Compulsory Arbitration

THE GRAND EXPERIMENT IN EMPLOYMENT

Richard A. Bales

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One

An Introduction to Employment Arbitration

ARBITRATION OF EMPLOYMENT DISPUTES IN THE nonunion sector was virtually unheard of as recently as five years ago. Today, however, commentators in the popular press[1] and in various trade journals are concluding that employment arbitration is becoming "the cornerstone of national labor policy,"[2] "an idea whose time has come,"[3] and that compulsory arbitration "is here to stay" as a method of resolving employment disputes.[4]

The trend was sparked by two events that occurred in 1991. The first was that Congress, in the Civil Rights Act of 1991 (the Act),[5] amended the federal antidiscrimination statutes to provide that "the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under" the federal antidiscrimination laws.[6] Although the legislative history of the Act indicates that Congress may not have intended to permit employers to require employees to sign agreements to arbitrate prospective claims,[7] employers and courts nonetheless have seized upon the language of the Act as a congressional endorsement of compulsory arbitration.[8]

The second event was the United States Supreme Court's ground breaking decision in *Gilmer v. Interstate/Johnson Lane Corporation*.[9] In *Gilmer*, the Court enforced an employee's agreement to submit all claims against his employer to arbitration instead of litigating them in court. When the employee filed suit in federal court with an age discrimination claim, the Court dismissed the lawsuit and ordered that his claim be referred to binding arbitration.

According to one commentator, the *Gilmer* decision precipitated a "stampede" by employers to draft agreements with their employees that would require them to submit employment disputes to binding arbitration.[10] This somewhat may overstate employer reaction. Although many employers, particularly in the securities industry, already have adopted

compulsory employment arbitration policies, many more have proceeded cautiously, waiting until the law becomes more established and the enforceability of arbitration agreements becomes more certain.

Recently, however, as courts continue to render decisions enforcing employment arbitration agreements, employers have become increasingly inclined to require employees to sign compulsory arbitration agreements as a condition of employment. A recent study by the United States General Accounting Office found that although only 1.3 percent of companies surveyed currently use arbitration outside the context of a collective bargaining agreement, an estimated 8.4 percent were considering implementing a policy requiring mandatory, binding arbitration.[11] Another survey of ninety-two companies showed that most presently are considering the use of employment arbitration,[12] and a newspaper reporter's informal survey of twelve Silicon Valley companies revealed that over half recently had enacted a compulsory arbitration policy.[13] The companies that have adopted or are considering compulsory arbitration range from large companies employing tens of thousands of employees, to small companies that worry that the cost of a single litigated case might put them out of business.

As the use of compulsory arbitration agreements proliferates, there is increasing concern that some employers are using the agreements to force their employees to relinquish important employment rights. Pony Express Courier Corporation is a particularly striking example of a company that has used arbitration agreements to eliminate substantive employment rights conferred by statute. Pony Express is a nationwide overnight delivery service. A subsidiary of Borg-Warner Security Corporation, it is headquartered in Charlotte, North Carolina, and employs approximately 4,100 people.[14] The company requires its employees, as a condition of employment, to sign an agreement providing that all employment claims will be arbitrated; that the employee's total remedy will be limited to the lesser of actual lost wages, six months' wages, or reinstatement; and that the arbitration will occur with no opportunity for the employee to conduct discovery of her case.[15] The effect of this agreement, if enforced, would be to wipe out an employee's statutory rights to trial by jury, to seek a broad spectrum of remedies including several years' worth of back pay and punitive damages, and to complete discovery of her case.

Concerns about compulsory arbitration assumed new urgency when the National Conference of Commissioners on Uniform State Laws approved the Model Employment Termination Act (META) to serve as a model for state employment legislative efforts.[16] META was created in part

to protect employees from arbitrary dismissal by prohibiting discharges without "good cause" for employees with at least one year's tenure.[17] META is also intended to protect employers from excessive jury awards by waiving jury trials and requiring employment disputes to be resolved by arbitration.[18] Supporters of META have argued that it provides a remedy to blue-collar and rank-and-file workers who previously could not bring lawsuits because of high litigation costs—a barrier which can be overcome by arbitration.[19]

The events leading to the emergence of compulsory employment arbitration have sparked an intense debate in both the academic community and the popular press about whether such arbitration should be encouraged, or whether it should be banned as yet another employer encroachment on employees' rights.[20] This book provides a comprehensive analysis of compulsory arbitration and includes an exhaustive review of its legal background, an examination of how it has been (and should be) implemented, and a discussion of the policy implications of substituting compulsory arbitration for litigation as the preeminent method of resolving disputes that arise in our nation's workplaces.

A. Arbitration Defined

Arbitration is a "simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding."[21] A compulsory employment arbitration agreement is an agreement between employer and employee to resolve future employment disputes by arbitration.[22] Compulsory arbitration provisions can be created as stand-alone agreements, or inserted as part of broader written employment agreements. They can be broad enough to encompass virtually every employment dispute imaginable, or drawn narrowly to encompass only a limited range of disputes (such as those involving discharge from employment). They can incorporate original rules to govern arbitral procedure, or adopt the rules promulgated by a neutral agency such as the American Arbitration Association (AAA) or the Center for Public Resources (CPR).

An arbitration agreement, by itself, does not affect the substantive legal rules that govern the employment relationship.[23] If an employee is employed at-will, that is, she can quit or be fired at any time without notice for any reason (other than one proscribed by law, such as her race),[24] an arbitration agreement does not affect her at-will status. Simi-

larly, an employee does not sign away her right to be free from invidious workplace discrimination or to recover certain damages specified by statute to compensate her for discrimination she has suffered, merely by signing an arbitration agreement. An arbitration agreement, by itself, merely changes the forum where the parties' substantive rights are adjudicated from the courthouse to arbitration, and does not affect those underlying rights.[25]

Some employers, however, have added additional provisions to arbitration agreements, provisions that significantly affect the parties' substantive rights. For example, Title VII, the federal statute making it illegal for an employer to discriminate on the basis of race, color, religion, sex, or national origin,[26] gives victims of employment discrimination the right to recover all of the pay they have lost as a result of discrimination, plus up to $300,000 in punitive damages and those for pain and suffering.[27] The agreement that Pony Express requires its employees to sign would permit a victim to recover only six months of back pay and would entirely eliminate her right to recover punitive damages and damages for pain and suffering. Courts should not permit overreaching by companies such as Pony Express, and should refuse to enforce provisions like theirs that affect parties' substantive employment rights.

The primary distinctive feature of a compulsory arbitration agreement is that both parties, the employer and the employee, agree to submit to binding arbitration any employment dispute that arises in the future. Because this is the final adjudication of a dispute, it operates to the exclusion of other forms of adjudication, such as litigation. As such, compulsory arbitration is a mutually exclusive alternative to litigation, because one signatory to such an agreement can compel the other to submit a claim to arbitration in lieu of litigation, and because an arbitration award is as final and binding as a case that has been litigated to final judgment with virtually all appeals exhausted.

This finality distinguishes arbitration from mediation, which is another alternative to litigation. The purpose of mediation is compromise. Instead of rendering a decision, the mediator attempts to persuade the parties, by proposals or arguments, to settle their differences voluntarily.[28] Mediation often is used by the parties trying to reach agreement before resorting to litigation. If the parties are unable to reach an agreement, however, they still must litigate to resolve their dispute. Arbitration ends the dispute, because the parties have previously agreed to accept the arbitrator's decision as binding, and courts will not permit a party to litigate such a dispute.

It is critical, therefore, that the arbitration be conducted fairly by an arbitrator who knows the area of the law at issue in the case. If the rules of mediation unfairly affect the parties, or if a mediator is ignorant about the law, the parties are free to attempt mediation for a second time under different rules or with a different mediator, or to bypass mediation altogether and proceed directly to litigation. However, if the rules of arbitration are unfair or if an arbitrator is ignorant about the law, the arbitrator's decision is, except under very narrow circumstances,[29] nonetheless final and binding.

B. A Brief History of Arbitration—with Emphasis on the American Workplace

1. Early Use of Arbitration

Arbitration is an ancient form of dispute resolution. King Solomon was an arbitrator.[30] Philip II of Macedonia, the father of Alexander the Great, specified the use of arbitration in disputes arising under his peace treaty with the city-states of southern Greece.[31] George Washington provided that any disputes concerning his intentions in his will would be resolved by a panel of three arbitrators, and that the decision of those arbitrations would be "as binding on the Parties as if it had been given in the Supreme Court of the United States."[32]

The United States inherited arbitration from England, where it had been used, though not always enforced,[33] many centuries before the beginning of English common law.[34] Arbitration has been used regularly in commercial settings as a substitute for litigation since the early 1920s.[35] The use of commercial arbitration in the United States and worldwide expanded significantly when, in 1970, the United States ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, under which the courts of signatory nations are required to enforce arbitration clauses and awards on the same basis as they would domestic arbitration proceedings.[36] More recently, Olympic athletes were required, as a precondition for competing in the 1996 Games, to agree to arbitrate any disputes between them and Olympic officials, including issues related to eligibility and drug testing.[37]

2. Transformations in the Resolution of Workplace Disputes

By far the most significant use of arbitration in the twentieth-century United States has been in the workplace. There have been three major transformations in the way workplace disputes have been resolved. The

first was the unionization of the American workforce in the 1940s and 1950s, and the concomitant use of arbitration to settle disputes between employers and unions.[38] The second was congressional passage of individual employment rights statutes, such as those prohibiting discrimination, which shifted the resolution of employment disputes from arbitration by the union and the employer, to resolution by litigation brought by an employee against the employer.[39] The third, which is the subject of this book, is the return to arbitration for resolving disputes concerning these individual rights.

Although labor arbitration began during the latter part of the nineteenth century, its most rapid advance occurred during World War II through the National War Labor Board.[40] The NWLB decided approximately 20,000 labor dispute cases, most of which were disputes over the terms of collective bargaining agreements. As a precondition to issuing a decision in a labor dispute, the NWLB required the parties to insert into their collective bargaining agreement a clause providing for arbitration of all future disputes. This laid the foundation for the current labor practice of terminating the contract grievance procedure with the final step of arbitration.[41]

The preeminent role of arbitration in resolving labor disputes was confirmed by the United States Supreme Court's 1960 *Steelworkers* Trilogy.[42] In these cases, the Court created a virtually irrebuttable presumption that disputes between employers and unions were arbitrable, and sharply restricted the role of courts in resolving such disputes.[43] The Court also articulated its vision of the American workplace as entirely autonomous—a place where unions and employers would collectively bargain and agree to rules governing the workplace, where all workplace disputes would be settled by arbitration, and where there was very little room (or need) for judicial intervention.

Beginning in the early 1950s and continuing to the present, however, union membership has withered.[44] The union density rate—the percentage of nonagricultural workforce participants who are unionized—declined from a high of 35 percent in 1954[45] to 15.5 percent in 1991.[46] When the recent increase in public sector unionization is discounted, the decline of private sector unionization becomes even more vivid. The private sector density rate currently is 10.9 percent, the lowest figure since 1936.[47] The decline shows no sign of reversal. If the rate of union membership decline over the past twelve years continues, the private sector union density rate may fall to 5 percent by the year 2000.[48]

This dramatic decline has resulted in a much smaller percentage of

employees who can avail themselves of union-negotiated grievance procedures, and has made it abundantly clear that unions are unable to provide workers with the minimal terms of employment that they have the right to expect.[49] This does not, however, mean that the employment of the vast majority of Americans is entirely subject to their employers' whims. At the same time that American workers began losing their ability to arbitrate grievances through the auspices of a union, the second major transformation in employment dispute resolution occurred: Congress passed legislation, and courts modified long-standing judicial doctrines, to establish threshold terms of employment that protect employees whether or not they belong to a union.

The trend to legislate in the employment sector began in the first decades of this century, when states began passing workers' compensation statutes. These laws supplanted the tort litigation system and established administrative agencies to oversee compensatory payments to injured workers.[50] The federal move toward employment legislation began in 1908 with the passage of the Federal Employers' Liability Act, which provided remedies for employees of common carriers engaged in interstate commerce.[51] In 1938, Congress passed the Fair Labor Standards Act,[52] which set the minimum wage, required premium pay for overtime work, and restricted child labor. The FLSA, however, merely was intended to provide a floor to support collective bargaining.[53] Statutory protection for broad categories of nonunion workers began in earnest in 1963, when Congress enacted the Equal Pay Act prohibiting wage discrimination on the basis of sex.[54] The watershed event occurred a year later when, in Title VII of the Civil Rights Act of 1964 (Title VII), Congress prohibited discrimination in employment on the basis of race, color, religion, sex, or national origin.[55] Other key federal statutes enacted since then include the Age Discrimination in Employment Act of 1967 (ADEA),[56] the Occupational Safety and Health Act of 1970 (OSHA),[57] the Rehabilitation Act of 1973,[58] the Employee Retirement Income Security Act of 1974 (ERISA),[59] the Pregnancy Discrimination Act of 1978 (PDA),[60] the Civil Service Reform Act of 1978 (CSRA),[61] the Employee Polygraph Protection Act of 1988 (EPPA),[62] the Worker Adjustment and Retraining Notification Act of 1988 (WARNA),[63] the Americans with Disabilities Act of 1990 (ADA),[64] the Civil Rights Act of 1991 (CRA),[65] and the Family and Medical Leave Act of 1993 (FMLA).[66]

State legislatures have followed the congressional lead and, in addition to enacting many state statutes that parallel the federal statutes listed above, have passed legislation protecting employees in a wide variety of

other circumstances.[67] As of 1991, twenty-two states made retaliatory dismissal for filing a worker's compensation claim unlawful, thirty-four states protected whistle-blowers,[68] and forty-two states regulated the administration of employment-related lie detector tests.[69] In addition, many states restrict the use of drug testing in the workplace,[70] several have enforced workplace safety and health mandates,[71] and some have enacted statutes to protect employees from the adverse effects of corporate takeovers.[72] Montana enacted the first state statute protecting workers from wrongful discharge,[73] and similar statutes have been passed in Puerto Rico[74] and the Virgin Islands.[75]

While federal and state legislatures have been imposing minimum terms on employment relationships, state courts have applied contract and tort principles to open gaping holes in the doctrine of employment at will.[76] For example, courts in at least twenty-nine states have used contract law to bind employers to tenure promises and discharge procedures outlined in employee handbooks.[77] Eleven states have used contract law's covenant of good faith and fair dealing to give employees a cause of action for wrongful termination.[78] Most states use contract law to enforce employers' explicit oral promises concerning job tenure,[79] and at least one state court has implied such a promise from an employee's length of service.[80]

At least thirty-two states have adopted a public policy exception to employment at will.[81] State courts use this exception, which gives employees a cause of action in tort, to protect employees fired for refusing to commit an unlawful act,[82] for exercising a statutory right,[83] or for performing a public duty.[84] Many states also have given employees tort actions for intentional infliction of emotional distress.[85]

These new minimum terms of employment are called "individual rights"[86] because the individual employee, rather than a union, is responsible for their enforcement. Unlike the grievance mechanism of a collective bargaining agreement, in which conflicts are resolved jointly by employer and union, individual rights rely for enforcement on lawsuits brought by employees against employers. The number of such lawsuits has exploded recently,[87] as press coverage of highly publicized cases has made employees aware of their rights and of the possibility of receiving large damage awards.

Not everyone, however, welcomes the prospect of enforcing these new individual employment rights through litigation. Judges see the employment litigation explosion as adding to a backlog that forces litigants to wait for years before getting to trial.[88] One commentator, predicting

the expanded use of arbitration to cover a broad range of conflicts in our society, noted aptly: "The courts cannot handle all of the load now, and even if they could handle all of it well, the judicial process is too slow and too costly. Courts are better at setting principles and establishing procedures in test cases. Private mechanisms need to carry the bulk of the caseload if the whole dispute-setting process is not to break down with serious consequences."[89] This may explain, at least in part, the recent judicial embrace of compulsory employment arbitration.[90]

Many employers are equally happy with compulsory arbitration. They dislike the jury system because they believe that juries are unpredictable, that jurors often decide cases on the basis of sympathy rather than legal merit, and that jurors are "the 'peers' of employees, not employers."[91] Moreover, because arbitration is faster and less formal than litigation, it is a substantially less expensive means of resolving employment disputes. As discussed later in this book,[92] one company slashed its annual expenditure on outside legal fees in half by adopting a comprehensive dispute resolution program that included compulsory arbitration.

Employees and their advocates often are less enthusiastic. This hesitation no doubt stems from the (often justified) fear that employers will draft arbitration agreements that deprive employees of their basic employment rights, and then offer these one-sided agreements to current and prospective employees on a sign-it-or-be-fired basis. The agreement Pony Express requires its employees to sign provides a vivid example of how employers can abuse compulsory arbitration. If arbitration is to become an effective and fair method of resolving employment disputes, courts will have to scrutinize arbitration agreements rigorously and refuse to enforce those that are unfair to employees.

A fairly designed compulsory arbitration system has a great deal to offer to employees. Many employees, especially lower-income workers, are shut out of the current litigation process because their low salaries make their receiving large damage awards unlikely, and this in turn makes it difficult to attract attornies who will handle these cases on a contingency basis.[93] The speed and low cost of an arbitration award may make even a low-damage case attractive to plaintiff attorneys. Moreover, even if the employee still cannot find an attorney, the relative informality of arbitration makes it far easier to arbitrate a claim without the aid of an attorney rather than satisfy the procedural roadblocks imposed by federal antidiscriminatory statutes as a prerequisite to litigation.[94] Further, the adversarial litigation process forces employees to jeopardize or sever current employment relationships; to pay for attornies' retainers, expert witness

fees, and protracted discoveries; and to put their professional lives on hold for years. Arbitration offers a way to resolve disputes quickly, often before the parties are so entrenched that reconciliation becomes impossible. For these reasons, employers and employees increasingly are entering into,[95] and courts increasingly are enforcing, compulsory arbitration agreements.

This use of compulsory arbitration to resolve disputes concerning individual employment rights represents the third transformation in the way employment disputes are resolved. This transformation, however, is far from complete, and in fact is quite tentative. As discussed at the beginning of this chapter, the transformation was sparked by the Supreme Court's *Gilmer* decision and by congressional passage of the 1991 Civil Rights Act. *Gilmer,* however, left several issues unresolved. For example, the Court did not specify whether its decision permitting compulsory arbitration applies to all employees or merely to a small, narrowly defined group; or whether all employment disputes (such as those arising under Title VII and other federal legislation) can be resolved by compulsory arbitration. A future Supreme Court decision ruling hostile to compulsory arbitration could bring the nascent era of compulsory arbitration to an end quickly and effectively. Similarly, it is possible to interpret the 1991 Civil Rights Act in a hostile manner. If courts reverse their current pro-arbitration course, or if Congress decides to pass a statute hostile to compulsory arbitration, it will become a thing of the past. That is why this book is subtitled *The Grand Experiment in Employment.*

C. An Overview of This Book

Chapter 2 provides the legal background to the enforcement of compulsory employment arbitration agreements. At common law, all arbitration agreements were unenforceable, but this changed in 1925 when Congress enacted the Federal Arbitration Act.[96] The FAA requires federal courts to enforce arbitration agreements. For years, courts used the FAA as authority for compelling arbitration of nonstatutory disputes (such as contractual disputes) and used other sources of law to compel arbitration of disputes arising between employers and unions. At the same time, however, courts refused to enforce agreements to arbitrate claims arising under statutory law, such as employment discrimination claims, because the courts considered arbitration an inferior way of adjudicating important public rights. This rigid divide between arbitrable nonstatutory issues and nonarbitrable statutory issues began to crumble when, in the late 1980s, the Supreme Court enforced agreements to arbitrate statutory claims aris-

ing under antitrust, securities, and racketeering laws. These nonemployment cases foreshadowed the Supreme Court's 1991 *Gilmer* decision, in which the Court gave its imprimatur to compulsory employment arbitration agreements by dismissing and ordering to arbitration an age discrimination lawsuit brought by an employee who had agreed to arbitrate all his prospective employment disputes.

Although there now is an extensive body of case law upholding the enforceability of compulsory employment arbitration agreements, two issues remain to be finally resolved before employers and employees can absolutely be confident that such agreements will be judicially enforced. These issues are discussed in chapters 3 through 5. The first issue, discussed in chapter 3, concerns the scope of an FAA clause excluding "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Although some commentators have argued which this clause should be interpreted broadly to prohibit courts from enforcing *any* arbitration agreement in the employment context, nearly every court that has considered the issue has interpreted the clause narrowly to apply only to employees *such as* seamen and railroad employees. The Supreme Court, however, has never resolved the issue and there is ample authority for reasoning that the clause should be construed broadly. Chapter 3 examines in detail both the legislative history and subsequent judicial interpretation of this "contract of employment" exclusion. It concludes that neither offers a definitive answer as to how the exclusion should be interpreted, allowing the Court either to continue its tentative endorsement of compulsory arbitration or to reverse course and shut down the experiment.

Chapter 4 discusses whether *Gilmer*, in which the Supreme Court ordered a federal age discrimination claim to arbitration, applies equally to other types of federal claims such as race and sex discrimination claims, and to claims arising under state law. Regarding federal claims, the issue is whether *Gilmer* can be applied to Title VII and other federal antidiscrimination statutes. Since *Gilmer*, the lower courts unanimously have answered this question affirmatively, thus broadening the applicability of compulsory arbitration. The Supreme Court, however, has not definitively resolved the issue, and there are indications in the legislative history of the 1991 Civil Rights Act that Congress may have been opposed to compulsory arbitration. Chapter 4 reviews both that history and post-*Gilmer* extensions of the FAA to various federal employment statutes, and, as with the FAA contracts of employment exception, concludes that it is sufficiently ambiguous for the Court either to bless or condemn compul-

sory arbitration. Similarly, such ambiguity gives Congress the opportunity to "clarify" its intention in the Civil Rights Act based on how compulsory arbitration works in practice.

The chapter next turns to extending the FAA to employment causes of action brought under state legislation and state common law. The FAA's failure to address its impact on state statutory and common law, and to provide a basis for independent federal question jurisdiction, left open issues such as whether, and to what extent, the FAA preempts contrary state law; whether causes of action based on state law are subject to compulsory arbitration under the FAA, and whether the FAA is applicable to state courts applying state substantive law. The latter part of chapter 4 thoroughly reviews the several Supreme Court decisions that have answered all these issues in favor of arbitration.

Chapter 5 considers the effect of the National Labor Relations Act on employment arbitration agreements. The NLRA, which gives employees the right to unionize, to bargain collectively, and to engage in other concerted activity such as strikes and picketing, might affect employment arbitration in two ways. First, requiring employees to waive their right to litigate statutory claims could interfere with their right to act concertedly. Second, an employment arbitration system, depending on its structure, might be an illegal employer-dominated labor organization. Although the dearth of case law on these issues makes it difficult to predict how the NLRA will affect employment arbitration, it appears more likely than not that the NLRA will not significantly inhibit arbitration's growth.

Chapter 6 examines the role of the Equal Employment Opportunity Commission, the federal agency Congress created to oversee enforcement of federal antidiscrimination laws, in the future of compulsory employment arbitration. Ever since the Supreme Court issued *Gilmer*, the EEOC in two ways has stridently opposed the use of compulsory arbitration agreements.

First, the EEOC has asserted that it has the legal right to circumvent the arbitration agreement without directly challenging the agreement itself. The EEOC's argument is that even if an employee contractually waives *her own* right to litigate her statutory employment claims, that waiver has no effect on the *EEOC's* right to sue the employer on behalf of the employee. After reviewing analogous case law related to class certification and employee settlements, I conclude that the EEOC is correct to assert that it retains independent authority to sue in its own name on behalf of employees. However, in cases where the employee on whose behalf the EEOC has sued has signed an arbitration agreement, the EEOC

may seek only classwide injunctive relief, and may not seek damages that the employee might have obtained in arbitration. This limitation, together with the paucity of the EEOC's resources, makes it extremely unlikely that the EEOC will litigate claims on behalf of employees who have signed valid (and fair) compulsory arbitration agreements.

Second, the EEOC has opposed compulsory employment arbitration by issuing policy statements condemning it and by directly challenging the legality of such agreements in court. It mounts direct challenges by litigating cases on behalf of employees who want to avoid enforcement of the arbitration agreements they have signed. But while the EEOC has the authority to litigate cases against employers that have adopted compulsory arbitration agreements, the agency's limited resources leave it unable to do so except in the most egregious cases. Moreover, the policy statements which the EEOC has issued condemning compulsory arbitration have no practical effect, because the agency has no legal authority to interpret the FAA. Although the EEOC has some limited authority to interpret federal antidiscrimination statutes, courts have already interpreted those statutes to favor compulsory arbitration, making the EEOC's opposition moot. For these reasons, an employer whose compulsory employment arbitration policy is scrupulously fair to employees has little to fear from the EEOC.

The next two chapters examine the way compulsory arbitration agreements have been implemented in two different industries. Chapter 7 considers the securities industry, which was the first industry to put these procedures into effect on a widespread basis. It did so almost by accident —the compulsory arbitration system that now resolves employment disputes was created to resolve investor-firm disputes. The provision that was drafted to compel arbitration of the latter disputes is broad enough to cover the former as well, and, since *Gilmer,* has been used with increasing frequency to compel the arbitration of employment claims. This discrepancy between the purpose for which the system was designed and the purpose for which it now is often used has created problems that raise serious doubts about the system's fairness to employees. This chapter discusses the securities arbitration system, its current application to employment disputes, and problems that often lead to the evisceration of employees' statutory rights.

The securities industry approaches arbitration essentially by substituting arbitration for litigation. Brown & Root, a large construction, maintenance, and engineering services company, has developed a radically different employment arbitration procedure. It has worked out a compre-

hensive four-step dispute resolution process, which culminates in arbitration but which is designed to encourage resolution of disputes by agreement reached, for example, through internal conciliation and mediation. This process has been phenomenally successful in the 3 years it has been used. In addition to slashing the company's outside legal fees in half, it has reduced the personnel turnover by resolving disputes before they result in discharges or resignation. This has not been accomplished at employees' expense; to the contrary, Brown & Root encourages employees to air grievances, contractually guarantees that they will not be retaliated against for doing so, and even reimburses them for legal expenses incurred when their grievance involves a legally protected right. Brown & Root's dispute resolution program is discussed in chapter 8.

Chapter 9 takes a "nuts and bolts" look at various aspects of employment arbitration agreements. Although the cases discussed in chapters 2 and 3 establish that virtually every conceivable type of employment claim is arbitrable, courts are unlikely to enforce those agreements perceived to be unfair to employees. This chapter discusses how employment arbitration agreements should be drafted and implemented, various procedures for selecting arbitrators, discovery options, whether arbitrators should be required to issue written opinions, attempts to limit the arbitrator's ability to award relief, and the scope of judicial review of arbitral awards. For each, the chapter first canvasses the existing case law, then makes recommendations both to courts regarding what procedures should be required prior to enforcement, and to employers regarding how their agreement should be drafted to maximize the probability of enforcement.

Finally, chapter 10 examines the policy implications of the current transition from dispute resolution by litigation to dispute resolution by compulsory arbitration. It begins by discussing the procedural rights that parties waive by agreeing to arbitration and the benefits arbitration offers over litigation, and by assessing the relative effect each right or benefit has on employers and employees. Next, the chapter considers several broader concerns commentators have raised about compulsory arbitration, such as the prospect of employers unilaterally imposing arbitration agreements on unwilling employees, the effect of compulsory arbitration on the enforcement of important public policies such as nondiscrimination, and the possibility that employers will abuse employment arbitration by using it to vitiate employees' substantive employment rights. Finally, this chapter offers some concluding remarks concerning the future of compulsory employment arbitration.

Arbitration has several significant advantages over litigation. A princi-

119–20 ("If . . . the duty to arbitrate is prominantly displayed near the signature line of the standardized agreement, the employee probably consents to arbitrate. If . . . the duty to arbitrate is buried among many pages of fine print, then the employee probably does not consent to arbitrate.").

79. Matthew W. Finkin, *Commentary on "Arbitration of Employment Disputes Without Unions,"* 66 CHI.-KENT L. REV. 799, 809 (1990).

80. Kenneth G. Dau-Schmidt, *Employment Security: A Comparative Institutional Debate,* 74 TEX. L. REV. 1645, 1649 (1996); *see also* J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate,* 1995 WIS. L. REV. 837, 898 (noting that, under established theories on the resolution of cognitive dissonance, "people prefer not to think about unpleasant possibilities").

81. *See* Sarah Rudolph Cole, *Incentives and Arbitration: The Case against Enforcement of Executory Arbitration Agreements between Employers and Employees,* 64 UMKC L. REV. 449, 479–82 (1996).

82. Joseph E. Herman, *Arbitrate, Don't Litigate, at Work,* N.Y. TIMES, Apr. 14, 1991, at F11.

83. *Id.*

84. *See, e.g.,* Peter M. Mundheim, Comment, *The Desirability of Punitive Damages in Securities Arbitration: Challenges Facing the Industry Regulators in the Wake of* Mastrobuono, 144 U. PA. L. REV., 197, 203 (1995) (discussing arbitration in the securities industry).

85. Some of the suggestions made in chapter 9 include putting the agreement in writing and making certain that it is clearly drafted, permitting ample discovery, requiring the arbitration to issue a written opinion, and not restricting the arbitrator's ability to award relief.

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