

## ARBITRATION AFTER CIRCUIT CITY\*

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### ABSTRACT

Section 1 of the Federal Arbitration Act contains a provision that excludes from the statute's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" [1]. In March 2001, the United States Supreme Court interpreted those words in *Circuit City Stores, Inc. v. Adams* [2]. This article discusses that case and a number of still unresolved issues that concern the arbitration of employment disputes. These matters include the scope of the agreement to arbitrate, the enforceability of handbook provisions, consideration, fairness of the process, sharing of arbitration fees, limitations on remedies and discovery, time limits, the enforceability of arbitration clauses in collective bargaining agreements, and the ability of the EEOC to bring lawsuits. The authors are attorneys who represent employers and this article is written from that perspective.

In March 2001, the U.S. Supreme Court issued a key decision concerning agreements to arbitrate employment disputes in *Circuit City Stores, Inc. v. Adams* [2]. Although the decision certainly indicates the Court's continued endorsement of arbitration for dispute resolution, it did not resolve the many issues surrounding the validity and enforcement of employment arbitration agreements.

\*This article should not be construed as legal advice or a legal opinion on any specific facts or circumstances.

Indeed, the issue in *Circuit City* was very narrow. It directly related only to Section 1 of the Federal Arbitration Act (FAA), which excludes from the statute's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" [1]. The question addressed by the Court concerned whether this exclusion extended to *all* employment contracts, other than contracts involving workers employed in the transportation industry, or *only* to employment contracts that involved transportation workers. In a 5-4 decision, the Court read the exclusion narrowly to apply only to those employees actually involved in the transport of goods. As a result, the FAA potentially extends to a great majority of American workers.

In dicta, the Court restated its general approval of arbitration in employment disputes, citing to its decision in *Gilmer v. Interstate/Johnson Lane Corp.*, in which the Court compelled an Age Discrimination in Employment Act (ADEA) claim to arbitration and rejected "generalized attacks" on arbitration clauses such as the employee being prone to "unequal bargaining powers" [3, at 32]. In *Circuit City*, the Court explained that there are "real benefits to the enforcement of arbitration provisions," including the reduction of costs, complexity, and uncertainty [2, at 1313]. Such benefits or advantages do not "somehow disappear when transferred to the employment context" [2, at 1313]. Indeed, according to the Court, the lower cost of arbitration is a benefit of "particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts" [2, at 1313].

Despite this favorable dicta, the *Circuit City* decision really addressed only the scope of Section 1 of the FAA, and the Court's conclusion on this issue was consistent with the decisions of all the appellate courts to consider this issue, with the exception of the Ninth Circuit Court of Appeals [4]. Significantly, the Court did *not* examine the specific arbitration agreement used by Circuit City, and therefore did not consider its validity or enforceability. As a result, there are still many unresolved issues related to the enforcement of arbitration agreements in the employment context. This article discusses some of the more significant open issues.

### KNOWING AND VOLUNTARY AGREEMENT

Generally, courts will apply general contract principles and examine the terms of the agreement in determining whether the employer and the employee intended the particular dispute to be arbitrated [5]. The Ninth Circuit Court of Appeals has adopted a heightened consent requirement, holding that "a Title VII [of the Civil Rights Act of 1964] Plaintiff may only be forced to [forgo] her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration" [6, at 1305]. But most courts reject this "knowing waiver" requirement [7]. In *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, for example, a district court in the Northern District of Illinois stated that the

view as stated by the Ninth Circuit is “incompatible with the Supreme Court’s decision in *Gilmer*, ignores core principles of contract interpretation, and inappropriately used legislative history to contradict plain statutory language” [8, at 1474]. Nonetheless, employers adopting mandatory arbitration for employment disputes should consider the following guidelines to defend against a claim that the agreement to arbitrate was not knowing and voluntary:

- The arbitration agreement must be in writing. Not only is a written agreement important to clearly communicate the agreement’s terms, but the FAA permits enforcement only of *written* agreements [1, § 2].
- The arbitration agreement should be stated in language that is clear, easy to understand, and appropriate for the work group to which it is being distributed.
- Employees should receive a copy of the entire agreement and any incorporated policies or rules.
- The language of the arbitration agreement should state that it is contractually binding [9].
- The claims that will be subject to arbitration should be clearly defined, including express reference to employment disputes and/or specific statutory claims such as Title VII and ADEA [10].
- Employees should be allowed sufficient time to read and understand the agreement and incorporated policies. A statement that the “[Applicant/Employee] should read the provisions carefully” will help show that the agreement does not unreasonably favor the employer [11].
- Employees should be encouraged to ask questions and sign a form acknowledging they have read and understood the policy and agreed to its terms. If the form provided to the employee does not encompass the entire policy, the form should specifically reference by name the document setting forth the entire policy and the fact that it has been made available to the employee, s/he has read it, and agrees to its terms [12].

Some employers simply include arbitration agreements in their employee handbooks or policy manuals. Although courts have found arbitration procedures published in personnel policy manuals to be enforceable, an employer has a greater likelihood of demonstrating the employee’s voluntary agreement to arbitrate if the employer has set forth the arbitration policy in a separate document and requires employees to sign an express agreement to its terms [13].

## CONSIDERATION

For new employees, employment with the company generally provides adequate consideration for an agreement to arbitrate disputes [14]. Most courts have concluded that continued employment constitutes adequate consideration for an agreement to arbitrate entered into with *current* employees [15]. Still, courts

are more likely to enforce arbitration agreements for current employees when additional consideration can be found in the employer's mutual agreement to arbitrate [16]. The employer's agreement to arbitrate at least some of its disputes with an employee should constitute sufficient consideration even if the employer does not agree to arbitrate certain types of disputes, such as breach of a non-compete or theft of trade secrets [17]. Moreover, because adequacy of the consideration is a question of fact, it would be prudent to identify the consideration expressly in the arbitration agreement. Failure to do so will present a court hostile to arbitration agreements with an opportunity to invalidate the agreement [18].

In *O'Neil v. Hilton Head Hosp.*, an agreement was found to be unenforceable because it permitted the employer to ignore the results of arbitration [19]. A company might consider including the following language to make clear the employer's agreement to arbitrate: "The company agrees to follow this Employee Alternate Dispute Resolution (ADR) Program in connection with the employee whose signature appears above," or "You and we would have had a right or opportunity to litigate disputes through a court but have agreed instead to resolve disputes through binding arbitration" [20].

### **PENALTIES FOR FAILING TO SIGN AN AGREEMENT TO ARBITRATE**

The Equal Employment Opportunity Commission (EEOC) has taken the position that withdrawing an offer of employment or terminating a current employee for failure to sign an arbitration agreement is retaliatory conduct. In *EEOC v. Luce Forward, Hamilton & Scripps, LLP*, the agency brought an action on behalf of an individual who had his conditional offer of employment rescinded after he refused to sign an arbitration agreement [21]. The district court, relying on the Ninth's Circuit's decision in *Duffield* [22], held that employers may not compel individuals to waive their Title VII right to a judicial forum [21]. Thus, it agreed with the EEOC and enjoined the employer from requiring its employees to agree to arbitration of their Title VII claims as a condition of employment and from attempting to enforce any such previously executed agreements. The district court made clear that its decision was based only on its duty to follow *Duffield* that a "great weight of legal authority" outside the Ninth Circuit supported the employer's position [21, at 1093]. This case is currently on appeal to the Ninth Circuit, which will force that court to determine whether *Duffield* is still viable after *Circuit City*. At least one court within the Ninth Circuit has concluded that *Duffield* is no longer viable at least with respect to California state law claims [23].

Because the district court's decision in *Luce Forward* was dependent on *Duffield*, it is unclear whether the EEOC will pursue its position on this issue in other jurisdictions or continue to do so in the Ninth Circuit if *Duffield* is overturned in light of *Circuit City*. In addition, at least one other court has found a

violation of a state antidiscrimination statute when an employee was terminated for refusing to sign an arbitration agreement. The court found this to violate the statute's prohibition on interfering with "the exercise or enjoyment of any right" protected by the statute, which included the right to file a complaint with the state administrative agency or sue in court for discrimination [24, at 878].

### FAIRNESS OF PROCESS

Central to *Gilmer* is the Supreme Court's requirement that "an employee who is made to use arbitration as a condition of employment effectively may vindicate [his or her] cause of action in the arbitral forum" [3, at 28]. Accordingly, courts will look at a variety of factors to determine whether the arbitration process is fair, impartial, and does, in fact, allow employees to vindicate their rights within the forum. Such factors include:

- *Mutual Selection of Arbitrator.* Courts are not likely to enforce an arbitration agreement that provides the employer with control over the selection of the arbitrator(s) [25].
- *Written Award.* Most courts hold that an agreement requiring a written opinion from the arbitrator is a factor weighing in favor of enforceability [26]. However, this does not mean that the arbitrator is required to issue findings of fact and conclusions of law or to set forth the reasons for the decision.
- *Location.* The location for the arbitration should not impose an unreasonable burden on the employee. If the location poses a significant burden obstacle, a court might find that the employee was effectively denied access to the process.
- *Representation by Counsel or Spokesperson.* Employees should be provided with the right to representation by a spokesperson of their choice [27].

### SHARING OF ARBITRATION FEES

Some courts prohibit fee splitting or fee-shifting provisions in arbitration agreements. The leading case is *Cole v. Burns Int'l Sec. Servs.* [26, at 1467] where the court concluded that to require an employee to pay for arbitration would undermine congressional intent and deter employees from pursuing their discrimination claims. Some courts have followed this decision [28]. Other courts, however, have adopted a case-by-case analysis that focuses on the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims. In *Williams v. Cigna Fin. Advisors Inc.*, for example, the court did not follow *Cole* because the evidence did not indicate that plaintiff was unable to pay one-half of the forum fees or that they were

prohibitively expensive for him, such that he was prevented from having a full opportunity to vindicate his claims effectively [29].

### LIMITATIONS ON REMEDIES

Most courts are reluctant to enforce arbitration agreements that fail to offer substantially the same remedies that could be obtained through a successful court action [30]. The implicit suggestion is that arbitration agreements that do not provide claimants with all of the relief available in court are inconsistent with the principles set forth in *Gilmer* [31]. But there are many exceptions.

- One court severed a claim of punitive damages from other arbitrable claims, while granting the claimant the opportunity to return to court to have his punitive damages claim heard after arbitration [32].
- Two cases relied on *Gilmer* to compel arbitration under agreements that precluded claimants from seeking punitive damages [33]. These courts generally held that the parties should be required to hold to their agreement, at least until Congress evinces an intention to preclude a waiver of judicial remedies for the statutory rights at issue. In both cases, the court was silent on the issue of whether the plaintiffs would have the right to seek punitive damages in another forum.
- Another court read the exclusion of certain damages as an implicit exclusion of statutory claims from the agreement's purview, and compelled arbitration only on the claimant's common law claims [34].
- Other cases have compelled arbitration when the agreement places limits on the amount of punitive damages. For example, in *Morrison v. Circuit City Stores, Inc.*, the arbitration agreement limited punitive damages to the sum of front pay, back pay, and benefits, or \$5,000, whichever was greater. The court compelled arbitration, finding that the limits on damages did not prevent the plaintiff from vindicating her rights in the arbitral forum [35].

### DISCOVERY

The *Gilmer* Court acknowledged that some limitations on discovery might be appropriate to achieve efficient and inexpensive resolution of disputes [3, at 31]. However, the Court indicated that an arbitration process that precludes all discovery might affect the enforceability of the arbitration agreement [36]. Courts considering this issue have rejected efforts to place severe limits on discovery, such as limiting the claimant to one deposition [37]. Courts are more likely to look favorably on arbitration agreements that permit limited, but reasonable, discovery. In *Morrison v. Circuit City*, an arbitration agreement that set specific limitations on the amount of discovery was reasonable in requiring that: 1) the employer supply the employee with documents from the employee's personnel file; 2) one

set of interrogatories with a document request; 3) three depositions; and 4) any additional discovery upon a showing of substantial need; and 5) discovery be completed within 90 days with time extended for good cause [35]. The American Bar Association's Due Process Protocol recommends "adequate but limited pre-trial discovery" in which employees "should have access to all information reasonably relevant" to their claims [27].

### TIME LIMITS FOR SUBMITTING CLAIMS TO ARBITRATION

As long as a reasonable time period is available in which employees may submit their claims to arbitration, an employer may be able to establish a filing period that is shorter than the one the law provides for a particular type of claim. In *Soltani v. Western & Southern Life Ins. Co.*, a provision in the employment contract that limited the filing period to six months for employment claims was enforceable [38]. In *Morrison v. Circuit City Stores*, a federal district court found that an agreement's one-year period for bringing employment claim was reasonable, even though it was shorter than the limitation period that might otherwise be available.

### ENFORCEABILITY UNDER COLLECTIVE AGREEMENTS

In *Alexander v. Gardner-Denver Co.*, the Supreme Court held that a black employee who had already arbitrated and lost his race discrimination claim under his union's collective bargaining agreement (CBA) was not thereafter barred from bringing a Title VII race claim in federal court [39]. The Court reasoned that a contract-based antidiscrimination guarantee created in an employee's CBA is a separate claim from those claims arising from the statutory protections afforded by Congress through federal antidiscrimination laws. In *Gardner-Denver*, the Court also indicated that union employees, such as the employee in that case, have special concerns regarding their individual discrimination claims, since their interests may not always be the same as those of their union's [39, at 58 n. 19]. Most circuit courts that have addressed this issue have relied on *Gardner-Denver* to hold that CBA clauses requiring arbitration of statutory discrimination claims brought by individual union members are unenforceable [40].

The Fourth Circuit Court of Appeals, relying on *Gilmer* and, more recently, on *Circuit City*, has held that as long as the waiver is "clear and unmistakable," it is enforceable. In *Safrit v. Cone Mills Corp.*, the employer agreed in the collective bargaining agreement not to discriminate against employees in protected classes, to "abide by all the requirements of Title VII," and to arbitrate any unresolved grievances arising under the CBA's non-discrimination language. The Fourth Circuit found this waiver to be "clear and unmistakable" and stated

that it would be “hard to imagine a waiver that would be more definite or absolute” [41].

The Supreme Court recently sidestepped the issue of the apparent conflict between *Gardner-Denver* and *Gilmer* in *Wright v. Universal Maritime Servs. Corp.* [42]. In that case, the Court held that the collective bargaining agreement did not contain clear and unmistakable language indicating an agreement to arbitrate individual statutory claims, and, therefore, there was no need for the Court to discuss the propriety of doing so.

### **IMPACT ON ABILITY OF EEOC TO BRING LAWSUITS**

The EEOC has consistently taken the position that it is not prevented from seeking individual relief, such as reinstatement, back pay or punitive damages, on behalf of employees who have entered into binding arbitration agreements with their employers. On January 15, 2002, the Supreme Court ruled 6-3 that even if an employee has agreed to arbitrate all employment-related disputes, the EEOC may still seek “victim-specific” relief in court for that individual, including backpay, reinstatement, and compensatory and punitive damages [43]. Citing a general reluctance “to approve rules that may jeopardize the EEOC’s ability to investigate and select cases” to pursue, the Court reversed the decision of the Fourth Circuit Court of Appeals, and overruled the decisions of the Second and Eighth Circuits in *EEOC v. Kidder Peabody & Co.*, and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon* [44]. Those cases all held that while the EEOC could pursue broad injunctive relief in prosecuting the claims of an individual who was a party to an arbitration agreement, the EEOC could not seek individualized, “victim-specific” relief.

While acknowledging the strong, competing public policies of encouraging arbitration and allowing the EEOC to exercise its full powers to enforce the antidiscrimination laws, the Supreme Court concluded that, in the absence of express legislative authority, no court may determine the weight to accord those policies, or otherwise take away any of the remedies the EEOC is authorized by law to seek in any given case. To hold otherwise, the Court concluded, would “undermine the detailed enforcement scheme created by Congress” for the EEOC.

It remains to be seen how aggressive the EEOC will be in pursuing claims on behalf of individuals who are barred from filing their own claims in court due to an arbitration agreement. However, it is unlikely that an employer’s decision to implement or continue an arbitration program would be affected by this case given the many other more significant considerations involved in deciding whether or not to have an arbitration program, and the reality that the EEOC has historically filed very few cases each year.



## SUMMARY AND CONCLUSIONS

In its 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*, the United States Supreme Court encouraged the use of arbitration in resolving employment disputes that involved nonorganized workers [3]. One of the questions that was *not* discussed in *Gilmer* concerned the meaning of a provision in the Federal Arbitration Act that excluded “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” from the coverage of the act. In March 2001, in *Circuit City Stores, Inc. v. Adams*, the Supreme Court defined the meaning of those exclusionary words. The Court interpreted the words narrowly, thereby extending the reach of the FAA to virtually all employees other than those directly involved in the transportation of goods.

*Gilmer* left a number of questions unanswered, and *Circuit City* answered only one of them. Most of this article has been devoted to discussing some of the answers—often contradictory—that the federal district and circuit courts have developed to resolve those questions. We examined what the federal courts have said about such topics as the degree of knowledge and consent required of an employee affected by an arbitration agreement, whether an arbitration clause contained in an employee handbook is enforceable, the kind of consideration necessary to render an arbitration agreement enforceable, the need for and requirements of a fair arbitration process, how much of a financial burden an employee is expected to bear, remedies, discovery, time limits, the relationship to collective bargaining agreements, and the ability of the EEOC to sue where the employee has agreed to arbitrate the same claims.

Since 1991, however, most courts have followed the Supreme Court’s directive and have encouraged the use of arbitration in employment disputes. The courts have done so largely because of a recognition that the advantages of arbitration far outweigh the potential disadvantages. From an employer’s viewpoint, those advantages include lower litigation costs, lower back-pay exposure, and reduced discovery burdens. In the arbitration process, the decision maker is likely to have a more neutral, less pro-employee bias than a jury, thereby avoiding “runaway jury” verdicts. The arbitration process, furthermore, brings finality to the problem because of limited appeal rights. Finally, the decisions do not establish the same precedent as adverse court decisions, and the process is more confidential and less public.

Arbitration is not a perfect process. There is a cost to set up and administer the program, and some employee’s may resent losing their ability to have their case heard by a jury. It may become harder to have cases dismissed at a preliminary stage or before a hearing, and the ease of access may increase number of employee claims. Arbitrators are probably less likely to accept procedural defenses such as the statute of limitations and jurisdictional prerequisites and more willing to allow hearsay evidence and irrelevant witnesses. Some arbitrators have a tendency to

“split the baby” or award something notwithstanding the law. The finality of the decision, furthermore, cuts two ways, for the employer has a quite limited right to appeal bad decisions.

Binding arbitration can be a useful tool in resolving workplace disputes, and its use is likely to continue to grow. However, the *Circuit City* decision does not mean that it is “all over” when it comes to the enforceability of pre-dispute arbitration agreements, as reflected in the Ninth Circuit’s holding on remand in that case that the agreement was unconscionable [4]. To the contrary, the decision is merely part of the swing of the pendulum begun in *Gilmer* toward increased judicial acceptance of such agreements. Many issues will need to be resolved before ADR gains full acceptance by the courts, employers, and employees. Only then will the process fulfill its promise of providing an efficient, cost-effective means of resolving many workplace disputes, the majority of which are not well-suited for full-scale litigation in court.

## ENDNOTES

1. 9 U.S.C. § 1, Federal Arbitration Act, 1925.
2. *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302 (2001).
3. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
4. *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1093 (9th Cir. 1999) (holding that Section 1’s exclusion applies beyond employment agreements in the transportation industry). Indeed, the Ninth Circuit Court of Appeals held on remand that the arbitration agreement was unconscionable because it was a contract of adhesion, and its limitations on damages were too restrictive. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893-4 (9th Cir., 2002).
5. *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984).
6. *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995); *see also Renteria v. Prudential Ins. Co. of America*, 113 F.3d 1104, 1105-06 (9th Cir. 1997) (stating that an employee’s consent to arbitration must be “knowing” and indicating that this is a heightened standard of consent).
7. *See Haskins v. Prudential Ins. Co. of Am.*, 230 F.3d 231, 235-36 (6th Cir. 2000) *cert. denied*, 121 S.Ct. 859 (2001); *Emeronye v. CACI Int’l Inc.*, 141 F. Supp. 2d 82 (D.D.C. 2001).
8. *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1474 (N.D. Ill. 1997).
9. *Durkin v. CIGNA Property & Cas. Corp.*, 942 F. Supp. 481, 488 (D. Kan. 1996).
10. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 18-19 (1st Cir. 1999) (holding that the employer will bear the risk of the employee’s ignorance about the range of claims subject to arbitration, at least where the arbitration agreement expressly identified the range by reference to another document, which was not provided to the employee).
11. *See Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 179, 180 (3d Cir. 1998) *cert. denied*, 525 U.S. 1139 (1999).

12. *See Gibbs v. Connecticut General Life Ins.*, No. CV97 0567009, 1998 WL 123010, \*3 (Conn. May 3, 1998) (agreement not enforceable where it was announced via interoffice memorandum and no acknowledgment was required indicating receipt of the policy).
13. Cases enforcing arbitration agreements in employee handbooks include *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837-38 (8th Cir. 1997); *Chanchani v. Salomon/Smith Barney Inc.*, No. 99 CIV 9219, 2001 WL 204214 (S.D.N.Y. Mar. 1, 2001); *Bauer v. Morton's of Chicago*, No. 99 C 5996, 2000 WL 149287 (N.D. Ill. Feb 9, 2000); *McClendon v. Sherwin Williams, Inc.*, 70 F. Supp.2d 940, 943 (E.D. Ark. 1999); and *Lang v. Burlington N. R.R.*, 835 F. Supp. 1104 (D. Minn. 1993). Examples of cases refusing to enforce arbitration agreements in employee handbooks include *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 762 (9th Cir. 1997), *cert. denied*, 523 U.S. 1072 (1998), and *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153 (9th Cir. 1998).
14. *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir. 1999); *Hull v. NCR Corporation*, 826 F. Supp. 303, 304 (E.D. Mo. 1993).
15. *See Venuto v. Insurance Co. of N. Am.*, No. Civ. A. 98-96, 1998 WL 414723, at \*5 (E.D. Pa. July 22, 1998); *Durkin*, [9]; *Kinnebrew v. Gulf Ins. Co.*, CA No. 3:94-CV-1517-R, 1994 WL 803508, at \*2 (N.D. Tex. Nov. 28, 1994) (“Federal courts do not hesitate to find enforceable an agreement to arbitrate when an arbitration policy is instituted during an employee’s employment and the employee continues to work for the employer thereafter.”); *cf. Gibson v. Neighborhood Health Clinics Inc.*, 121 F.3d 1126 (7th Cir. 1997).
16. *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1550 (11th Cir. 1985) (“the consideration exchanged for one party’s promise to arbitrate must be the other party’s promise to arbitrate at least some specified class of claims”); *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 377, *rev’d on other grounds*, (4th Cir. 1998); *Hellenic Lines, Ltd. v. Louis Dreyfus Corp.*, 372 F.2d 753, 758 (2d Cir. 1967) (“Hellenic’s promise to arbitrate was sufficient consideration to support Dreyfus’s promise to arbitrate”). *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997) (agreement unenforceable where the agreement permitted the employer to ignore the results of arbitration). Consider including the following language: “[Company] agrees to follow this Employee ADR Program in connection with the associate whose signature appears above,” or “You and we would have had a right or opportunity to litigate disputes through a court but have agreed instead to resolve disputes through binding arbitration.” *See Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000) (enforcing cited language in nonemployment case), *cert. denied*, 121 S.Ct. 1081 (2001).
17. *Quinn v. EMC Corp.*, 109 F. Supp.2d 681, 684 (S.D. Tex. 2000).
18. *See Gibbs v. Connecticut General Life Ins.*, No. CV 97 0567009, 1998 WL 123010, \*3 (Conn. May 3, 1998) (striking down arbitration clause because of lack of consideration because the employer failed to communicate to the employee that it would forgo discharging the employee in exchange for the employee’s promise to submit claims to arbitration); *Phillips v. CIGNA Investment, Inc.*, 27 F. Supp. 2d 345, 353-59 (D. Conn. 1998) (applying *Gibbs*).
19. *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997).
20. *See Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000) (enforcing cited language in nonemployment case), *cert. denied*, 121 S.Ct. 1081 (2001).

21. In *EEOC v. Luce Forward Hamilton & Scripps, LLP*, 122 F. Supp. 2d 1080 (C.D. Cal. 2000).
22. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), *cert. denied*, 525 U.S. 928 (1998), at 1093.
23. See *Olivares v. Hispanic Broadcasting Corp.*, No. CV 00-00354-ER, 2001 WL 477171 (C.D. Cal. Apr. 26, 2001) (rejecting *Duffield* and ordering arbitration with respect to California state law claims); but see *Melton v. Philip Morris Inc.*, No. 01-93-KI, 2001 LEXIS 12601 (D. Or. Aug. 9, 2001) (finding *Duffield* still viable as to Title VII and Oregon discrimination laws but compelling arbitration on ADEA and state common-law tort claims).
24. *Ackerman v. The Money Store*, 728 A.2d 873 (N.J. Super. 1998).
25. *Hooters of America, Inc. v. Hooters of Myrtle Beach, Inc.*, 173 F.3d 933, 937 (4th Cir. 1999). See also *Gothic Constr. Group, Inc. v. Port Auth. Trans-Hudson Corp.*, 312 N.J. Super. 1, 9-11 (App. Div. 1998) (arbitration provision held unenforceable where drafter of provision was designated as arbitrator); *Chimes v. Oritani Motor Hotel, Inc.*, 480 A.2d 218 (N.J. Super. 1984) (refusing to enforce arbitration agreement between union members and employer where agreement designated union board as arbitrator of dispute).
26. *Cole v. Burns Int'l. Security Services*, 105 F.3d 1465, 1482 (D.C. Cir. 1997).
27. *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1103 (W.D. Mich. 2000). The American Bar Association's Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (May 1995) (the "ABA Protocol") recommends that employees should have the right to be represented by a spokesperson of their own choosing.
28. See *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230 (10th Cir. 1999). *Perez v. Globe Airport Security Servs. Inc.*, 253 F.3d 1280 (11th Cir. 2001) (arbitration agreement unenforceable due to fee-splitting provision, even where the arbitrator awarded fees and costs to the plaintiff). The District of Columbia Circuit Court of Appeals recently held that its holding in *Cole* applies only to arbitration of federal statutory claims and not common law claims rooted in public policy. *Brown v. Wheat First Securities, Inc.*, 257 F.3d 821 (D.C. Cir. 2001).
29. *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 763-64 (5th Cir. 1999) *cert. denied*, 529 U.S. 1099 (2000). See also *Bradford v. Rockwell Semiconductor Sys.*, 238 F.3d 549, 556 (4th Cir. 2001); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 18-19 (1st Cir. 1999) (refusing to invalidate arbitration agreement simply because of the possibility that the arbitrator would charge the plaintiffs a forum fee "which may be as high as \$3,000 per day and tens of thousands of dollars per case," because, among other reasons, "arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court").
30. See, e.g., *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (invalidating employer's mandatory arbitration agreement that appeared to limit damages for Title VII claim to contract damages because it "defeated that statute's remedial purposes because it insulated [the employer] from Title VII damages and equitable relief").
31. For example, *Cole [26] and Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996) (compelling arbitration of Federal Labor Standards Act (FLSA) claim where arbitrator would have full power to award all remedies).

32. *DiCrisi v. Lyndon Guaranty Bank*, 807 F. Supp. 947, 953 (W.D.N.Y. 1992).
33. *DeGaetano v. Smith Barney, Inc.*, No. 95 1613, 1996 WL 44226 (S.D.N.Y. Feb. 5, 1996); *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100 (S.D.N.Y. 1995).
34. *Alcaraz v. Avnet, Inc.*, 933 F. Supp. 1025 (D.N.M. 1996).
35. *Morrison v. Circuit City Stores, Inc.*, 70 F.Supp.2d 815 (S.D. Ohio 1999), at 826, and *Ward v. Circuit City Stores, Inc.*, No. CIV-S-97-0227, 1997 U.S. Dist. LEXIS 23833 (E.D. Cal. Mar. 29, 1997). But *Johnson v. Circuit City Stores, Inc.*, 203 F.3d 821, 2000 WL 19166 (4th Cir.) (per curiam) (unpublished), *cert. denied*, 530 U.S. 1276 (2000) (affirmed district court's conclusion that arbitration agreement was unenforceable because it failed to provide plaintiff with the full set of remedies to which she would have been entitled to under Section 1981). The Eighth Circuit Court of Appeals recently held that this remedies limitation should simply be severed from the contract and the matter should proceed to arbitration. *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 682 (8th Cir., 2001).
36. "Although [arbitration discovery] procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration," quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). See also *Cole v. Burns Int'l Security Servs.*, [26, at 1482] (an employee must be given the right to at least minimal discovery in arbitrations).
37. See, e.g., *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp.2d 940, 948 (N.D. Ind. 2000) or *Geiger v. Ryan's Family Steakhouses, Inc.*, 134 F. Supp.2d 985, 995 (S.D. Ind, 2001).
38. *Soltani v. Western & Southern Life Ins. Co.*, 2001 U.S. App. LEXIS 9267 (9th Cir. Aug. 6, 2001), unpublished opinion. See also *Taylor v. Western & Southern Life Ins. Co.*, 966 F.2d 1188 (7th Cir. 1992), where a contractual six-month limitation valid under Illinois law was upheld since it was knowingly accepted, reasonable, and not contrary to public policy; see also *Myers v. Western-Southern Life Ins. Co.*, 849 F.2d 259, 260-61 (6th Cir. 1988), where the six-month limitation period for bringing employment claims was held to be reasonable even though it was shorter than the limit provided in state discrimination statute.
39. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).
40. See *Doyle v. Raley's Inc.*, No. 97-15863, 1998 WL 697395 (9th Cir. Sept. 22, 1998); *Harrison v. Eddy Patash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *remanded on other grounds*, 524 U.S. 947 (1998); *Penny v. United Parcel Serv.*, 128 F.3d 408 (6th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir.), *cert. denied*, 522 U.S. 912 (1997).
41. *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308 (4th Cir. 2001). The Fourth Circuit also enforced arbitration clauses in *Wikle v. CNA Holdings, Inc.*, No. 01-1119, 2001 WL 474692 (4th Cir. May 4, 2001), where the FMLA was explicitly incorporated into the terms of the CBA, and in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), where the CBA contained a statement that all disputes arising under the provision binding company to comply with antidiscrimination laws would be submitted to grievance procedure resulting in binding arbitration. *Cert. denied*, 519 U.S. 980 (1996).
42. *Wright v. Universal Maritime Servs. Corp.*, 119 S.Ct. 391 (1998).

43. *EEOC v. Waffle House, Inc.*, No. 99-1823, 2002 WL 46763 (January 15, 2002).
44. *EEOC v. Kidder Peabody & Co.*, 156 F.3d 209 (2d Cir. 1998), and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon*, 210 F.3d 814 (8th Cir. 2000).

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