate Title VII disputes).

Cir. 1998), the court stated that far from evidencing an intention to preclude arbitration, the statute is interpreted to favor arbitration agreements. See also McWilliams v. Logicom, Inc., 143 F.3d 573 (10th Cir. 1998) (terminated employee must arbitrate ADA claims as required by provisions of employment application). Cf. Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998) (ADA claims are not subject to arbitration under a CBA where the grievance and arbitration provisions in the CBA did not include explicit reference to statutory rights under ADA).

4. The Employment Retirement Income Security Act of 1974 (ERISA). Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, 7 F.3d 1110 (3d Cir. 1993) (claims for violations are subject to mandatory arbitration, overruling earlier decision in Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985)); Simon v. Pfizer Inc., 398 F.3d 765 (6th Cir. 2005) (not deciding issue, but noting that the majority of courts considering the issue have held that disputes arising under ERISA are subject to arbitration under the FAA) (citing cases). But see Bond v. Twin Cities Carpenters Pension Fund, 307 F.3d 704, (8th Cir. 2002) (provision in a pension plan requiring employees to split the costs of mandatory arbitration violates ERISA).

5. ADEA. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Weeks v. Harden Mfg. Corp., 291 F.3d 1307 (11th Cir. 2002); Williams v. CIGNA Fin. Advisors, 56 F.3d 656, 660 (5th Cir. Tex. 1995) (“the OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum”).

6. Polygraphs. Saari v. Smith Barney, Harris Upham & Co., Inc., 968 F.2d 877 (9th Cir. 1992) (Employee Polygraph Protection Act (EPPA) does not compel judicial resolution of an employment dispute when the employee has signed an agreement to arbitrate.).

7. Public Policy/Wrongful Termination. McNulty v. Prudential-Bache Sec., Inc., 871 F. Supp. 567 (E.D.N.Y. 1994) (wrongful discharge claim of employee who was terminated, in violation of Juror’s Act, for serving on a grand jury was subject to arbitration).

8. Extension to All Corporate Employees. Ahing v. Lehman Bros., 2000 WL 460443 (S.D.N.Y. Apr. 20, 2000) (reaffirming earlier decision that secretary’s discrimination claim was subject to arbitration regardless of the fact that she was not a securities broker; affirming arbitration panel’s decision in favor of employer).

9. Family Medical Leave Act (FMLA). See Butler Mfg. Co. v. United Steelworkers, 336 F.3d 629 (7th Cir. 2003) (arbitrator did not exceed his authority to interpret CBA by relying on the FMLA when he reinstated the employee who was discharged for excessive absenteeism; noting that the U.S. Supreme Court has made it clear that arbitrators are capable of handling statutory claims and that parties can make effective agreements that commit such claims to an arbitral process. The court also held that a determination that parties had to arbitrate labor disputes but litigate statutory disputes would be a wasteful duplication of proceedings at best and an undermining of arbitral tribunals at worst.); O’Neil v. Hilton Head Hosp., 115 F.3d 272 (4th Cir. 1997) (arbitration policy, contained in employee handbook, required employee to arbitrate statutory FMLA claim).

10. Noncompete Agreement. In Saga Communications of New England, Inc. v. Voornas, 756 A.2d 954 (Maine 2000), the court held that a former employer could not arbitrate a claim for enforcement of a noncompete agreement because the employer tried to remedy the situation in court without timely seeking arbitration. The court held that the strong federal policy in favor of arbitration was not intended to provide litigants with successive opportunities to prevail by continually revisiting the same issue in different forums, particularly where running away from unfavorable results in court.

11. FLSA. FLSA claims can be properly resolved through arbitration and an employee can be required to arbitrate such claims based upon a mandatory arbitration agreement contained in an employment application. See Owen v. Bristol Care, Inc., 702 F.3d 1050, 1052 (8th Cir. 2013) (the plaintiff identified “nothing in either the text or legislative history of the FLSA that indicates a congressional intent to bar employees from agreeing to arbitrate FLSA claims individually, nor is
there an ‘inherent conflict’ between the FLSA and the FAA. In short, the FLSA contains no ‘con-
trary congressional command’ as required to override the FAA.”); Bailey v. Ameriquest Mortgage
Co., 346 F.3d 821 (8th Cir. 2003) (account executives’ overtime claims under FLSA were subject
to arbitration agreement but arbitrator had authority to enforce statutory rights in conflict with
contractual limitations and to sever unenforceable terms); Adkins v. Labor Ready, Inc., 303 F.3d
496 (4th Cir. 2002) (finding arbitration agreement enforceable even though the arbitration pro-
dure did not permit class action claims); Chapman v. Lehman Bros., Inc., 279 F. Supp. 2d 1286
(S.D. Fla. 2003) (holding that arbitration of collective FLSA action was required even though
National Association of Securities Dealers (NASD) rules prohibited arbitration of class actions).
However, in Billingsley v. Citi Trends, Inc., 560 F. App’x 914 (11th Cir. 2014), the Eleventh Circuit
refused to enforce arbitration agreements against FLSA collective action plaintiffs because the
agreements were entered into after the FLSA collective action was filed. In denying the motion
to compel arbitration, the district court held that the arbitration agreements were unconscionable
and that there was a record of abuse in obtaining the agreements. The Eleventh Circuit held that
the district court’s decision was within its authority to manage FLSA collective actions.

12. State Law Tort Claims. See the above discussion of the Circuit City decision. The Alabama
Supreme Court has held that an employee of an automobile dealership who signed an arbitration
agreement as a condition of employment was not required to arbitrate his tort claims against
the company owner because his employment did not have a substantial effect on interstate
U.S. 52 (2003). Alabama law prohibits enforcement of a precontroversy agreement to submit a
controversy to arbitration. The FAA, which requires enforcement of valid arbitration agreements,
pre-empts the state law only if “a contract containing arbitration provisions, or … a transaction
evidenced by such a contract, substantially affects interstate commerce,” according to Justice
Douglas Johnstone. He found it irrelevant that Bill Penney Motor Company’s buying and selling
of cars affects interstate commerce because those “contracts or transactions are distinct and
separate from Webb’s employment contract and the transaction it evidences.” Id. The court held
that the company failed to submit “any evidence that Webb’s employment or chores substantially,
or even detectably, affected any of the contracts or transactions between [the dealership] and
persons or entities outside Alabama.” Id.

13. Sarbanes-Oxley. As discussed above, the Dodd-Frank Act amended SOX to prohibit the
use of predispute arbitration agreements for whistleblower claims brought under the SOX.


a. Parties Cannot be Compelled to Submit to Class Arbitration Where There is No
Supreme Court held that parties who had never agreed on the issue of whether to allow class
arbitration under the arbitration agreement between them – and whose arbitration agree-
ment made no mention whatsoever of class arbitration – could not be required to submit to
class arbitration under the agreement. In so holding, the Court ruled, “A party may not be
compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a
contractual basis for concluding that the party agreed to do so.” In this decision, the Court
clarified that its earlier decision in Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003),
did not establish the rule to be applied in deciding whether class arbitration is permitted but
instead left that question open. The basic principles the Court relied on in reaching its deci-
sion in Stolt-Nielsen were that the purpose of the FAA is to ensure that private agreements
to arbitrate are enforced according to their terms; arbitrators derive their powers from the par-
ties’ agreement to forgo the legal process and submit their disputes to private dispute resolu-
tion; parties have the freedom to structure their agreements to limit the issues that must be
arbitrated, to agree on rules governing the arbitration proceeding, to choose who will resolve
particular disputes, and to specify with whom they choose to arbitrate their disputes; and a
party who agrees through an arbitration agreement to engage in classic, bilateral arbitration
– arbitration between two parties – likely does so with the intent to increase efficiency and reduce costs and administrative burdens, and class arbitration precludes such a party from effectuating that intent due to the fact that class arbitration more closely resembles complex litigation than bilateral arbitration.

On the basis of these guiding principles, the Court held that the decision of the arbitration panel – which ruled that the arbitration agreement allowed the parties to engage in class arbitration notwithstanding both parties' express statements that they had reached no agreement on the issue – was “fundamentally at war with the foundational ... principle that arbitration is a matter of consent.” Accordingly, the Court held that Stolt-Nielsen could not be required to submit to class arbitration under the terms of the arbitration agreement. See also Kinecta Alternative Financial Solutions v. Superior Court, 205 Cal. App. 4th 506, 140 Cal. Rptr. 3d 347 (Ct. App. 2012), as modified May 1, 2012 (class wide arbitration precluded where the arbitration agreement only identified two parties to the agreement and made no reference to other employees).

b. Class Action Waivers in Arbitration Agreements Contract Enforceable. In AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (5-4), the U.S. Supreme Court held that an arbitration agreement in a consumer contract that prohibited class wide arbitration was enforceable. The Concepcion decision is a strong indication that an arbitration agreement prohibiting class wide arbitration in the employment context would be enforceable. This case involved an arbitration agreement incorporated in a contract for the sale of cellular telephones. The agreement specified that all claims be brought in the parties’ “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.” Subsequently, the plaintiffs filed suit against AT&T in federal court over a dispute regarding their cell phone contract. AT&T moved to compel arbitration pursuant to the terms of the contract. The lower courts refused to enforce the arbitration agreement based on a California Supreme Court decision (Discover Bank v. Superior Court, 113 P.3d 1100 (2005)), which held that class action waivers in many consumer cases are unconscionable. The U.S. Supreme Court reversed, holding that requiring class wide arbitration would interfere with the fundamental attributes of arbitration. The Court noted that the “principle purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.” To that end, parties may agree to limit the issues subject to arbitration, arbitrate according to specific rules, and limit with whom a party will arbitrate its disputes. By applying the Discover Bank rule, the California courts interfere with the principle purpose of arbitration. The Court went on discuss how class arbitration differs from bilateral arbitration by: (1) undermining the efficiency of arbitration by making arbitration slower and more expensive; (2) requiring procedural formality; and (3) increasing the risks to the defendant, because mistakes are more frequent in arbitration, and the effect of any mistake would be magnified with class arbitration.

The Supreme Court again upheld the validity of a class action waiver in an arbitration agreement in American Express Co. v. Italian Colors Restaurants, 133 S. Ct. 2304 (2013). In American Express, the Court held that the FAA does not permit courts to invalidate such a contractual waiver even when it is not financially feasible for an individual to pursue a particular federal statutory claim (given that the cost of doing so greatly exceeds the potential recovery). In this case, a group of merchants filed a class action antitrust lawsuit against American Express. The company sought to require the merchants to arbitrate their claims individually, in accordance with the class action waiver provision of the arbitration agreement in its contracts with the merchants. The merchants objected, claiming the cost of individually arbitrating their claims, including the expense of expert witnesses, would far exceed any individual recovery. Thus, the merchants argued that they could not effectively vindicate their statutory rights through individual arbitration.

In a majority opinion, the Court rejected the merchants’ arguments. The Court noted that Congress enacted the FAA in 1925 to blunt judicial hostility to private arbitration and to allow
contracting parties to choose arbitration as a means for speedy resolution of their disputes. In that light, the Court rejected some lower courts’ efforts to limit enforceability of arbitration agreements through the broad use of an “effective vindication” analysis, i.e., rejecting arbitration agreements that in the courts’ view fail effectively to vindicate parties’ statutory rights. As for class action waivers, the Court noted it has already rejected the notion that class actions are necessary in arbitration to avoid claims “that might slip through the legal system.”

Reversing the Second Circuit, the Court held the fact that pursuit of an individual statutory claim in arbitration might be costly did not mean that arbitration eliminated the right to pursue such a remedy. The Court recognized the possibility of arbitration provisions that would fail for that reason, such as, for example, a contract provision forbidding the assertion of certain statutory rights, or imposition of filing fees so high as to make access to the forum impracticable. But again, the fact that arbitration of a particular claim might prove too expensive for an individual to pursue would not alone justify a court’s refusal to enforce the arbitration contract.

In *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir.), cert. denied, 134 S. Ct. 2886 (2014), the Eleventh Circuit, relying on *American Express* and *Concepcion*, held that an arbitration agreement that waives an employee’s ability to bring a collective action under the FLSA is enforceable under the FAA. The Eleventh Circuit found the agreements enforceable under the FAA, in light of the FAA’s “liberal federal policy favoring arbitration agreements.” *Id.* at 1329. The court explained that Supreme Court precedent requires courts to “rigorously enforce arbitration agreements according to their terms.” *Id.* at 1329-30. (quoting *American Express*). Further, the court noted that the “overarching purpose of the FAA … is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” *Id.* (quoting *Concepcion*). Thus, since there was no dispute that the plaintiffs’ FLSA claims fell within the scope of the arbitration agreements, the court held that “the FAA standing alone, requires enforcement of the Arbitration Agreements according to their terms, which, in this case, means individual, not collective, arbitration.” *Id.* The court also rejected the plaintiffs’ argument that the right to bring a collective action under the FLSA is a nonwaivable substantive right and that the FLSA has overridden the FAA’s requirement that collective action waivers in arbitration agreements be enforced. The court acknowledged that the FAA’s requirement that arbitration agreements be enforced according to their terms may be overridden by a “contrary congressional command.” *Id.* at 1331. However, citing the Fifth Circuit’s decision in *D.R. Horton, Inc. v. NLRB*, the court noted, “[i]n every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA.” *Id.* at 1332. After examining the statutory text of the FLSA, as well as its legislative history and purposes, and Supreme Court decisions addressing the enforceability of arbitration agreements, the Eleventh Circuit could discern “no contrary congressional command” that precluded the enforcement of the plaintiffs’ arbitration agreements and their collective action waivers. *Id.* at 1335-36. *See also Cruz v. Cingular Wireless*, 648 F.3d 1205 (11th Cir. 2011) (rejecting plaintiffs’ argument that Concepcion permits them to present evidence regarding whether the parties could vindicate their statutory rights in arbitration). In *Cruz*, the court held that the plaintiffs’ evidence “goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion* – namely, that the class action waiver will be exculpatory, because most of these small-value claims will go undetected and unprosecuted.” *See also Green v. SuperShuttle Int’l, Inc.*, 653 F.3d 766 (8th Cir. 2011) (holding that under *Concepcion*, the FAA pre-empted the plaintiffs’ state law challenges to class action waivers in their franchise agreements with the defendant).

c. California Supreme Court Overrules Gentry. Acknowledging the U.S. Supreme Court’s decision in *Concepcion* to be a game-changer, the California Supreme Court has held that the FAA pre-empts a state’s refusal to enforce an arbitration agreement that includes a class action waiver. The California Supreme Court’s decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), officially signals the demise of its earlier ruling in
Gentry v. Superior Court, 42 Cal. 4th 443 (Cal. 2007) which had invalidated class action waivers in employment arbitration contracts.

The court held that Gentry, which had found class action waivers in arbitration agreements to be unconscionable or against public policy under California law, could not survive after Concepcion. Previously, there had been a dispute among the lower courts regarding whether Gentry’s holding could survive since Concepcion had addressed class action waivers in arbitration agreements in the consumer context. Nevertheless, the California Supreme Court held that Gentry has been effectively abrogated by Concepcion, and ultimately found its earlier opinion to be pre-empted by the FAA. See also Lewis v. UBS Fin. Servs., 818 F. Supp. 2d 1161 (N.D. Cal. 2011) (holding that Concepcion effectively overruled Gentry); Valle v. Lowe’s H1W, Inc., 2011 WL 3667441 (N.D. Cal. Aug. 22, 2011) (concluding that “in light of Concepcion, Gentry is no longer good law”).

In Iskanian, the court also held that the state’s prohibition of waivers of representative actions under the California Private Attorneys’ General Act of 2004 (PAGA) was not pre-empted by the FAA. The court held that the FAA, which focuses on providing an efficient forum for the resolution of private disputes, does not apply to PAGA actions, which involve disputes between an employer and the state. See also Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 433 (9th Cir. 2015) (“after considering the objectives of the FAA, we conclude that the Iskanian rule does not conflict with those objectives, and is not impliedly preempted”).

The court in Iskanian also rejected the plaintiff’s argument that class action waivers in arbitration agreements violate the National Labor Relations Act (NLRA). In reaching this decision, the California Supreme Court joined with other federal courts in declining to adopt the NLRB’s reasoning in In re D.R. Horton, Inc., which found arbitration contracts that include class action waivers to be unfair labor practices. That decision was reversed by the Fifth Circuit Court of Appeals in D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344 (5th Cir. 2013). These decisions are discussed in more detail below.

d. Arbitrator Should Decide Whether Class Action is Permitted if Arbitration Agreement is Ambiguous. In Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (U.S. 2013), the U.S. Supreme Court held that if an arbitration agreement is ambiguous regarding whether class actions are allowed, the issue is subject to the determination of the arbitrator. In Oxford, the Court determined that the arbitrator’s decision survived the limited judicial review FAA § 10(a)(4) allowed because: (1) under § 10(a)(4), the question for a judge was not whether the arbitrator construed the parties’ contract correctly, but whether he construed it at all; and (2) the arbitrator’s decisions were interpretations of the parties’ agreement since he considered their contract and decided whether it reflected an agreement to permit class proceedings, which sufficed to show that the arbitrator did not “exceed his powers.”

e. Fifth Circuit Rejects Attack on Mandatory Arbitration Agreements. In D.R. Horton, Inc., 357 NLRB No. 184 (Jan. 3, 2012), the NLRB held that an employer violated § 8(a)(1) of the NLRA by requiring employees, as a condition of employment, to execute agreements requiring employees to address any employment-related disputes in individual arbitrations. The Board held this prohibition against employee collective actions violated § 8(a)(1) of the Act. Section 7 of the NLRA protects the rights of employees to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection. … ” Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” § 7.

However, in December 2013, the Fifth Circuit overruled this decision, holding that the Board failed to give proper weight to the “FAA, which requires lawful arbitration agreements to be enforced as written.” D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344 (5th Cir. 2013). The court held that neither the FAA’s “saving clause” nor a contrary congressional command precluded ap-
plication of the FAA’s mandate requiring arbitration agreements to be enforced. Specifically, the majority stated:

The NLRA should not be understood to contain a congressional command over-riding application of the FAA. ... Because the Board’s interpretation does not fall within the FAA’s “saving clause,” and because the NLRA does not contain a congressional command exempting the statute from application of the FAA, the [arbitration agreement] must be enforced according to the terms.

Id. at 362. Additionally, in Murphy Oil U.S.A., Inc. v. NLRB, 2015 WL 6457613 at *3 (5th Cir. Oct. 26, 2015), the Fifth Circuit, following its decision in D.R. Horton, held that the employer in that case “committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here.” Even before the Fifth Circuit overruled D.R. Horton, a number of federal courts refused to follow it. See, e.g. Owen v. Bristol Care, Inc., 702 F.3d 1050, 1054 (8th Cir. 2013) (noting that although no federal appeals courts have yet addressed the decision, nearly all of the federal district courts to consider it have declined to follow it) (Citing, among others, Carey v. 24 Hour Fitness USA, Inc., 2012 WL 4754726 (S.D. Tex. Oct. 4, 2012); Morvant v. P.F. Chang’s China Bistro, Inc., 870 F. Supp. 2d 831 (N.D. Cal. 2012); Delock v. Securitas Sec. Servs. USA, 883 F. Supp. 2d 784 (E.D. Ark. 2012); and LaVoice v. UBS Fin. Servs., Inc., 2012 WL 124590 (S.D.N.Y. Jan 13, 2012)).

Despite these court rulings, the Board continues to invalidate arbitration agreements in employment. See, e.g., Amex Card Servs. Co., 363 NLRB No. 40 (NLRB 2015) (relying on the Board decisions in Murphy Oil and D.R. Horton (even though the Fifth Circuit has refused to enforce those decisions) the Board held that the employer violated the NLRA by maintaining and enforcing its arbitration policy, which included a class action waiver); Leslie’s Poolmart, Inc., 362 NLRB No. 184 (NLRB 2015) (relying on its decision in Murphy Oil, the Board held that the employer violated Section 8(a)(1) by maintaining “a mandatory and binding arbitration agreement which required employees to resolve certain employment-related disputes exclusively through individual arbitration and, though not expressly, but in practice, required them to relinquish any right they have to resolve such disputes through collective or class action”); On Assignment Staffing Servs., Inc. 362 NLRB No. 189 (Aug. 27, 2015) (relying on its decisions in Murphy Oil and D.R. Horton the Board invalidated a mandatory arbitration agreement containing a class action waiver, even though it allowed employees to opt out of the waiver because the opt out procedures significantly burdened employees’ exercise of their Section 7 right to pursue collective or class litigation).

15. Uniformed Services Employment and Reemployment Rights Act (USERRA). In Garrett v. Circuit City Stores, Inc., 449 F.3d 672 (5th Cir. 2006), the Fifth Circuit held that claims under the USERRA are subject to mandatory arbitration. The court held that USERRA provides for substantive rights relating to compensation and working conditions, not to affording a particular forum for dispute resolution. Id. at 678. “An exclusive judicial forum is not a right protected by Chapter 43 of USERRA nor is it within the scope of § 4302(b).” Id. The court held that § 4302(b) does not conflict with the FAA’s policy to encourage the procedural remedy of arbitration. Accordingly, the court reversed the trial court’s refusal to order arbitration of the plaintiff’s USERRA claim. See also Landis v. Pinnacle Eye Care, LLC, 537 F.3d 559 (6th Cir. 2008) (relying on Garrett, finding USERRA claim arbitrable).

16. Collective Action Claims Precluded Under the Financial Industry Regulatory Authority Inc. (FINRA) Arbitration Rules. The Securities and Exchange Commission (SEC) has amended Rule 13204, applicable to arbitrations conducted by the FINRA, to preclude both class and collective actions brought by employees of FINRA members from being arbitrated in a FINRA forum. Collective actions are brought under the FLSA, ADEA or Equal Pay Act. Unlike class actions, an individual must affirmatively consent or “opt-in” to become a member of the collective action to benefit from the outcome. Absent members (those who do not opt-in) are not precluded
from pursuing their claims in other forums; however, FINRA’s rule now specifically provides that collective action claims under the FLSA, ADEA or Equal Pay Act cannot be arbitrated under FINRA rules. In *Zeltser v. Merrill Lynch & Co.*, 2013 WL 4857687, at *3 (S.D.N.Y. Sept. 11, 2013), a federal trial court in New York refused to compel individual arbitration of state and federal wage and hour class action claims filed against Merrill Lynch. The plaintiffs had signed agreements to arbitrate any disputes with the firms. The court denied the motion to compel, holding that FINRA’s arbitration code does not permit class or collective actions. The court rejected the employer’s argument that to the extent FINRA does not compel arbitration of class and collective actions, it is pre-empted by the FAA. The court held, “Neither the Supreme Court nor the Second Circuit has held that FINRA is preempted by the FAA in a fact pattern such as the one before me here.”

G. Civil Rights Act of 1991 (1991 CRA). The 1991 CRA contains a provision encouraging employees and employers to submit to arbitration “disputes arising under the Acts or provisions of Federal law amended by this title.” 42 U.S.C. § 1981. This language supports the enforcement of arbitration agreements, where courts pay deference to it. See *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307 (11th Cir. 2002). In the Ninth Circuit’s discussion in *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003), the court addressed the 1991 CRA and confirmed that mandatory employment arbitration is permitted. In that discussion, the Ninth Circuit, quoting from the Second Circuit opinion in *Desiderio v. Nat’l Ass’n of Sec. Dealers, Inc.*, 191 F.3d 198 (2d Cir. 1999), overturned its prior holding in *Duffield*, which had denied enforcement of arbitration agreements.

H. Requirements for an Enforceable and Valid Agreement/“Gateway Matters” and the Unconscionability Argument. While the U.S. Supreme Court in *Gilmer* established the rule that a party challenging an arbitration agreement has the burden of proving the claims are not suitable for arbitration, mandatory arbitration agreements continue to be challenged as unenforceable. One basis for challenge is that the arbitration process is inadequate to provide statutory rights claimants with sufficient remedies. The other is based on the language contained in FAA § 2 that prevents enforcement where, as a matter of state law, issues are raised about contract formation and unconscionability.

1. FAA Governs Arbitrability Questions Where State Law is not Expressly Designated. In *Brennan v. Opus Bank*, 796 F.3d 1125, 1129 (9th Cir. 2015), the court held that federal law governs the arbitrability question by default where an arbitration agreement is covered by the FAA, and the parties have not clearly and unmistakably designated that nonfederal arbitrability law applies. (citing *Cape Flattery Ltd. v. Titan Maritime*, 647 F.3d 914, 921 (9th Cir.2011)). See also *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide."); *Anders v. Hometown Mortgage Services, Inc.*, 346 F.3d 1024 (11th Cir. 2003); *Fox v. Tanner*, 101 P.3d 939 (Wyo. 2004) (courts should not assume the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so).

2. Severability. As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). Because “[a] federal court can only adjudicate challenges to ‘the making and performance of the agreement to arbitrate,’ not challenges to the enforceability of the contract as a whole,” Mun. *Energy Agency of Miss. v. Big Rivers Elec. Corp.*, 804 F.2d 338, 342 (5th Cir. 1986) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395), challenges to the enforceability of a contract containing an arbitration clause are determined by the arbitrator. *Buckeye*, 546 U.S. at 449. *Buckeye* was a nonemployment case in which the Court held that because the parties in that case challenged the contract containing the arbitration agreement, not the agreement itself, the provisions of the arbitration agreement were enforceable apart from the remainder of the contract. Accordingly, the Court held that the challenge should be considered by an arbitrator, not a court (rejecting the Florida Supreme Court’s holding that the enforceability of the arbitration agreement should turn on “Florida public policy and contract law.”) Subsequently, in *Preston v. Ferrer*, 552 U.S. 346 (2008), the U.S. Supreme Court held that the FAA overrides
Chapter Twenty-Two

a state law vesting initial adjudicatory authority in an administrative agency where the defendant challenged the contract as a whole. According to the Court in Preston, "Buckeye largely, if not entirely, resolves the dispute before us." Id. at 354. See also Pleasant v. Houston Works USA, 236 F. App’x 89 (5th Cir. June 7, 2007) (holding that it is for the arbitrator, not the court, to determine whether the employer’s alleged breach of the open door provision excused the employee’s compliance with the arbitration clause); M.A. Mortenson Co. v. Saunders Concrete Co., 676 F.3d 1153 (8th Cir. 2012) (arbitration provision was severable and should be judged separately from contract to determine enforceability).

3. Under FAA Arbitrator Not Court Determines Unconscionability Under Delegation Clause. In Rent-A-Center West v. Jackson, 561 U.S. 63 (2010), the U.S. Supreme Court held that under the FAA, an arbitrator, not a court, should decide whether an arbitration agreement is unconscionable when the parties have delegated the determination of that issue to the arbitrator. The Court’s decision overturned that of the Ninth Circuit, which held that the court has exclusive jurisdiction to determine the issue of unconscionability, even though the parties’ arbitration agreement gave the arbitrator that authority. The Court held that an agreement to arbitrate a gateway issue is “simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce” and that the FAA operates on this additional arbitration agreement as it does on any other.

In this case, the underlying contract was the arbitration agreement, while the provision Rent-A-Center sought to enforce was the delegation provision. Thus, the Court held that unless Jackson challenged the delegation provision specifically, it must treat that provision as valid under § 2 and enforce it, leaving any challenge to the validity of the agreement as a whole, i.e. Jackson's unconscionability challenge, for the arbitrator.

4. Substantive Law Created by FAA Applies in State Court (pre-emption). In Nitro-Lift Technologies, L.L.C. v. Howard, 133 S. Ct. 500 (2012), the U.S. Supreme Court reiterated the national policy favoring arbitration and rejected an Oklahoma Supreme Court decision reflecting “judicial hostility towards arbitration.” This case involved noncompetition agreements that included mandatory arbitration provisions. The Oklahoma Supreme Court held that the existence of an arbitration agreement in an employment contract does not preclude a state court from determining the validity of the underlying contract. The court then held that the noncompetition agreements were void and unenforceable under Oklahoma law. The U.S. Supreme Court vacated the Oklahoma Supreme Court's decision, finding the state court's decision disregarded U.S. Supreme Court precedence interpreting the FAA. The Court held that the FAA "declares a national policy favoring arbitration" and that the substantive law created by the Act is applicable in state courts. Id. at 503. The Court further held, “When parties commit to arbitrate contractual disputes, it is a mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance, not by a federal or state court.” Id. Thus, when a court finds that an arbitration provision is valid, it is the arbitrator’s role to determine the validity of the underlying contract.

The U.S. Supreme Court also rejected the Oklahoma Supreme Court's determination that its own jurisprudence controlled the issue and permitted review of a contract submitted to arbitration. The U.S. Supreme Court held that the state court must abide by the FAA, which is the supreme law of the land, and by the U.S. Supreme Court's decisions interpreting that law. The Court rejected the state court's reasoning that the more specific Oklahoma law interpreting noncompete agreements must yield to the more general statute favoring arbitration because this reasoning only applies where the laws in question are of equal dignity. Under the Constitution's Supremacy Clause, when a specific state statute conflicts with a general federal statute, the federal statute governs. “There is no general-specific exception to the Supremacy Clause.” Id. at 504.

5. Contract of Adhesion Analysis. In instances where state law is involved, courts often examine employment agreements under an analysis applied to contracts of adhesion. At issue here are concerns for due process procedures where there is a difference in the bargaining powers
of the parties. A process that is “unconscionable” may be struck down if the procedure is judged too one-sided. See Brewer v. Mo. Title Loans, 364 S.W.3d 486, 492-93 (Mo. 2012) (holding that Concepcion permits state courts to apply state law defenses to the formation of the particular contract at issue on a case-by-case basis; “the purpose of the unconscionability doctrine is to guard against one-sided contracts, oppression and unfair surprise,” finding the agreement unconscionable in light of the disparity of bargaining power between the parties and because it only required the consumer to arbitrate claims, not the title company, and did not require the title company to pay the consumer's arbitration costs or attorneys' fees, even if the consumer prevailed) (nonemployment case).

6. Adequacy of the Forum to Grant Statutory Relief. If the express language of an arbitration provision prevents an arbitrator from providing a party with full statutory remedies, for example, attorneys' fees or punitive damages, as would be permitted by statutory remedy provisions, courts will strike such unlawful provisions or refuse to compel arbitration entirely where the presence of unlawful provisions “taints” the enforceability of the arbitration process. This is particularly true if there is a no express severance provision in the arbitration agreement. See Graham Oil Co. v. ARCO Products Co., 43 F.3d 1244, 1248-49 (9th Cir. 1994) (arbitration clause purporting to waive federal statutory remedies was unenforceable), amended by 95 Cal. Daily Op. Service 1888 (9th Cir. March 13, 1995). Where the arbitration clause has a provision that defeats the remedial purpose of the statute, the arbitration clause is not enforceable. See Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1468 (D.C. Cir. 1997) (decided before Green Tree Finance of Alabama, fee payments for statutory rights arbitration). Cf. Jung v. Association of American Medical Colleges, 300 F. Supp. 2d 119 (D.D.C. 2004) (plaintiff failed to show that fee-splitting arrangement was unconscionable).

Even in the absence of express language, courts will also consider enforcement challenges where, for example, a claimant argues the costs of the arbitration will prohibit the vindication of statutory rights. See Green Tree Fin. Corp. of Alabama v. Randolph, 531 U.S. 79 (2000) (non-employment case in which plaintiff sought to invalidate arbitration agreement based on claim that arbitration process was prohibitively expensive. See the discussion below.). Cf. American Express Co., supra.

7. Cost-Splitting, Unreasonable Costs, “Loser Pays” Provisions. A party challenging the arbitration process as prohibitively expensive must come forward with evidence that the costs and fees render the agreement unenforceable. A provision that is silent as to costs will not be presumed to invalidate the arbitration agreement. See Green Tree Fin. Corp. of Alabama v. Randolph, 531 U.S. 79, 90 (2000). In Green Tree, the U.S. Supreme Court held that a cost-splitting provision in an arbitration agreement would only invalidate the arbitration agreement if the party seeking invalidation shows that the costs are prohibitively expensive to deter vindication of rights and that the party is likely to incur such costs. Id. at 92.

The Sixth Circuit has modified the test somewhat to examine whether a cost-splitting provision would deter a substantial number of similarly situated potential litigants. See Cooper v. MRM Investment Co., 367 F.3d 493, 510-11(6th Cir. 2004). Under this analysis, factors to be considered are job description and socioeconomic backgrounds. See also, e.g., Musnick v. King Motor Co. of Ft. Lauderdale, 325 F.3d 1255 (11th Cir. 2003) (loser pays provision in arbitration agreement did not automatically render agreement unenforceable where employee in religious discrimination case did not meet his burden of demonstrating prohibitive costs); Thompson v. Irwin Home Equity Corp., 300 F.3d 88 (1st Cir.2002). Cf. Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002) (mere presence of fee-shifting provision invalidates arbitration agreement).

These criticisms of cost-splitting provisions have resulted in drafting changes as well as provider rule modifications. The AAA, for example, has limited the costs incurred by employees or consumers in certain arbitrations and under their rules and protocols to provide that employers will bear these costs. See AAA Rules on Employment and Consumer Case Arbitration.
Courts have held that claimants are entitled to discovery procedures to assist them in showing the likelihood of bearing prohibitive costs. See Blair v. Scott Specialty Gases, 283 F.3d 595 (3d Cir. 2002) (court ordered limited discovery into rates of provider and approximate length of arbitration proceeding); Brady v. Williams Capital Group, L.P., 928 N.E.2d 383 (N.Y. Ct. App. 2010) (holding that an employee challenging the enforceability of a fee-splitting provision in a predispute arbitration agreement is entitled to a factual hearing to establish that her inability to pay arbitration costs precluded her from vindicating her statutory rights).

The AAA has now adopted a policy that they will review any employment arbitration agreement between the parties before agreeing to administer employment arbitration claims.

8. Challenges on Right to Proceed Collectively, Attorneys’ Fees, Forum Selection, Discovery. After Concepcion, the fact that an arbitration agreement contains a class action waiver cannot be the basis for a determination that the agreement is unconscionable. See, e.g., Robinson v. Title Lenders, Inc., 364 S.W.3d 505, 517 (Mo. 2012) (“Pursuant to Concepcion, the trial court clearly erred in finding that Title Lenders’ arbitration agreement was unenforceable based on its class waiver. Concepcion instructs that, instead of limiting its unconscionability considerations to the presence of the class waiver, the trial court should have assessed whether the arbitration agreement was enforceable in light of Borrower’s additional arguments regarding ordinary state-law principles that govern contracts but that do not single out or disfavor arbitration.”). See also Antkowski v. Taxmasters, 455 F. App’x 156, 160 (3d Cir. 2011) (“Because it is unclear to what extent the District Court’s concern with the class action waiver influenced its conclusion that the arbitration agreement is unconscionable in toto, we will remand to ensure that the disposition of this case is consistent with Concepcion.”).

At least one federal trial court has held that a limitation on discovery did not render an arbitration agreement unenforceable because the limitation affected both parties equally. See Yagoda v. Strang Corp., 2008 WL 4606306 (D.N.J. Oct. 16, 2008). However, in Hulett v. Capitol Auto Group, Inc., 2007 WL 3232283 (D. Oregon Oct. 29, 2007), the court granted a motion to compel arbitration, but severed a provision limiting discovery that the court found unfairly favored the defendant.

9. Discovery Protocols in Employment Arbitration. The AAA has suggested initial discovery protocols for employment arbitration cases. Implementing discovery provisions similar to those suggested by the protocols could help prevent a court from finding that the discovery procedure in an arbitration agreement is unconscionable or renders an agreement unenforceable. Some of the highlights of the protocol include:

- Limiting production to a three-year time period before the date of the matter in controversy, unless otherwise specified;
- 30-day time limitation on responses;
- Requiring both claimants and respondents to produce: (a) all communications between the parties (including other formal claims or charges) concerning the factual allegations or claims at issue in the arbitration; (b) documents concerning the formation, terms and conditions, and termination of the employment relationship; (c) documents concerning any application for (and receipt of) unemployment benefits and/or disability benefits;
- Requiring the claimant to produce: (a) diary, journal and calendar entries by the claimant, and current resume; (b) documents concerning job search efforts and communications with potential employers; (c) identification of persons who have or may have knowledge of the facts concerning the claims or defenses; and (d) description of categories and amounts of damages; and
- Requiring the respondent to produce: (a) claimant’s personnel file and, if not included, performance evaluations and formal discipline reports or write-ups; (b) documents relied upon to make the employment decision(s) at issue; (c) relevant job descriptions, compensation
and benefits documents, and workplace policies or guidelines; (d) table of contents and index of any employee handbook, code of conduct, or policy manual in effect; (e) documents concerning investigation(s) of any relevant complaint(s) about or made by the claimant; (f) identification of claimant’s supervisor(s) and/or manager(s), other individual(s) involved in making the adverse action; and (g) decision or with knowledge of the facts concerning the claims or defenses.


10. Limits on Substantive Statutory Rights. Where an employee seeks statutory relief through arbitration, the courts have considered whether the arbitration agreement is adequate to provide the intended relief and, if not, have refused to compel arbitration. See Alexander v. Anthony Int’l L.P., 341 F.3d 256 (3d Cir. 2003) (arbitration agreement that allows employee to file claims only for 30 days, restricts remedies, does not allow recovery of attorney fees and requires loser to pay arbitration costs is unconscionable and unenforceable).

11. Contract Severance Provisions. The Federal Appeals Courts differ on whether the court will, on its own, sever offensive provisions and enforce an otherwise valid arbitration agreement or refuse to enforce the arbitration agreement in the absence of express severance language. See, e.g., Booker v. Robert Half Int’l, Inc., 413 F.3d 77 (D.C. Cir. 2005) (the existence of an express severability clause, the fact that the arbitration agreement was otherwise valid and enforceable, and a “healthy regard for the federal policy favoring arbitration” led the D.C. Circuit to affirm the decision of the trial court severing an arbitration clause’s ban on punitive damages and compelling arbitration); Cooper v. MRM Investment Company, 367 F.3d 493 (6th Cir. 2004); Gannon v. Circuit City Stores, Inc., 262 F.3d 677 (8th Cir. 2001).

The Sixth Circuit upheld a trial court’s order to use the AAA rules for selecting an arbitrator after severing an unenforceable arbitrator selection clause from an employment related arbitration agreement. See McMullen v. Meijer, Inc., 166 F. App’x 164 (6th Cir. Jan. 13, 2006). In this case, the employee challenged the arbitrator selection clause because it permitted the employer to choose a panel of arbitrators from which the parties would select an individual to arbitrate the employee’s termination. In 2004, the Sixth Circuit held that this clause was unenforceable and remanded the case to the trial court to determine whether the clause could be severed from the arbitration agreement. The Sixth Circuit affirmed the trial court’s determination that the arbitrator selection clause was severable and the court’s use of the AAA’s rules for selecting an arbitrator. See also Adler v. Fred Lind Manor, 103 P.3d 773 (Wash. 2004) (holding that substantially unconscionable provisions in mandatory arbitration agreements can be severed but arbitration is still required); Zuver v. Airtouch Communications, Inc., 103 P.3d 753, 761 (Wash. 2004) (unequal bargaining power, standing alone, did not render arbitration agreement procedurally unconscionable); Faber v. Menard, Inc., 367 F.3d 1048 (8th Cir. 2004) (“Mere inequality in bargaining power does not make the contract automatically unconscionable ... and is not enough by itself to overcome the federal policy favoring arbitration.”).

However, the Ninth Circuit, applying Washington law, has refused to enforce an arbitration agreement that was “permeated with unconscionable provisions,” which could not be severed. See Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (9th Cir. 2005). The Ninth Circuit distinguished Fred Lind Manor and Airtouch, because those arbitration agreements contained only two unconscionable provisions as opposed to the numerous unconscionable provisions found in the Circuit City agreement.

12. Knowing. An employee may be required to arbitrate a claim of discrimination only if the employee knowingly agrees to submit such a claim to arbitration. See, e.g., Ashbey v. Archstone Prop. Mgmt., Inc., 612 F. App’x 430, 431 (9th Cir. 2015) (finding arbitration agreement enforceable where employee signed an acknowledgement incorporating the terms contained in the employer’s employment manual, which included an arbitration policy); Foy v. Ambient Techs., Inc., 2009 WL 1766718 (D.V.I. June 19, 2009) (relying on the Sixth Circuit’s factors to determine
whether there was a knowing and voluntary agreement to arbitrate: (a) plaintiff’s experience, background, and education; (b) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer; (c) the clarity of the waiver; (d) consideration for the waiver; as well as (e) the totality of the circumstances; finding agreement was knowing and voluntary); *Milloul v. Knight Capital Group*, No. A-1953-13T2 (N.J. App. Sep. 1, 2015) (unpublished decision) (“We, therefore, hold that an arbitration provision in an employment agreement must include language informing the employee that he or she is waiving a right to a trial in court and ... it must ‘be written in a simple, clear, understandable and easily readable way’”). *But see Morales v. Sun Constructors, Inc.*, 541 F.3d 218 (3rd Cir. 2008) (finding arbitration agreement enforceable; in the absence of fraud, the fact that the employee could not read, write, speak, or understand the English language was immaterial to whether an English-language agreement the employee executed was enforceable, where the employee had a translator present when he signed the agreement and did not request a word for word translation of the agreement); *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144 (2d Cir. 2004) (refusing to invalidate arbitration agreement, finding that the plaintiff’s failure to fully read the arbitration provision contained in U-4 form before he signed it undermined his claim that the court should find it unenforceable).

13. Notice and Receipt of Agreement/Signature. There continue to be enforcement challenges to arbitration agreements where the employee has not “signed” the agreement. Most of the cases look at whether there was notice and receipt of the policy. See, e.g., *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005) (“signed” agreement was not necessary for Gulfstream’s dispute resolution process to be valid under the FAA, it was enough that it was in writing; “[N]o heightened ‘knowing and voluntary’ standard applies, even where the covered claims include federal statutory claims generally involving a jury trial right”); *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135 (Ill. 2006) (rejecting “knowing and voluntary” standard for determining validity of arbitration agreement and holding that principles of fundamental contract law apply). *But see Cosme v. Durham*, 2008 WL 324020 (E.D. Pa. Feb. 4, 2008) (refusing to enforce arbitration agreement where there was no evidence from which the court could ascertain the circumstances under which the arbitration agreement was presented to the plaintiff and executed; the court also held that language in arbitration agreement stating that claims by the employee against the employer may be heard by a neutral mediator did not appear to require claims to be submitted to arbitration.).

a. Employee Handbook Provisions Containing Arbitration Agreement. Whether an employee will be bound by an arbitration agreement contained in an employee handbook generally depends upon whether the employer can establish that the employee received the handbook and agreed to be bound by the policies contained within it, including the arbitration agreement. See, e.g., *Corl v. Thomas & King*, 2006 WL 1629740 (Ohio App. 2006) (employee’s act of signing acknowledgment form indicating she had read and understood the policies contained in the company’s handbook and initialing beside each handbook policy listed on the acknowledgment form, including the dispute resolution program, “[w]as sufficient to demonstrate she read and understood its terms and specifically agreed to binding arbitration as the sole and exclusive method of resolving employment disputes”). *But see Mitri v. Arnel Mgmt. Co.*, 157 Cal. App. 4th 1164, (Cal. App. 2007) (refusing to require arbitration of employment-related claims where plaintiffs denied signing arbitration agreement and employer failed to produce copy of signed agreement; although the plaintiffs signed a form acknowledging receipt of an employee handbook, the form did not reference the arbitration agreement and the handbook provision discussing arbitration stated that employees would be required to sign an arbitration agreement and would be given a copy of the agreement); *Plebani v. Bucks County Rescue Emergency Medical Services*, 2007 WL 4224365 (E.D. Pa. Nov. 27, 2007) (refusing to require plaintiffs to arbitrate discrimination claims where arbitration provision was contained in employee handbook but no one explained it to the plaintiffs nor did they sign any
forms acknowledging they received the handbook or agreed to the arbitration provision). Additionally, in In re 24R, Inc., 324 S.W.3d 564 (Tex. 2010), the Texas Supreme Court held that an arbitration agreement was not rendered unenforceable by language in a separate employee handbook. Accordingly, the court ordered arbitration of the plaintiff’s discrimination claims.

b. **E-Mail Notification.** Although employers frequently communicate with employees through e-mail, some courts have refused to enforce arbitration agreements that were transmitted to employees electronically if the employer cannot establish that the employee received the agreement. See, e.g., *Campbell v. General Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005) (mass e-mail notifying employees of implementation of arbitration agreement was not sufficient to put a reasonable employee on inquiry notice of an alteration to the contractual aspects of the employment relationship where e-mail did not require employees to acknowledge receipt and did not otherwise indicate it heralded a significant change in the employment relationship or a waiver of legal rights; however, the court noted that in some circumstances, a straightforward e-mail explicitly delineating an arbitration agreement would be sufficient).

14. **Ability to Read Agreement.** In *Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937 (S.D. Tex. 2001), the court held that an arbitration agreement, written in English, which provided for the arbitration of all disputes, either with the employer or with customers and clients, was unenforceable because the employees who signed it could not read English and were not given a translation. *But see Morales v. Sun Constructors, Inc.*, 541 F.3d 218 (3rd Cir. 2008) (finding arbitration agreement enforceable; in the absence of fraud, the fact that the employee could not read, write, speak, or understand the English language was immaterial to whether an English-language agreement the employee executed was enforceable, where the employee had a translator present when he signed the agreement and did not request a word for word translation of the agreement); *Washington Mut. Finance Group, LLC v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004) (under Mississippi law inability to read an arbitration agreement does not render an otherwise valid agreement unconscionable or unenforceable).

15. **Voluntary.** An agreement to take a job subject to a mandatory arbitration agreement generally satisfies the voluntariness requirement. See, e.g., *Borg-Warner Protective Servs. Corp. v. Gottlieb*, 116 F.3d 1485 (table), 1997 WL 15516 (9th Cir. 1997) (finding that at-will employee who signed arbitration agreement to keep job did not sign involuntarily). Additionally, many courts have held that continued employment constitutes consent to be bound by an arbitration agreement. See, e.g., *McAllister v. East*, 611 F. App'x 17, 19 (2d Cir. 2015) (arbitration provision enforceable even though employee never signed an arbitration agreement because she continued to work for 15 years after the employer first promulgated the employee handbook containing the arbitration clause); *Seawright v. American General Finance Inc.*, 507 F.3d 967 (6th Cir. 2007) (under Tennessee law, the plaintiff expressed a valid assent to the arbitration agreement when she continued to work for the employer); *Hardin v. First Cash Fin. Servs.*, 465 F.3d 470 (10th Cir. 2006) (employee was bound by arbitration agreement despite initial express rejection of agreement; employee’s continuation of employment after being informed that continued employment would constitute consent to be bound by the arbitration agreement constituted acceptance of agreement); *cf. George Town Club at Suter’s Tavern v. Salamanca*, 2007 WL 1041657 (D.D.C. Apr. 5, 2007) (where employee did not sign arbitration agreement, his continued employment alone was insufficient to demonstrate his assent to be bound by the arbitration agreement).

16. **Consideration/Mutuality.** Consideration is an essential element of a contract. An employer’s commitment to be bound by the arbitration procedure may constitute consideration for the employee’s voluntary agreement to arbitrate.

a. **Promise to Consider Employment Application.** Some courts have held that an employer’s willingness to consider the employee’s application is sufficient consideration for the employee’s agreement to arbitrate. See *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4th Cir. 1998).
b. Continued Employment. State law varies with regard to whether the continued employment of an at-will employee is deemed sufficient consideration for an arbitration agreement. See, e.g., Hightower v. GMRI, Inc., 272 F.3d 239 (4th Cir. 2001) (employee's continued employment sealed assent to binding arbitration program); In re Halliburton Co., 80 S.W.3d 566 (Tex. 2002). But see DelMassee v. ITT Corp., 984 P.2d 1138 (Arizona 1999) (continued employment alone does not suffice as adequate consideration for employer's unilateral change of terms of employment to require arbitration of employment disputes); Baker v. Bristol Care, Inc., 2014 WL 4086378, at *1 (Mo. Aug. 19, 2014) (no consideration to create a valid arbitration agreement because the plaintiff's continued at-will employment did not provide consideration for the arbitration agreement. Additionally, the fact that the employer retroactively could modify, amend or revoke the agreement means that the employer's promise to arbitrate was illusory and did not constitute consideration for the plaintiff's agreement to arbitrate.)

c. Illusory Promises. Where an arbitration agreement gives the employer discretion to unilaterally amend the agreement, it may be found to be unenforceable for lack of consideration because the employer's promises may be viewed as illusory. See, e.g., Cheek v. United Healthcare of the Mid-Atlantic, Inc., 835 A.2d 656 (Md. 2003) (promise to arbitrate was illusory because employer reserved the right to alter, amend, modify or revoke the arbitration agreement at any time and without notice).

However, a number of courts have enforced arbitration provisions in employee handbooks and employment agreements. For example, in Lambert v. Austin Ind., 544 F.3d 1192 (11th Cir. 2008), the Eleventh Circuit held that a provision in the company's Open Door policy stating that "You should consult your Open Door facilitator to determine if your workplace dispute is appropriate for presentation to an arbitrator. If so, the facilitator will contact the AAA to initiate the process" did not mean that the facilitator was a "gatekeeper" who could determine whether to submit a claim to arbitration. Instead, the court held that the Open Door policy permitted employees to initiate arbitration on their own; they were not required to involve a facilitator unless they wished to do so. Accordingly, the court held that the Open Door policy was an enforceable arbitration agreement. See also, e.g., Bennett v. Cisco Sys., Inc., 63 F. App'x 202 (6th Cir. April 22, 2003) (unpublished decision) (arbitration provision in employment agreement signed by employee was not unilateral but obligated both parties to submit claims to arbitration and required employee to arbitrate question of kickbacks); Pierce v. Kellogg, Brown & Root, Inc., 245 F. Supp. 2d 1212 (E.D. Okla. 2003) (arbitration agreement was not illusory merely because employer could amend upon 10 days' notice since the ability to terminate only applied prospectively and would not affect pending arbitration proceedings); Holloman v. Circuit City Stores, 894 A.2d 547 (Md. 2006) (employer's mandatory employment arbitration agreement is an enforceable contract despite a clause reserving the company's right to terminate, alter, or amend the pact with 30 days written notice to its employees).

I. Due Process Protocol. Due to fairness concerns, a protocol entitled “A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship” was issued by the Task Force on Alternative Dispute Resolution in Employment on May 5, 1995. The AAA, the Federal Mediation and Conciliation Service, the American Bar Association, and the House of Delegates of the American Bar Association have adopted this protocol. This protocol recommends several procedures to improve the fairness of employment arbitration. It suggests adequate but limited pretrial discovery for mediation and arbitration. It also makes suggestions to ensure the qualifications of the arbitrator, recommends that any decision be written and that some judicial review be available.

J. Waiver of Arbitration. An employer that pursues court litigation and then attempts to enforce an arbitration clause may be deemed to have waived the contractual right to arbitration. See Franceschi v. Hospital General San Carlos, Inc., 420 F.3d 1, 4 (1st Cir. 2005) (“failure to promptly appeal a denial of arbitration will, if prejudicial to the opposing party, operate to forfeit the demanding party's right to arbitration”); company that delayed appeal of denial of request for arbitration for three years,
until jury trial was complete, waived the right to enforce arbitration clause); Sega Communications of New England v. Voornas, 756 A.2d 954, 961 (Me. 2000) (holding that the relevant question regarding waiver of arbitration is whether the parties have litigated substantial issues going to the merits of the claim subject to arbitration claim, and noting that arbitration was not intended to provide litigants with successive opportunities to prevail by continually revisiting the same issue in different forums).

However, the First Circuit has held that the employer’s failure to file for arbitration during the pendency of an EEOC investigation does not waive the right to later demand arbitration. See Marie v. Allied Home Mortgage Corp., 402 F.3d 1 (1st Cir. 2005). In Marie, the court held that since an employer cannot preclude the EEOC from bringing an enforcement action based on an employee’s complaint by relying on an arbitration clause between the employer and employee (according to the U.S. Supreme Court in EEOC v. Waffle House, Inc., 534 U.S. 279 (2002)), “a rule forcing the employer to file for arbitration during the pendency of an EEOC investigation would lead to wasteful, duplicative proceedings.” Id. at 4. See also Hill v. Ricoh Ams. Corp., 603 F.3d 766, 774 (10th Cir. 2010) (employer did not waive arbitration by failing to demand arbitration in its answer or by failing to demand arbitration until four months after complaint, employees not substantially prejudiced by delay).

The Eleventh Circuit has held that in certain circumstances a waiver of arbitration is nullified when an amended complaint is filed that changed the focus or scope of the action. See Krinsk v. Suntrust Banks, Inc., 654 F.3d 1194 (11th Cir. 2011). The court held that not every amended complaint will trigger a revival but that the test to be applied is when “the amended complaint … changes the theory or scope of the case.” Additionally, the court held that an amendment that materially alters the scope of and broadens the focus of the litigation falls within the circumstances that revive the right to compel arbitration.

K. Judicial Review of Arbitration Award.

1. Vacatur of Award. Judicial review of an arbitration award is extremely narrow. The FAA identifies four situations in which a court may vacate an arbitration award: (a) where the award was procured by corruption, fraud, or undue means; (b) where there was evident partiality or corruption in the arbitrators, or either of them; (c) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (d) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10.

In Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008) (nonemployment case), the U.S. Supreme Court reiterated that the grounds for reviewing an arbitrator’s decision under the FAA are limited to those set forth in the statute and that parties cannot contractually expand the statutory grounds for modifying or vacating an arbitration award. The arbitration agreement in Hall Street permitted the federal court to vacate, modify or correct the arbitrator’s award “(i) where the arbitrator’s findings of facts are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.” The Supreme Court held that this provision is not valid and that parties to an arbitration agreement cannot contractually expand the statutory grounds for modifying or vacating an arbitration award. But see Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84 (Tex. 2011) (holding that the parties to an arbitration agreement governed by the state’s arbitration act can agree that the arbitrator’s decision will be subject to review to the same extent as a court decision would be — that is, appellate review; rejecting both the reasoning and holding of Hall Street).

Subsequently, federal appeals courts have differed on whether the “manifest disregard of the law” as grounds for vacating an arbitrator’s award survived the U.S. Supreme Court’s decision in Hall Street. See, e.g., Frazier v. Citifinancial Corp., LLC, 604 F.3d 1313, 1324 (11th Cir. 2010)
Chapter Twenty-Two

("judicially-created bases for vacatur are no longer valid in light of Hall Street"); Citigroup Global Mkts. v. Bacon, 562 F.3d 349 (5th Cir. 2009) (holding that Hall Street restricts the grounds for vacatur to those set forth in § 10 of the FAA and consequently “manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA”); but see Coffee Beanery, Ltd. v. WW, L.L.C., 2008 WL 4899478 (6th Cir. Nov. 14, 2008) (unpublished decision) (“In light of the Supreme Court’s hesitation to reject the ‘manifest disregard’ doctrine in all circumstances, we believe it would be imprudent to cease employing such a universally recognized principle. Accordingly, this Court will follow its well-established precedent here and continue to employ the ‘manifest disregard’ standard.”); Jock v. Sterling Jewelers, Inc., 2015 WL 7076011 at *5 (S.D.N.Y. Nov. 15, 2015) (noting that the arbitrator’s decision to certify an opt-out class for classwide injunctive relief was made in “manifest disregard of law,” although not citing Hall Street).

a. Award Procured by Corruption, Fraud or Undue Means (§10(a)(1)). In ARMA, S.R.O. v. BAE Systems Overseas, Inc., 961 F. Supp. 2d 245 (D.D.C. 2013), a nonemployment case, the court set out the conditions courts have required must be established to vacate an arbitral award under § 10(a)(1). “First, the party seeking vacatur must demonstrate by clear and convincing evidence that its opponent actually engaged in fraudulent conduct or used undue means during the course of the arbitration.” Id. at 254. (citations omitted). “As a second condition, the movant must show that the fraud could not have been discovered before or during the arbitration through the exercise of reasonable diligence.” Id. “As a third and final condition, the alleged misconduct must “materially relate[ ] to an issue in the arbitration.” Id. (citations omitted). In ARMA, the court denied the motion to vacate, finding the requirements had not been met.

b. Evident Partiality or Corruption in the Arbitrator (§10(a)(2)). In Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 729 F.3d 99 (2d Cir. 2013), the court held that evidence of corruption must be abundantly clear in order to vacate an award under § 10(a)(2). The court found the plaintiff failed to show any abundantly clear evidence of corruption especially since there is no record of the proceedings and the parties’ conflicting accounts amount to little more than “he-said, she-said” factual disputes.

In Alim v. KBR (Kellogg, Brown & Root) – Halliburton, 331 S.W. 3d 178 (Tex. App. 2011), the court held that a neutral arbitrator exhibits evident partiality if he has actual knowledge but does not disclose facts that might, to an objective observer, create a reasonable impression of the arbitrator’s partiality. In Alim, the court noted that the Texas Supreme Court has held that “evident partiality is established from the nondisclosure itself, regardless of whether the nondisclosed information necessarily establishes partiality or bias.” Id. at 181. In Alim, the court vacated an arbitration award in favor of the employer because the arbitrator failed to disclose that the corporate representative in the current case had appeared before him as a party representative in a prior case involving the employee’s former employer. The court noted that the arbitrator was required to disclose whether any party representative had appeared before him in past arbitration cases. The arbitrator had answered this question in the negative in his sworn notice of appointment and also stated that he diligently conducted a conflicts check, “although that check appears to be nothing more than an exercise he conducted from memory.” Id. at 182. Further, the arbitrator failed to disclose the falsity of his representation or amend his response “apparently based on his belief – maintained at least through the date of his post-arbitration deposition – that he was under no requirement to do so and that whether a prior contact is sufficient enough to constitute a conflict is an issue solely for him to decide,” Id. The court held that the arbitrator’s failure to disclose that the defendant’s corporate representative had previously appeared before him as a party representative of a related entity was a fact that might, to an objective observer, create a reasonable impression of partiality. “The nondisclosure of that fact – and the failure to amend or correct his answer to the question specifically inquiring as to that fact – constitutes evident partiality and is grounds for vacating the arbitration award under the FAA.” Id.
In *P.H. Glatfelter Co. v. United Steelworkers*, 2012 WL 3600180 (S.D. Ohio Aug. 21, 2012), the court vacated an arbitration award where the arbitrator failed to disclose to the parties prior to the hearing that the arbitrator had six first cousins in the bargaining unit. The court applied § 10(a)(2) of the FAA to an FMCS arbitrator's decision on a contracting-out grievance filed by the union and granted the petition to vacate, stating that the arbitrator should have disclose his relationship to members of the bargaining unit as part of the arbitrator selection process. The court applied FAA standards of evident partiality in this instance saying, “A reasonable person would have to conclude that the arbitrator was partial.”

c. Arbitrator Misconduct (§10(a)(3)). In *Goldman, Sachs & Co. v. Athena Venture Partners, L.P.*, 803 F.3d 144, 149 (3d Cir. 2015) the Third Circuit overruled the lower court’s decision vacating an arbitration award based on the arbitrator’s failure to disclose allegations of unauthorized practice of law that had been made against him. The lower court vacated the arbitration award under §§ (10)(a)(3) and (4). However, the Third Circuit overruled this decision, finding that the complaining party waived this argument by failing to raise it prior to the arbitrator’s final award. The court held that where a party could have “reasonably discovered that any type of malfeasance, ranging from conflicts-of-interest to non-disclosures such as those at issue here, was afoot during the hearings, it should be precluded from challenging the subsequent award on those grounds.” *Id.*

d. Arbitrator Exceeded Powers (§ 10(a)(4)). In *DirecTV, LLC v. Arndt*, 546 F. App’x 836, 840 (11th Cir. Oct. 22, 2013), the court held that the federal trial court erred in vacating arbitrator’s award, noting that “the Supreme Court allows federal courts little leeway in determining whether an arbitrator exceeded her powers within the meaning of § 10(a)(4).” The “sole question for a federal court is ‘whether the arbitrator (even arguably) interpreted the parties’ contract, not whether [s]he got its meaning right or wrong.’” *Id.* (citing *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013)). In *DirecTV*, the arbitrator held that the plain language of the arbitration agreements explicitly allowed the plaintiffs to assert their rights on a collective basis. In reversing the trial court’s decision, the Eleventh Circuit held that “[b]ecause the arbitrator arguably interpreted the parties’ agreements, the district court should have ended its inquiry and denied *DirecTV’s* petition for vacatur.” *Id.*

In *Jock v. Sterling Jewelers, Inc.*, 2015 WL 7076011, at *2 (S.D.N.Y. Nov. 15, 2015) court held that the Arbitrator acted outside her authority in certifying an opt-out class for injunctive and declaratory relief, where she certified the class under Federal Rule of Civil Procedure 23(b)(2), but then permitted class members to opt out of injunctive and declaratory relief. The court noted that “it is settled law that … ‘Rule [23] provides no opportunity for (b)(1) or (b)(2) class members to opt out.’” *Id.* (citing *Wal Mart Stores, Inc. v. Duke*, 131 S. Ct. 2541 (2011)). Thus, the court held that “in finding that some Sterling employees could opt out of a class certified to seek classwide injunctive or declaratory relief, the Arbitrator failed to present a ‘barely colorable justification for the outcome reached’” and vacated the class determination award to the extent it permitted individuals to opt out of a class “certified for the purposes of classwide injunctive and declaratory relief.” *Id.* at *5.

2. Modification Under §11. Additionally, § 11 of the FAA permits courts to modify arbitration awards for mistakes in calculations or descriptions; where the arbitrators awarded on matters not submitted to them (unless it is a matter that does not affect the merits of the decision); or to correct the form of the award, if this does not affect the merits of the controversy.

3. Evident Material Mistake Under § 11(a). Section 11(a) of the FAA allows a district court to correct an “evident material mistake in the description of any person, thing, or property referred to in the award.” In *AIG Baker Sterling Heights, LLC v. American Multi-Cinema, Inc.*, 508 F.3d 995 (11th Cir. 2007), the Eleventh Circuit held that this language in the FAA does not embrace a mistake (one party’s failure to inform the arbitration panel that it had already paid a portion of the disputed tax amount to the taxing authority) by a party that was not brought to the attention
of the arbitration panel before the panel rendered the award. Accordingly, the court reversed the lower court's order modifying the arbitration award and remanded the case for further proceedings. Subsequently, the district court entered judgment affirming the arbitration award and then granted relief under Fed. R. Civ. Pro. 60(b)(5) granting relief from the judgment for the amount already paid. On appeal, the Eleventh Circuit held that §§ 10 and 11 of the FAA did not control this situation because the district court neither vacated nor modified the arbitration award but instead entered a judgment confirming the award and later ordered some relief from that judgment. See AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc., 579 F.3d 1268 (11th Cir. 2009). Since §§ 10 and 11 say nothing about court judgments, they did not control the appeal. Id. The court then noted that § 13 of the FAA provides that a judgment confirming an arbitration award is to be treated like any other civil judgment and is subject to all of the provisions of law relating to a judgment in a civil action, including Rule (60)(b)(5). Id. Accordingly, the Eleventh Circuit affirmed the lower court's order.

4. Time Frame to File Motion for Vacating Award. The time limit for filing a motion to vacate under § 12 of the FAA is strictly construed. See Webster v. A.T. Kearney Inc., 507 F.3d 568 (7th Cir. 2007) (motion to vacate filed three months and one day after the arbitrator’s decision was placed in the mail was untimely; parties agreed to follow AAA procedures, including a rule that legal delivery of the award can be accomplished by placing it in the mail, thus the time-frame began to run when the award was placed in the mail.). See also United Steel v. Wise Alloys LLC, 642 F.3d 1344 (11th Cir. 2011) (noting that LMRA § 301 does not provide a limitations period for the filing of a motion to vacate and adopting the FAA’s three-month filing period for arbitration award challenges; holding that the employer’s efforts to raise a fraud defense in response to the unions’ lawsuit seeking enforcement of the arbitration award were time-barred because the employer did not file a motion to vacate within three months of the arbitrator’s ruling in favor of the unions). In reaching this decision, the Eleventh Circuit followed the First, Third, and Seventh circuits in holding that “a party adversely affected by an arbitration award in [§] 301 cases must challenge the award by judicial action within the statute of limitations or else be barred from raising any defenses to the award.” The court further held that “[a]n aggrieved party may not wait to attack the award in a subsequent suit to confirm the award after the statute of limitations has run.” Since LMRA § 301 does not contain an independent statute of limitations, the court relied on the “most analogous” limitations period, which was that contained in the FAA.

5. Other Grounds for Challenging Award. Courts have considered other grounds for vacating an arbitration award. See Thomas v. City of North Las Vegas, 127 P.3d 1057 (Nevada 2006) (in union grievance context, failure of arbitrator to disclose membership on employer’s arbitration panel did not violate guidelines adopted by the FMCS, “Code of Professional Responsibility for Arbitrators of Labor-Management Disputes,” which only required disclosure of “managerial, representational, or consultative” relationships – service on neutral, rotating arbitration panel “does not give rise to a reasonable impression of partiality.”).

6. Sanctions. In Seagate Tech., LLC v. W. Digital Corp., 854 N.W.2d 750 (Minn. 2014), the Minnesota Supreme Court affirmed an arbitration award of over $500 million against the defendants in a misappropriation of trade secret case. The plaintiff claimed that the defendants fabricated evidence to make it appear that certain of the trade secrets in question (secrets 4, 5, and 6) had been made public and, accordingly, did not qualify as trade secrets and filed a motion for sanctions based on the alleged fabrication. The arbitrator held that the “fabrications were obvious,” and imposed sanctions against the defendants including precluding them from presenting evidence disputing the validity of the trade secrets 4, 5, and 6 or their misappropriation or use and entering judgment against the defendants for misappropriation of the trade secrets. The arbitrator awarded Seagate compensatory damages of $525 million, prejudgment interest totaling nearly $96 million and post-award interest. The defendants moved to vacate the portion of the award pertaining to trade secrets 4, 5 and 6. The case made its way to the state supreme court, which held that the defendants had not waived their right to request vacatur under state
law because the statute in question did not require them to object during the arbitration. The court then addressed whether the award exceeded the arbitrator’s authority. The court noted that the arbitration agreement empowered the arbitrator to settle “any dispute or controversy arising out of or relating to any interpretation, construction, performance or breach” of the employment agreement and authorized the arbitrator to grant injunctions or “other relief.” The agreement also provided that the arbitration would be conducted in accordance with the AAA Employment Rules. The court noted that the “AAA Employment Rules do not specifically address punitive sanctions, but they do authorize arbitrators to ‘grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs.’ AAA Employment R. 39(d) (2009).” The court held that the arbitrator did not clearly exceed his authority in violation of state law by issuing punitive sanctions against the defendants “[b]ecause punitive sanctions were a permissible form of relief and because the arbitrator had discretion in fashioning a remedy.” The court noted that the benefits of arbitration “come with costs, including significantly less oversight of decisions, evidentiary and otherwise, and very limited review of the final award.” Id. at *11. Accordingly, the court affirmed the reinstatement of the arbitration award in full.

7. Public Policy. The Alaska Supreme Court has adopted an exception to judicial enforcement of arbitration awards where such enforcement would violate an explicit public policy of the state, although it determined that the exception did not apply to an arbitrator’s reinstatement of a state trooper involved in the case. See State of Alaska v. Public Safety Employees Ass’n, 257 P.3d 151 (Alaska 2011) (“Following a path taken by the U.S. Supreme Court and many other state jurisdictions, we now endorse the State's long-standing suggestion and adopt the ‘exception to enforcing arbitration decisions where doing so would violate an ‘explicit, well defined, and dominant' public policy’”).

L. Alternative Appeals Through AAA Rules. The AAA has announced new “optional appellate arbitration rules” that provide parties with a standardized and streamlined procedure for pursuing appeals within the arbitration process. Linda Chiem, “New Arbitration Rules for Alternative Appeals,” Law360 (Nov. 3, 2013). The AAA stated that the appellate arbitral panel will apply a more expansive standard of review than used by courts to review arbitration decisions. Id. The rules are optional and will only be used where there parties agree, either through contract or stipulation. Parties will be permitted to appeal on the grounds that an award is based on a material or prejudicial error of law or clearly erroneous error of fact.

III. MEDIATION

Probably the fastest evolving methodology of ADR is mediation. Mediation has the benefit of presenting a conflict to a third party neutral, the mediator, who acts as a neutral to help the parties reach an agreed upon resolution but does not allow for any binding finding of fact, conclusion of law, or outcome. Typically, the neutral third party selected by the parties is familiar with judicial standards and commonly accepted rules of the workplace and, after hearing the evidence and arguments, attempts to help the parties in their evaluation and negotiation process to reach a mutually acceptable resolution.

The advantage of the system is that a skillful mediator can, in most cases, find a common ground for resolution. The mediator has no authority to make factual findings or render binding decisions. Thus neither party has any fear of being forced to accept an unpalatable solution. In this sense, mediation is a no-lose proposition; at the conclusion of the unsuccessful mediation, no party is worse off except for the cost of the mediation. Yet, the process presents an excellent opportunity to resolve the dispute.

The disadvantage is that the nonbinding nature of the process allows the party claiming injury to proceed to court when no agreement has been reached between the parties. If, however, the parties reach a signed written agreement, it constitutes an enforceable contract.
Workplace disputes, whether in a union or nonunion setting, divide employees and undermine team cohesiveness. An effective grievance mediation program can address not only the surface dispute but also the underlying problem that is often the cause. The following is a thumbnail discussion of mediation describing: the primary reasons for establishing a mediation program; the nature of the process; the types of grievances appropriate for mediation; the five essential steps of the process; and a summary of the strengths and weaknesses of mediation.

The AAA has amended its Employment Arbitration Rules and Mediation Procedures to encourage more parties to try mediation. The revised rules were effective November 1, 2009 and make it easier for the parties to try mediation and convert from arbitration to mediation. The AAA revised its arbitration rules to allow parties to initiate mediation without filing a fee. The rest of the amendments pertain to the mediation procedures, including a revision allowing parties, by mutual agreement, to conduct the mediation via telephone or electronic means. Note in the 2013 commercial rules, the AAA has added a statement in its prehearing checklist providing that the prehearing discussion with the parties should include that mediation will be conducted on a parallel track to any scheduled arbitration unless the parties specifically opt out of the mediation step.

A. Primary Reasons for Management to Establish a Mediation Program. The primary reason employers create mediation programs is to avoid litigation and government investigations. The program should reduce legal costs, including attorneys’ fees, employee and management time lost to litigation, and ultimately the loss of customers because of the delay and inefficiency in resolving important internal issues. It should also avoid or reduce liability in an uncertain legal environment, including the enforcement of mandatory arbitration provisions, and unpredictable juries. Equally important, by resolving disputes beforehand, the program should help to avoid potentially harmful publicity.

B. Nature of the Process. Mediation aims to bring about the voluntary settlement of a dispute involving employees, supervisors, and/or the company using a neutral third party. Mediation enables the parties to properly understand the true nature of the dispute to enable a resolution. The emphasis is on cooperatively resolving differences, rather than on “winning.” It is less emotional and confrontational than either litigation or arbitration, and diminishes the likelihood of hostile verbal or physical workplace incidents.

C. Types of Grievances Appropriate for Mediation. Grievances or complaints are appropriate for mediation if they arise under a broad contract or company policy provision, do not involve essential interests of either party, and suggest a wide range of possible settlements, for example, disciplinary grievances. Additionally, mediation is appropriate where the parties need a resolution but do not need a lengthy explanation. An example of this situation would be when resolution turns on a narrow factual issue, like an overtime assignment, or a discipline grievance that turns solely on credibility, or a narrow issue of contract or policy interpretation (for example, bereavement pay).

Grievances or disputes for which mediation is particularly unsuited are those that are rooted in historical or repeated disagreements. In the union setting, for example, such disputes include contracting-out of bargaining unit work and the extent to which the employer is bound to continue a prior practice. Also less suitable are grievances that turn on complex factual issues, those that raise issues in which the reasoning is more important than the result, and those presenting issues representing deeply held positions of the parties.

D. Process.

Step 1. Rules – Rules governing mediation can be drawn from various private providers or court-annexed programs or the company may draft the rules to govern the process. Including employees in this process aids in the perception of fairness. Questions that need to be addressed include: How do issues get to mediation? At what point in the grievance process is a mediation conference triggered? What kinds of cases are appropriate for mediation and how are they separated from the rest of the cases? Where should the mediation process occur? Who should attend?
Two rules that should be included in the process are: (1) no mediator in a given case may serve as the regular arbitrator on that same case, and (2) nothing said or done by the mediator or the parties in mediation may be disclosed in later arbitration or litigation.

**Step 2. Mediator Explains Process** – The mediator opens the meeting by explaining the process of mediation and the roles of the mediator and the participants. It is essential for participants to understand the function of the mediator. The mediator is not there to help one side win, but to help both sides reach a settlement, to facilitate communications and cooperative problem solving, to emphasize the future, and to find resolutions rather than assign fault.

**Step 3. Parties’ Opening Statements** – Parties make opening statements directed to each other. Allowing parties to tell their stories in a factual, unemotional manner sets a positive tone for identification of underlying issues and problem solving.

**Step 4. Parties’ Discussions** – Parties discuss issues together with mediator and can caucus separately with mediator in an effort to reach resolution.

**Step 5. Parties Sign Agreement** – If the parties resolve the issues with the mediator’s help, they sign a written settlement agreement, which is enforceable.

**E. Strengths of the Process.** Mediation can produce a speedy resolution of cases and avoid transcripts, briefs, or written opinions. The mediation typically takes less than one day and typically is less expensive than other forms of dispute resolution. Furthermore, the atmosphere is far less contentious than in litigation or arbitration. Perhaps most importantly, there is often a constructive result because the parties focus on underlying problems, not just their “positions.”

A mediated solution gives the parties a greater opportunity to fashion a settlement that takes into account the interests of all the stakeholders. Generally, the remedies available to an arbitrator or judge are circumscribed compared with the range of options the parties can agree upon, especially with the help of a skilled mediator who can assist the parties in generating a broad range of solutions. Mediated agreements are more enduring than solutions imposed by third parties; the parties are more involved in the process and take ownership for the follow through.

**F. Weaknesses of the Process.** If mediation is unsuccessful, time and expense are lost, although what was learned in mediation may be useful or lead to post-mediation settlement. Furthermore, the opposing party is given exposure to your witnesses, facts, and theories of the case that it can use in further discovery, arbitration, or litigation.

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**IV. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) AND ADR**

The EEOC uses ADR techniques, including mediation, settlement and conciliation to resolve charges of discrimination. The EEOC has engaged in ADR from its inception in 1964. In the beginning, it had the authority only to conciliate investigated charges in which it found cause to believe discrimination had occurred. In 1972, Congress conferred litigation authority on the EEOC. It then became mandatory to conciliate all charges in which cause had been found.

**A. Formal Conciliation.** Formal conciliation under the EEOC’s statutory procedures occurs after a charge has been investigated and a cause determination issued.

**B. National Mediation Program.** The EEOC has established a National Mediation Program, in which mediation-based ADR is offered by EEOC early in the administrative process to facilitate resolution without lengthy investigations or litigation. EEOC chair Jacqueline A. Berrien has urged employers to use the agency’s mediation program, saying it has been very successful in resolving discrimination claims. See EEOC Chair Berrien Advocates Mediation For Private Sector Employees, Citing Success, 166 Daily Lab. Rep. (BNA) A-9 (Aug. 27, 2013). Berrien says there is a high rate of satisfaction among parties to mediation. According to Berrien, “some 96 percent of participants have said they would use EEOC’s mediation program again, and in the past year, the commission
settled more than 9,000 of the roughly 11,000 cases in the program." *Id.* More information on this program is available on the agency's web site at: [http://www.eeoc.gov/employers/resolving.cfm](http://www.eeoc.gov/employers/resolving.cfm).

**C. EEOC Position Regarding Mandatory Arbitration of Employment Disputes.** Since 1997, the EEOC has taken the position that mandatory arbitration is incompatible with Title VII and other anti-discrimination laws. However, the EEOC approved a mandatory arbitration procedure as part of a settlement agreement in California case, *EEOC v. Luce, Forward, Hamilton & Scripps Production*, LA CV 00-1322 FMC (ALJX) (C.D.CA June 17, 2004).

**V. ISSUES ARISING UNDER THE RLA**

**A. Mandatory Arbitration Agreements Not a Mandatory Subject of Bargaining Under the RLA.** In *Air Line Pilots Ass’n v. Northwest Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1999), opinion reinstated, 211 F.3d 1312 (D.C. Cir. 2000), the U.S. Court of Appeals for the District of Columbia, relying on *Alexander v. Gardner-Denver*, held that the imposition of a mandatory arbitration agreement is not a mandatory subject of bargaining under the RLA. Relying on *Gardner-Denver*, the court held that since a union cannot prospectively waive an individual employee's right to litigate a statutory claim of discrimination, the arbitration clause promulgated by the employer was not a mandatory subject of bargaining.

**B. Court Jurisdiction Over Minor Disputes Under the RLA.** The RLA contains a mandatory arbitral mechanism for “the prompt and orderly settlement” of two classes of disputes: major and minor disputes. 45 U.S.C. §151a. The U.S. Supreme Court has held that major disputes concern the formation of CBAs or efforts to secure them while minor disputes concern the interpretation of existing CBAs. See, e.g., *Consol. Rail Corp. v. Ry. Labor Exec. Ass’n*, 491 U.S. 299, 302 (1989). Minor disputes must be addressed through the employer’s grievance procedure and, failing that, through the arbitration procedures established by the RLA (for airlines, this is the System Board of Adjustment; for railway employees, it is the National Railroad Adjustment Board (NRAB)). Before resorting to arbitration, employees and carriers must exhaust the grievance procedures in their CBA, a stage known as “on-property” proceedings. As a final prearbitration step, the parties must attempt settlement “in conference” between representatives of the carrier and the grievant-employee. If the parties fail to achieve resolution, either may refer the matter to the NRAB. See *Union Pac. R.R. v. Brotherhood of Locomotive Engineers & Trainmen*, 558 U.S. 67(2009). Parties may seek court review of an NRAB panel order on one or more stated grounds: “failure … to comply with the requirements of [the RLA], … failure of the order to conform, or confine itself, to matters within the scope of the division’s jurisdiction, or … fraud or corruption by a member of the division making the order.” *Id.* Courts of Appeals have divided on whether, in addition to the statutory grounds for judicial review stated in the RLA, courts may review NRAB proceedings for due process violations. *Id.* The U.S. Supreme Court has held that that on-property conferencing is not a prerequisite to the NRAB’s exercise of jurisdiction. *Id.*

For more information on the RLA, please see the *RLA and Interaction Between the RLA and Other Laws Chapters of the SourceBook*. 