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CURRENT LABOR ARBITRATION ISSUES AFFECTING CONSTRUCTION EMPLOYERS

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Presented by:

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Experience
Robert Roginson is a partner in the Firm's Employer Services Practice Group. His practice includes all aspects of employment and labor law litigation and counseling for employers.

Mr. Roginson has represented private and public employers in state and federal courts and administrative agencies. Mr. Roginson has defended dozens of employers in class actions involving a variety of allegations, including employee misclassification, meal and rest period violations, off-the-clock claims, and record keeping violations. He also counsels employers on California and federal wage/hour and pay practice laws, prevailing wage laws, reduction in force issues and WARN notification requirements, labor relations and union matters, tribal immunity and sovereignty issues, and retaliation and discrimination claims.

From November 2007 until March 2010, Mr. Roginson served as Chief Counsel for the California Division of Labor Standards Enforcement (DLSE). Appointed by Governor Arnold Schwarzenegger, Mr. Roginson represented and advised the California Labor Commissioner and her staff in all aspects of enforcement and interpretation of California's labor and wage/hour laws, licensing requirements, and retaliation statutes. He also managed and directed the Division's litigation and handled matters involving meal and rest period compliance and enforcements, public works and prevailing wage requirements, child labor and work permit issues, the Talent Agency Act, farm labor contracting, garment manufacturing, and the Private Attorney General Act (PAGA).

As Chief Counsel, Mr. Roginson authored DLSE amicus briefs and opinion letters, including:

- DLSE amicus brief in the California Supreme Court meal period case, *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*
- DLSE opinion letter affirming California's on-duty meal period requirements
- DLSE opinion letter affirming an employer's right to take deductions for vacation and sick time for partial-day absences for exempt employees
- DLSE opinion letter affirming an employer's right implement proportionate salary and work schedule reductions for exempt employees
- DLSE opinion letter authorizing the use of debit paycards and convenience checks
- DLSE opinion letter approving summertime alternative workweek schedule

Mr. Roginson also co-wrote and edited the DLSE's Public Works Manual.

Mr. Roginson focuses on bringing creative solutions to complex legal problems. He has negotiated several settlements of wage/hour class and representative actions on terms favorable to the companies. Mr. Roginson also has considerable experience defending against union sponsored litigation and has represented garment manufacturers in a wage and hour class action brought by UNITE, a transportation company in a meal and rest period class action brought by the Teamsters Union, and various construction companies in prevailing wage and apprenticeship class action lawsuits financed and driven by the building and construction craft unions, including the IBEW, Roofers Union, and others.

Prior to joining Atkinson, Andelson, Loya, Ruud & Romo, Mr. Roginson worked in the industrial relations department for the Associated General Contractors of California (AGC of California), where he represented construction contractors in labor grievance and arbitration matters in addition to the negotiation of the Southern California Basic Trades Master Labor Agreements.

Representative Cases

- Defeated class certification in a class action lawsuit by warehouse employees against their logistics employer for meal and rest period and overtime claims.

- Defeated class certification in a class action lawsuit against a talent agency based upon contract and unlawful business practices arising out of the California Talent Agencies Act.

- Defeated class certification in a class action lawsuit by workers against their construction employer for purported prevailing wage violations.

- Defeated class certification in a class action lawsuit by employees against their restaurant employer for purported wage and hour violations.

- Negotiated an industry-wide settlement with the California Labor Commissioner on behalf of the ready mix concrete industry concerning meal periods taken by ready mix concrete truck drivers.

- Obtained a California Court of Appeal decision holding that specific opinion letters by the California Labor Commissioner constituted impermissible underground regulations.

- Obtained a summary judgment ruling that a contractor was not required to pay prevailing wages on a jail improvement project and successfully defended an appeal of the decision.

- Obtained a court ruling reversing a public works coverage determination that equipment repair work at a landfill was subject to California prevailing wage requirements.

- Obtained summary judgment against a union on behalf of two non-union contractors that such contractors have no obligation to comply with union apprenticeship requirements.
- Obtained public works coverage determination finding that privately funded improvements made to public golf course were not subject to California prevailing wage requirements

Education
Mr. Roginson attended Loyola Law School Los Angeles and received his Juris Doctorate. Mr. Roginson attended Loyola High School in Los Angeles and received his Bachelor of Arts degree in Philosophy from Georgetown University.

Bar Admissions
All California State Courts, United State Ninth Circuit Court of Appeal, United States Districts for the Southern, Central, and Northern District of California

Memberships and Affiliations
Mr. Roginson is a member of the Employers Group Legal Committee and the AGC of California Legislative and Legal Advisory Committees. He served as Chair of the AGC Legal Advisory Committee in 2007.

Presentations / Speeches
Mr. Roginson is an experienced presenter and has spoken before numerous organizations, including: California Department of Industrial Relations, Society for Human Resource Management (SHRM), Professionals In Human Resources Association (PIHRA), Employers Group, CalPELRA, Employment Roundtable of Southern California, Association of Talent Agents, AGC of California, AGC of America, Harbor Trucking Association, Practising Law Institute, National Association of Women in Construction (NAWIC), California Association of Licensed Security Agencies, Guards, and Associates (Calsaga), Visual Effects Society (VES), and the California Hospital Association, among others.

I. OVERVIEW OF ARBITRATION

Arbitration is an alternative method of resolving disputes outside of the civil judicial system. Arbitrators are typically attorneys or former judges and act as a neutral decision-maker. The neutral arbitrator is selected by the parties and hears evidence and arguments, then makes a final decision. Unlike mediation, arbitration is binding on the parties.

Arbitration agreements requiring employees to arbitrate any employment-related claims they have against their employers have become increasingly popular in the United States in recent years. One recent study estimated that approximately 15-20% of American employers have adopted binding arbitration of employment disputes, which means that the number of employees covered by such agreements now exceeds the number covered by arbitration provisions in collective bargaining agreements.[1]

The explosion of mandatory arbitration agreements followed the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991), which upheld an agreement to arbitrate a statutory age discrimination claim under a securities industry arbitration agreement. Since then, the employer community has increasingly looked to binding arbitration as a means of resolving both statutory and common law employment law claims as an alternative to the American jury trial system. U.S. courts have largely gone along with this trend, so long as the procedures for arbitrating claims are deemed fair and the procedure can be viewed as essentially the substitution of one forum for another.

Arbitration is highly favored, and the courts indulge every intendment to give effect to such proceedings. *See Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983); *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011); *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012). The courts have also favored arbitration because it helps lessen their caseloads. Any doubts concerning the scope of an arbitral issue are resolved in favor of arbitration. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). It is therefore little wonder that challenges to arbitration agreements have become more common, and that employers have also attempted to obtain both strategic and substantive advantages in arbitration that they cannot otherwise obtain through the judicial system.

This paper examines the current labor arbitration issues affecting construction employers and important things to consider when creating, considering, or reviewing arbitration agreements. It will not address labor issues in the union-context. It will discuss current judicial limits on what kinds of agreements the American courts have been willing to enforce, advantages and disadvantages of arbitration agreements, and other arbitration trends and guidelines. A review of "class action waivers" of arbitration claims, which preclude class treatment of any claims asserted in arbitration, is also provided. Finally, the most common arguments for and against the imposition of mandatory arbitration agreements are included.

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[1] *See* Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Admits the Sound & Fury,* 12 EMP. RIGHTS & EMP'T POLICY J. 405 (2007).

II. ISSUES AFFECTING ARBITRATION

A. PROBLEM AREAS

1. Invalid Agreements and Enforcement Issues

Before reviewing the kinds of provisions that the courts have struck down as unenforceable, it is helpful to note the particular circumstances in which they have found that either a contract was not validly entered into or the circumstances surrounding its enforcement barred arbitration. These include circumstances in which an employee was not given adequate notice of the terms of the mandatory arbitration agreement; when there was a lack of consideration for the agreement; when the employer reserved the right to unilaterally change the agreement; and when the employer waived its right to arbitrate by resorting to the judicial system. Each of these circumstances is reviewed below.

a. Inadequate Notice

The courts have been circumspect in requiring that the basic contract formation elements of an offer and some form of acceptance be present before determining that an arbitration agreement actually exists. Critical to this determination is whether the employee actually obtains notice of the proposed arbitration provisions.

In some cases, the courts have rejected the use of the internet or electronic mail to inform employees that they are subject to an arbitration agreement, when the company did not require acknowledgement of receipt of the agreement. *Skirchak v. Dynamics Research Corp*., 432 F.2d 175, 181 (D. Mass. 2006); s*ee also Campbell v. General Dynamics Gov't Systems Corp.*, 407 F.3d 546 (1st Cir. 2005) and *Hudyka v. Sunoco, Inc.*, 2007 WL 208516 (E.D. Pa. 2007) (holding that a mass e-mail distribution advising employees of the establishment of a new arbitration policy for legal claims was insufficient to show consent, when it could only be accessed through links and no records showed that the employees opened the messages). On the other hand, distribution of an arbitration policy by e-mail was found sufficient when it also contained a web address for a summary of the program and arbitration rules and provided confirmation of the applicant's knowledge of the website and agreement to arbitrate. *Bell v. Hollywood Entertainment Corp.*, 2006 WL 2192053 (Ohio Ct. App. 2006).

Sometimes employees seek to avoid arbitration agreements on the ground that they did not read them. However, one California court held that "a party can not [sic] use his own lack of diligence to avoid an arbitration agreement" by simply failing to read it. *Brookwood v. Bank of America*, 45 Cal.App.4th 1667 (1996). Other courts have similarly held that parties cannot avoid arbitration agreements by claiming they did not read the agreement. *See Ragone v. Atlantic Video at Manhattan Center,* 595 F.3d 115, 122 (2d Cir. 2010); *Bryant v. American Exp. Financial Advisors, Inc.*, 595 N.W.2d 482, 486–87 (Iowa 1999). Applying Illinois law, another state court held that an employee consented to an arbitration program that was mailed to her that was included in a policy manual, regardless of whether she had read or understood it. *Melena v. Anheuser-Busch, Inc.*, 847 N.E.2d 99, 111 (Ill. 2006). And in another case, a California Court of Appeal held that the distribution of a brochure to all employees was sufficient to establish an enforceable arbitration agreement, even though the plaintiff contended that she never received it. *Craig v. Brown & Root*, 84 Cal.App.4th 416, 422 (2000). *See*, however, *Newman v. Hooters of America, Inc.,* 2006 WL 1793541 (M.D. Fla. 2006) (employer's assertion that employee 'must

have signed' an agreement which it could not produce, because all employees were required to sign it, was insufficient to compel arbitration.)

The wording of employee handbooks can also pose problems to employers seeking to enforce arbitration provisions contained in them. In one case, an arbitration provision located on page 20 of a 60-page handbook, which stated that it "did not create a contract" and that its policies were meant to be treated as "guidelines" and "for information only," was insufficient to establish consent to arbitrate. *Douglas v. Pflueger Hawaii, Inc.*, 135 P.3d 129, 145 (Haw. 2006).

b. Lack of Consideration

Some courts have held that employees who remain in their employer's employ after the implementation date of a dispute resolution program impliedly consent to the program, and cannot escape it. *Hardin v. First Cash Financial Svcs., Inc.*, 465 F.3d 470 (10th Cir. 2006). In addition, because at-will employees have no right to future or permanent employment, they usually do not need to be given consideration for entering into mandatory arbitration agreements. *See, generally*, *Research & Trading Corp. v. Powell*, 468 A.2d 1301, 1305 (Del. Ch. 1983); *In re Dillard Department Stores*, 2006 WL 508629 (Tex. 2006). In these circumstances, by merely continuing to work the employees were deemed to have "accepted" the modified employment terms, and the employer's agreement to continue the employment relationship constitutes sufficient consideration. *See Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986).

However, in cases involving employees with agreements providing for termination only for "cause" or for employment for a specific length or term, payment of some form of consideration to the employee for agreeing to arbitration is normally required, lest the contract be considered illusory by virtue of the employer's right to unilaterally modify it without penalty. *See, e.g., Trumbull v. Century Marketing Corp.*, 12 F.Supp.2d 683 (N.D. Ohio 1998).

c. The Right To Unilaterally Modify The Agreement

A defect in contract formation that is closely related to lack of consideration is the right of the employer to unilaterally modify the arbitration agreement at any time. The courts have generally held that such provisions render the agreement unenforceable. *See Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 385 (6th Cir. 2005), and *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999), in which the employer reserved the right to change the arbitration rules at any time; *see also* DeMichele & Bales, "Unilateral Modifications Provisions In Employment Arbitration Agreements," 24 HOFSTRA LAB. & EMP. L.J. 63 (2006).

But when this right has been limited in some meaningful respect, the courts have ruled differently. For example, in *Hardin v. First Cash Financial Svcs.*, *supra*, the agreement gave the employer the right to provide ten days' notice of modification, and precluded it from being able to modify the agreement with respect to any pending claims arising prior to the date of termination. Notwithstanding this limited judicial inroad, the better practice is to provide that the agreement is only subject to modification by written consent of the parties.

d. Waiver by Taking Judicial Action

Employers can also be foreclosed from arbitrating when they have "substantially invoked" the litigation process to obtain advantages through the judicial system which they

cannot obtain through arbitration. *See PPG Industries v. Webster Auto Parts, Inc.*, 128 F.3d 103, 109 (2d Cir. 1997). The California courts have also barred employers from enforcing arbitration agreements when they obtained benefits such as formal discovery and requiring the plaintiff to reveal legal theories that they would not have been able to obtain in arbitration. *See Berman v. Health Net*, 80 Cal.App.4th 1359, 1365-70 (2000); *Davis v. Continental Airlines, Inc.*, 59 Cal.App.4th 205, 212-13 (1997). However, given the courts' general requirement that employment arbitration agreements require at least "minimal discovery," and the provisions in standard arbitration rules for at least some discovery, these arguments no longer appear valid.[2] *See Ryan's Family Steak House v. Kilpatric*, 2006 WL 3691554 (Ala. Civ. App. 2006) (employer's three-month delay in requesting arbitration, during which it obtained discovery through civil litigation, did not prejudice its right to enforce the agreement).

Employers have also been prevented from arbitrating when they have taken positions in the courts that are antithetical to the arbitral agreement. In *Brown v. Dillard's, Inc.*, 430 F.3d 1004 (9th Cir. 2005), the court concluded that an employer was not able to enforce an arbitration agreement against an employee when it repudiated the contract by failing to participate in the processing of the employee's wrongful termination claim to the American Arbitration Association. *See also Cox v. Ocean View Hotel Corp.*, 433 F.Supp.2d 1171, 1178 (D. Haw. 2006) (company waived right to enforce arbitration agreement when it took the position before the court that the employee had no arbitrable claim and resisted arbitration).

2. **Union Conflicts**

Aside from invalidly entered agreements, an employer could also be saddled with the burden of a mistake made by a union improperly representing its employee. In some cases, an employee sues a union and employer, even after an arbitration or grievance procedure.[3] Many of those situations involve a union breaching their duty of fair representation to the employee when the union represents the employee in a grievance procedure.[4] Suits for violations of collective bargaining agreements under the Labor Management Relations Act[5] ("LMRA") can displace state law tort claims when interpreting a Collective Bargaining Agreement[6], but the LMRA is not applicable to all cases. An employer is at risk for being sued as a co-defendant with the union even after an arbitration or grievance proceeding, subjecting the employer to spending additional time and money to resolve a claim. To prevent such situations, employers should consider what the unions want included in the terms of their representation.

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[2] *See e.g. Armendariz v. Foundation Health Psychcare Services, Inc.,* 24 Cal.4th 83, 106 (2000); American Arbitration Association Employment Arbitration Rules and Mediation Procedures, at section 9, located at www.adr.org.

[3] *See Washington v. Service Employees Intern. Union, Local 50*, 130 F.3d 825 (8th Cir. 1997); *Filippo v. Northern Indiana Public Service Corp., Inc.*, 141 F.3d 744 (7th Cir. 1998); *May v. GMC Mansfield Metal Fabricating,* 61 Fed.Appx. 171 (6th Cir. 2003); *Nachtsheim v. Continental Airlines*, 111 Fed.Appx. 113 (3d Cir. 2004).

[4] *Washington*, *supra* note 3.

[5] Labor Management Relations Act, 29 U.S.C. § 185.

[6] *Filippo*, *supra* note 3.

3. **Federal Arbitration Act ("FAA") Preemption**

The FAA does not contain an express preemption provision, "nor does it reflect a Congressional intent to occupy the entire field of arbitration." *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989). When state law and the FAA are apparently conflicting, the courts frequently determine that the FAA trumps state law if the state law is seen as undermining the goals of arbitration. *Id.* at 477–78. The Supreme Court has determined that the the FAA preempts California state law on many occasions. *See Concepcion*, 131 S.Ct. 1740; *Perry v. Thomas*, 482 U.S. 483, 489-91 (1987) (holding the FAA preempts a California law permitting employees to sue for unpaid wages notwithstanding an enforceable arbitration agreement); *Southland Corp. v. Keating*, 465 U.S. 1, 10-17 (1984) (holding the FAA preempted a California state law barring arbitration of certain statutory claims). The Supreme Court held the FAA preempted a Montana law requiring specific formatting of arbitration clauses. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-89 (1996). If state law arbitration rules are intended to apply to an agreement, it must be expressly stated in the provision. If the provision shows a specific intent for a certain state's laws to apply, the Court will find it is consistent with the goals of the FAA. *See Volt Info. Sci., Inc.*, 489 U.S. at 479.

B. **RECENT SIGNIFICANT CASES**

The United States Supreme Court frequently holds that the Federal Arbitration Act preempts state law, but there is constant friction when interpreting arbitration agreements under state law. "State courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act . . . ." *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S.Ct. 500, 501 (2012) (per curiam). Under the Federal Arbitration Act, the Supreme Court recently clarified that an arbitrator must decide whether a non-compete agreement is valid under state law and state courts must abide by the Federal Arbitration Act. *Nitro-Lift Technologies*, 133 S.Ct. 500. Below is a discussion of states to pay particular attention to in the coming year and recent cases addressing arbitration issues.

1. **California**

California is frequently at the forefront of employee legal issues, and arbitration agreements are no exception. California courts continue to challenge the validity of arbitration agreements. In *Pearson Dental Supplies, Inc. v. Superior Court*, the California Supreme Court held that an arbitration decision in favor of an employer is subject to judicial review and to being vacated by a court if a legal error by the arbitrator would deprive the plaintiff employee of a hearing on the merits of a claim for violation of the Fair Employment and Housing Act or a claim based upon "other unwaivable statutory rights."[7] California continues to reject class action waivers in arbitration agreements as unconscionable under *Armendariz*. *See e.g. Compton v. Superior Court; Am. Management Servs., LLC, Real Party in Interest*, No. B236669, 2013 WL 1120619 (Cal. Ct. Appeal Mar. 19, 2013); *Samaniego v. Empire Today LLC*, 205 Cal.App.4th 1138, 1150 (2012).

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[7] *Pearson Dental Supplies, Inc. v. Superior Court*, 48 Cal.4th 665 (2010).

2. Hawaii

NORESCO, an energy services company, had a contract with the United States to work on a construction project. NORESCO entered into a subcontracting agreement with a lighting company, LSI. Island, the insurance company, issued a Subcontractor Performance Bond. NORESCO argued that Island had to arbitrate, claiming a provision in the subcontract agreement between NORESCO and LSI was incorporated by reference into the contract between LSI and Island. Island did not have to arbitrate liability for Davis-Bacon Act wage violations of the lighting company working on a construction subcontract on a Marine Corps base. The court held the arbitration clause did not bind Island, a non-signatory, because it was not broad enough to bring Island within its terms. *Island Ins. Co., Ltd. v. NORESCO, LLC*, 2012 WL 6629588 (D. Haw. Dec. 19, 2012). When engaging in construction and subcontracting agreements, employers should be aware of the potential to be forced into arbitration with claims involving subcontractors. If there is a broad enough provision, a non-signatory can be encompassed within an agreement's terms. *See, e.g., U.S. Fidelity & Guar. Co. v. West Point Constr. Co.*, 837 F.2d 1507, 1508 (11th Cir. 1988).

3. Ohio

A district court in Ohio held that a construction firm working under a state highway agreement was not obligated to arbitrate a grievance with a participating local union it specifically excluded. *Ohio Conference of Teamsters v. Kokosing Constr. Co., Inc.*, 2012 WL 2374736 (S.D. Ohio June 22, 2012). According to this court, when entering into an agreement excluding certain unions, an employer cannot be forced to arbitrate grievances with that union.

4. New York

Federal courts in New York have recently decided three arbitration-related cases. On March 21, 2013, the Second Circuit held that arbitration agreements precluding Title VII class actions are enforceable. *Parisi v. Goldman, Sachs & Co.*, No. 11-5229, 2013 WL 1149751 (2d Cir. March 21, 2013). Federal district courts in New York have also recently enforced arbitration agreements precluding employees from bringing Fair Labor Standards Act claims on a collective basis, requiring the plaintiffs to individually pursue their claims through arbitration. *Torres v. United Healthcare Servs., Inc.,* 2013 WL 387922 (E.D. N.Y. Feb. 1, 2013); *Ryan v. JPMorgan Chase & Co.,* 2013 WL 646388 (S.D. N.Y. Feb. 21, 2013).

III. ARBITRATION AGREEMENT VALIDITY

A. THE BASICS

In the seminal case of *Armendariz*, *supra*, decided in 2000, the California Supreme Court devised a five-part test for determining when the "minimal requirements" for arbitrating an employee's statutory claim can be met. Relying largely on the case of *Cole v. Burns Int'l Sec. Servs*, 105 F.3d 1451 (D.C. Cir. 1997), the Court listed those requirements as follows:

1. A neutral arbitrator decide the dispute;

2. For more than minimal discovery;

3. A written award;

4. That the plaintiff be able to recover all the types of relief that would be available in a court of law; and

5. The employee not be required to pay unreasonable costs or any arbitrator fees or expenses as a condition of access to the arbitration forum.

Agreements which honor these requirements, and avoid the kind of overreaching provisions of the kind catalogued above, accordingly stand a much better chance of enforcement by judges in appellate courts.[8] Arbitration clauses must be clear and concise.[9] The wording will determine whether the agreement applies to a particular dispute and doubt as to the scope of arbitral issues is resolved in favor or arbitration.[10] In addition to the factors listed above, arbitration agreements should:

- Specify that all claims against the employer and its officers, directors and employees are arbitrable under the Federal Arbitration Act;
- Exclude only claims for administrative charges filed with the EEOC, unemployment and workers' compensation insurance claims, and unfair labor practice charges filed with the NLRB;
- Provide reference or access to the rules of the tribunal which will be administering the arbitration;
- Provide that to the fullest extent permitted by law, the claims asserted in arbitration shall not be joined or consolidated with those of other parties; and
- Provide that it is the entire agreement between the parties with respect to dispute resolution, and can only be modified by both parties in writing.

B. UNENFORCEABLE PROVISIONS

1. Biased Arbitration Selection Procedures

One provision that courts have routinely invalidated is a selection procedure which heavily favors one side of the dispute. For example, in *Graham v. Scissor Tail, Inc.*, 28 Cal.3d 807 (1981), the California Supreme Court held that a music producer was not required to arbitrate a dispute with a music performer before an arbitration panel composed of three representatives of the musician's union. Similarly, an arbitration service known as Employment Dispute Services, Inc. ("EDSI") was found to be an inappropriate dispute resolution provider in the Kilpatric case and other cases involving Ryan's Family Steak Houses, because that company's supervisors were permitted to serve on the arbitration panel. *See Floss v. Ryan's*

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[8] *See, however*, *Giuliano v. Inland Empire Personnel Inc.*, 149 Cal.App.4th 1276 (2007), holding that the *Armendariz* requirements do not apply to non-statutory claims which do not implicate public policy tied to a constitutional or statutory provision.

[9] *See, e.g., Alticor, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 411 F.3d 669 (6th Cir. 2005).

[10] *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 675 (2012) (Sotomayor, J., concurring).

Family Steak Houses, Inc., 211 F.3d 306, 314 (6th Cir. 2000). Generally, when a court concludes that an employer's unilaterally-established arbitral rules are so "one-sided that their only possible purpose is to undermine the neutrality of the proceeding," they will be stricken. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-9 (4th Cir. 1999) (where employer given unlimited control over composition of arbitration panel).

2. **Inadequate Discovery**

Another device that employers have unsuccessfully used in order to gain an advantage in arbitration is to unduly restrict available discovery. In *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 786 (9th Cir. 2002), an agreement was held unenforceable when it limited depositions of employer representatives (but not of employees), to "no more than four designated subjects." Along the same lines, in *Walker v. Ryan's Family Steak Houses, Inc.*, 289 F.Supp.2d 916, 925 (M.D. Tenn. 2003), the court refused to enforce an arbitration agreement that limited each party to one deposition and permitted the arbitrator to order additional depositions only in "extraordinary fact situations and for good cause shown." Although it is widely recognized that the full panoply of discovery rights available in civil litigation is generally not consistent with the speed and efficiency that arbitration is designed to achieve, the courts have still required that parties be afforded at least some discovery in order to both vindicate their statutory claims and adequately defend themselves. *See Armendariz*, 24 Cal.4th 83.

3. **Non-Mutuality of the Obligation to Arbitrate**

The lack of mutuality of the obligation to arbitrate has also gotten employers in trouble. The Ninth Circuit Court of Appeals has been particularly hostile to the absence of "bi-laterality" and the obligation to arbitrate. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1174-5 (9th Cir. 2003). The California courts are also much less inclined to enforce an agreement that specifically "carves out" or excludes from arbitration claims for injunctive or other equitable relief for intellectual property violations, unfair competition, or the use of unauthorized disclosure of trade secrets or confidential information, which only employers are likely to bring. *See Mercuro v. Superior Court*, 96 Cal.App.4th 167, 176 (2002); *O'Hare v. Financial Resource Consultants*, 107 Cal.App.4th 267, 276 (2003). Although the California courts have not specifically invalidated an arbitration agreement based solely on the absence of bilaterality of the obligation to arbitrate, that factor has often been cited as one of multiple grounds establishing unconscionability and requiring invalidation. *See Armendariz*, 24 Cal.4th at 117-118. Courts require mutuality of obligation for an enforceable agreement. *See Zamora v. Swift Transp. Corp.*, 547 F.Supp.2d 699, 703 (W.D. Tex 2008); *In re C & H News Co.*, 133 S.W.3d 642, 646–47 (Tex. App. 2003); *Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino*, 640 F.3d 471, 475 (1st Cir. 2011).

4. **Overly Short Limitations Periods**

Another device that has caused difficulty to employers in enforcing arbitration agreements is a statute of limitations period ("SOL") that is shorter than the claims-filing periods applicable in civil actions. Sometimes the SOL set out in a labor or arbitration agreement will conflict with state law SOL. When that occurs, which is the applicable SOL period? This is one issue that will likely become more common as arbitration agreements continue to gain popularity.

In *Davis v. O'Melveny & Meyers*, 485 F.3d 1066 (9th Cir. 2007), the court struck down a "notice provision" requiring that the claimant give notice and a demand for mediation within one year from when the basis of the claim became known or should have become known; and that "failure to give timely notice of a claim along with a demand for mediation will waive the claim and it will be lost forever." Relying on several previous cases involving Circuit City Stores, the Ninth Circuit found the limitations period substantively unconscionable because it was inadequate to protect the employees' ability to vindicate their statutory rights. The *Davis* court also expressed its concern about barring a "continuing violations" by employees based on an alleged systematic policy of discrimination in invalidating that provision.

A one-year limitations period was also fatal to an arbitration agreement in the California case of *Stirlen v. Supercuts, Inc.*, 51 Cal.App.4th 1519, 1528 (1997), and as applied to FEHA claims in *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003). Six-month limitations periods have also been struck down on public policy grounds. *Conway v. Stryker Medical Division*, 2006 WL 1008670 (W.D. Mich. 2006) (shortening the three-year limitations period of an FMLA claim to six months); *Wherry v. Award, Inc*, 192 Cal.App.4th 1242 (2011). If an employer would like to establish a different SOL period, that provision is likely going to be subject to challenge later, especially if it is significantly reducing the statutory SOL period.

5. **Limitations on Remedies**

Another creative device enabling employers to escape a certain type or extent of damages available in the judicial system, has also been found unconscionable. Such a provision was invalidated in *Stirlen*, 51 Cal.App.4th 1519, which limited an employee's potential recovery to only contract damages. Similarly, in *Suh v. Superior Court*, 181 Ca.App.4th 1504 (2010), a provision that prohibited an arbitrator from awarding consequential or punitive damages was held unlawful. In *Morrison v. Circuit City Stores*, 317 F.3d 646, 655 (6th Cir. 2003), the imposition of a one-year cap on back-pay, a two-year cap on front-pay, and a $5,000 cap on punitive damages was found invalid. And, in *Alexander v. Anthony International, LLP*, 341 F.3d 256, 267 (3d Cir. 2003), the court struck a provision limiting an employee's relief to reinstatement "net pecuniary damages." Some courts have merely stricken such offending provisions and given the arbitrator the authority to award damages to the full extent permitted by law. *See Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 (5th Cir. 2003). But by far the safer course of action is to permit employees to be able to obtain all remedies available in a court of law, so that the arbitral forum is considered as merely the replacement of a judicial one and not an inferior one. *See* AAA Employment Arbitration Rules, § 39.d.

6. **Barring Access to Statutorily-Provided Forums**

In *Davis, supra,* 485 F.3d 1066*,* the employer's dispute resolution policy prohibited an individual employee from notifying governmental agencies such as the Department of Labor or the California Labor Commissioner, and prohibited them from initiating administrative charges against the employer through those agencies. The court held that the prohibition on the filing of administrative claims was void, and cited that provision as a further basis to invalidate the policy in that case.

In California, model arbitration agreements also recognize the exclusion of claims that can be processed through the state worker's compensation system and unemployment insurance system from the arbitration process. In addition, the National Labor Relations Board has found

that an arbitration agreement which did not specifically exclude the arbitration of unfair labor practice charges violates the National Labor Relations Act, and is unenforceable. *See U-Haul Co. of California*, 347 N.L.R.B. 375, 377-9 (2006).

7. Employee Responsibility for Excessive Costs

Agreements requiring employees to share arbitration fees equally, up to a cap determined by the employee's salary, have been held invalid because they violate public policy. *Tibbs v. Autoclub of Southern California*, 2006 WL 3719422 (Cal.App. 2006). The courts have in fact recognized and in order to require employees to arbitrate statutory claims, the employee cannot be required to pay any costs that would not otherwise be required to process a claim through the judicial system. *See Armendariz*, *supra*, 24 Cal.4th 83, 102. The AAA rules contain similar provisions, as well as a waiver of employee filing fees based on financial hardship.

8. Forum Selection Clauses

Clauses requiring employees in one state to arbitrate their claims in another have also been stricken. For example, in *Domingo v. Ameriquest Mortgage Co.*, 70 F.App.'x 919, 920 (9th Cir. 2003), the court refused to enforce an agreement that required an employee in Hawaii to arbitrate her claim in California. Such clauses, to the extent that they make it more difficult or unlikely for an employee to pursue a claim against their employer or former employer, are accordingly subject to attack.

9. Not Making the Applicable Arbitration Rules Available

In the cases of *Fitz v. NCR Corp.*, 118 Cal.App.4th 702 (2004) and *Trivedi v. Curexo Technology Corp.*, 189 Cal.App.4th 387 (2010), employers were faulted for failing to provide a copy of the AAA rules to employees when they signed the agreement. It is therefore advisable to make copies of the rules and either distribute them or make them available upon request.

IV. CURRENT STATUS OF CLASS ACTION WAIVERS AND *D.R. HORTON*

More and more arbitration agreements are being written in ways that exclude class action claims by existing employees. However, in *Gentry v. Superior Court*, 42 Cal.4th 443 (2007), the Court concluded that when class arbitration is likely to be a "significantly more effective and practical means of vindicating the rights" of affected employees than individual suits, a class action waiver must be invalidated. Factors that are determinative of such a finding include "the modest size of potential individual recovery, the potential for retaliation against class members, and the potential that absent class members may be ill informed of their rights."

The *Gentry* case very arguably makes enforcement of class actions waivers in employment cases almost impossible, particularly given the developing jurisprudence defining a claim as large as $37,000 to be small enough to justify class treatment. *See Gentry* at 458, citing *Bell v. Farmers Ins. Exchge.*, 115 Cal.App.4th 715, 745 (2004). Accordingly, although *Gentry* stated that it was not invalidating *all* such class action waivers, there remains some significant risk in continuing to include them in arbitration agreements, since the courts can rely on such a provision in finding the agreement to be unconscionable. *See Franco v. Athens Disposal Co., Inc.*, 171 Cal.App.4th 1277 (2009) (invalidating arbitration agreement that included a class

action wavier as well as a statement that the employee agreed not to act as a "private attorney general" on a PAGA claim.)

In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662 (2010), the United States Supreme Court held that when a mandatory arbitration clause is silent concerning classwide arbitration, a party cannot be forced to submit to classwide arbitration.

However, the continued viability of the *Gentry* rule has been called into question by the Supreme Court decision in *Concepcion*. There, the Court held that the Federal Arbitration Act was intended to "ensure the enforcement of arbitration agreements according to their terms," and that class arbitration cannot be required without the parties' consent. The Court held the Federal Arbitration Act preempted California state law. The Court also stated that class-wide arbitration is a "structural matter" that includes absent parties, necessitating additional and different procedures and concerns about confidentiality that are not present in the traditional arbitration setting, and that arbitration is "poorly suited to the high risks of class litigation." The Court accordingly upheld the enforcement of a class action waiver in a consumer arbitration agreement, and required the consumers to arbitrate their claims against *AT&T* individually and not as part of a class. How broadly or narrowly courts will interpret Concepcion remains to be seen.

In a subsequent California Court of Appeal case, *Brown v. Ralph's Grocery Company*, 197 Cal.App.4th 489 (2011), the Court held that *Concepcion* did not apply to representative actions under the California Private Attorneys General Act. *Iskanian v. CLS Transp. Los Angeles, LLC* rejected the validity of *Brown.* It also held that *Concepcion* did overrule *Gentry* and that a class action waiver in an arbitration agreement is enforceable. *Iskanian v. CLS Transp. Los Angeles, LLC*, 206 Cal. App. 4th 949 (2012). The California Supreme Court granted review in *Iskanian* in September 2012. The United States Supreme Court granted review in *Italian Colors Restaurant v. American Express Co.*, 667 F.3d 204 (2d Cir. 2012) during Fall 2012 and heard oral arguments in the case February 27, 2013. In *Italian Colors*, the Second Circuit held class action waivers should be invalidated if the plaintiff can prove that the expense of the case compared to the likely recovery means the claim has to be adjudicated as a class claim or not at all. The arguments in front of the Supreme Court also addressed whether the FAA permits courts to invalidate arbitration agreements that prevent class arbitration of federal law claims. Since there are similarities between the *Gentry* holding and the *Italian Colors* class invalidation reasoning, the Supreme Court's decision in *Italian Colors* will likely impact *Iskanian*. On March 25, 2013, the Supreme Court heard arguments on whether it is within an arbitrator's powers to determine whether the parties agreed to authorize class arbitration when the agreement is silent on the specific issue. *Oxford Health Plans LLC v. Sutter*, ____ U.S. ____, No. 12-135 (2013). The *Sutter* decision will determine how much deference to afford an arbitrator under *Stolt-Nielsen*.

A. ***D.R. Horton, Inc.***

More recently, In *D.R. Horton*, the NLRB ruled that D.R. Horton, a nationwide homebuilder, violated Section 8(a)(1) of the National Labor Relations Act (NLRA) by requiring employees to sign agreements that: 1) contained a mandatory arbitration provision; and 2)

required them to bring all employment-related claims to an arbitrator on an individual basis, as opposed to as a potential class action.[11]

The NLRB in *D.R. Horton* ruled that the right to file a class or collective action over wages, hours, or working conditions either in court or before an arbitrator was included within the ambit of protected activities. Because the mandatory arbitration agreement used by D.R. Horton eliminated the rights of the employees to undertake such concerted activities, the NLRB found that use of the agreement violated Section 8(a)(1) of the NLRA. In *D.R. Horton, Inc.,* 357 NLRB No. 184 (2012), the National Labor Relations Board ("NLRB") concluded that mandatory arbitration agreements which as a condition of employment require the employee to waive their "right to maintain class or collective actions in all forums" was unlawful because it could "reasonably be read to bar protected, concerted, activity" protected by the federal labor laws. Employers must weigh the risk against the benefit of such waivers to limit employees' ability to litigate claims against the company on a class-wide basis. The NLRB attempted to distinguish *Stolt-Nielsen* and *Concepcion* by drawing highlighting the difference between employment and consumer class actions. The NLRB explained that employment class actions are "less cumbersome and more akin to an individual arbitration proceeding." *D.R. Horton*, 357 NLRB No. 184, at 12. The NLRB determined that their decision was in accordance with the FAA because the National Labor Relations Act guarantees the substantive right to bring a collective action. *D.R. Horton*, 357 NLRB No. 184, at 12. The NLRB limited its holding in *D.R. Horton* to employee agreements and it does not bar individual claim arbitration as long as class arbitration or litigation is still an available option.

D.R. Horton effectively forces employers to provide for class arbitration or litigation for employees. It remains to be seen whether this decision can be harmonized with *Concepcion*, as it has not been enforced by a federal appellate court as of this time. However, courts have been declining to follow *D.R. Horton* because of the perceived conflict with *Concepcion* and *CompuCredit Corp. v. Greenwood* and an appeal is pending before the Fifth Circuit. In *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), the Eighth Circuit found that *D.R. Horton* carried very little persuasive value because it was limited to arbitration agreements that bar all protected activity. The court found that courts owe no deference to the reasoning in D.R. Horton re the FAA.[12] This year will provide more guidance on the applicability and validity of *D.R. Horton.*

[11] Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" the act. These rights include the right to "engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[12] *See also Jasso v. Money Mart Express, Inc.*, 879 F.Supp.2d 1038 (N.D. Cal. 2012) (holding class action waiver in arbitration agreement enforceable in accordance with Concepcion and *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012) and declining to follow *D.R. Horton*); *LaVoice v. UBS Fin. Serv.*, 2012 WL 124590 (S.D.N.Y. 2012) (declining to give weight to *LaVoice*'s reliance on *D.R. Horton*).

V. SHOULD I HAVE AN ARBITRATION AGREEMENT?

A. ADVANTAGES

1. Higher Employer Success Rate

Empirical studies have shown that both the percentage of cases won by employees in arbitration, and the amounts of damages recovered, are less than what is normally recovered in the judicial system. In one study conducted in 1999 and 2000, researchers found employee win rates of 26.2% in arbitration as opposed to between 36.4% and 43.8% in litigation.[13] Another study concluded that in 408 federal court employment discrimination cases in 1999 and 2000, the median award was approximately $150,500 and the mean award was $336,291; whereas in 26 cases involving employer-promulgated agreements, the median award was only $13,450, and the mean award was $38,723.[14] Still other studies have concluded that "there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration]; but it is undeniable that extremely large awards are more common in litigation, especially by juries.[15] Thus, arbitration frequently reduces the settlement value of a case. After using an arbitrator multiple times, an employer will become more familiar with how the arbitrator tends to rule.

2. Lower Cost

Arbitration, in most cases, decreases legal fees spent on employee disputes since discovery and trial are limited.[16] Employers are usually able to resolve disputed employment-related claims for substantially less when the case is to be tried before an arbitrator instead of a jury, given the perception that a neutral arbitrator is less likely to award an excessive amount of money than a "runaway jury."[17] It is also less likely that an arbitrator will award punitive damages.[18]

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[13] *See Colvin*, *supra* note 1, at p. 7.

[14] Lewis L. Maltby, "Employment Arbitration and Workplace Justice," 38 U.S.F.L. Rev. 105 (2003). The same study showed that in 68 state court employment discrimination trials in 1996, the median award was $206,976 and the mean award was $474,888.

[15] David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1571 (2005); Maltby, *supra* note 38 at 114-115.

[16] COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 276 (4th Cir. 1999).

[17] John L. Reed and Richard K. Herrmann, *An Alternative to the Not-Ready-for-the-Year-2000 Court System*, DISP. RESOL. J., Nov. 2008, at 18.

[18] Ashley M. Sergeant, *The Corporation's New Lethal Weapon: Mandatory Binding Arbitration Clauses*, S.D. L. REV. 149, 165 (2012).

3. **Resolution Speed**

Arbitration will often allow for a speedier resolution of employee disputes.[19] The arbitrator can not only hear a case faster, but can come to a decision about liability faster than a judge or jury.[20] Instead of testimony, arbitration uses documental evidence.[21]

4. **Learned Neutral Decision-Maker**

The figures discussed above bear on what most employers expect: that trained neutral arbitrators, with backgrounds in employment law, can more easily sift through the various claims made by employees, and decide cases more fairly based on the application of the law as opposed to passion, prejudice, or anecdotal experiences that jurors often rely on. In addition, arbitration is likely to be more private than a court proceeding with a jury. The commonly held perception that employees stand a greater chance of losing in arbitration, and of obtaining a lower amount of damages even if they prevail, helps explain the ferocity with which plaintiff lawyers typically challenge the enforcement of arbitration agreements, and the increasing number of judicial cases deciding those challenges. But in our experience, the value of mandatory arbitration agreements stems from other more practical concerns: namely, that the prospect of a case being decided by a learned neutral, as opposed to a group of citizens who are not trained in the law, typically results in a vast decrease in the settlement value of such cases, so that matters which normally end up settling anyway can settle for far less. It is this salient feature of mandatory arbitration programs that should be among the foremost concerns to the management community as the law continues to develop in this area.

5. **Employee Morale**

Arbitration may improve employee relations by presenting the image that there is fairness and due process in the workplace. Since it is less public than litigation, it can also prevent grievances from becoming a workplace distraction and disrupting productivity.

B. **DISADVANTAGES**

1. **Disfavor of Mandatory Arbitration**

Despite the increasing use of arbitration agreements in the employment setting, plaintiff lawyers continue to make both judicial and legislative challenges to them, and some employers continue to resist them. The plaintiffs' bar most commonly argues that arbitration unfairly deprives citizens of their right to a jury trial guaranteed by the Seventh Amendment of the United States Constitution, when it is unilaterally imposed by their employer before a dispute arises. The primary initial challenges that were made to arbitration of statutory claims were cogently articulated in the Ninth Circuit's decision in *Duffield v. Robertson-Stephens Co.*, 144 F.3d 1182

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[19] Sarah Rudolph Cole, *Let the Grand Experiment Begin:* Pyett *Authorizes Arbitration of Unionized Employees' Statutory Discrimination Claims,* 14 LEWIS & CLARK L. REV. 861, 899 (2010).

[20] *Alternative Dispute Resolution*, SUPERIOR COURT OF CAL., COUNTY OF FRESNO, HTTP://WWW.FRESNO.COURTS.CA.GOV/ALTERNATIVE_DISPUTE_RESOLUTION/ (last visited Apr. 3, 2013).

[21] *Alternative Dispute Resolution*, *supra* note 19.

(9th Cir. 1998), which invalided the arbitration of Title VII claims. *Duffield* was later overruled, however, and its logic has since been replaced by the substantial authority favoring alternative dispute resolution mechanisms as means for resolving employment-related claims.

2. **Employer Bears Cost**

Disfavor of mandatory arbitration is not limited to the plaintiff bar. Many employers dislike arbitration because they must bear the cost of arbitration if it is made a substitute for the civil justice system as the sole means for resolving an employee's claims.[22] This is normally overridden by the fact that an employer will spend much more defending itself in a judicial proceeding, with the availability of more discovery, longer trials, and the time and effort involved in jury selection.

3. **"Compromise" or "Split" Verdicts**

There is a perceived tendency of arbitrators to impose "split verdicts" or "compromise verdicts." Often when an employer could otherwise prevail at trial, arbitrators will render a "split verdict" or "compromise verdict" as a means of resolving the matter.[23] That occurs partially because of their interest in obtaining repeat business form the litigants or their attorneys. "Split" verdicts can in fact substantially increase an employer's potential liability when a fee-shifting statute (such as Title VII or the California Fair Employment and Housing Act) is involved and requires and award of attorney's fees to the party if he or she prevails on any of their claims.

Along these same lines, dispositive motions, either at the pleading or summary judgment stage, are less likely to either be permitted or to succeed in arbitration, given the relatively expeditious nature of the procedure and the popular conception that arbitration comprises an informal way for a litigant to "have their day in court." Some weaker cases may in fact be more logically suited to judicial resolution through the available law and motion procedure as opposed to binding arbitration.

4. **Limited Appeal Rights**

Many employers dislike the unavailability of appeal except in very limited circumstances. Most state arbitration statutes, such as the California Arbitration Act[24], provide extremely limited grounds for vacating arbitral awards – such as fraud, corruption, or failure of the arbitrator to disclose their relationships with opposing party or counsel – an employer is essentially "stuck with" an adverse award which may be enforced as a judgment against it.[25] Typically, the employer must live with the decision of the arbitrator. For these reasons, arbitration is not viewed as a panacea by everyone in the employer community, particularly those companies

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[22] *See* William H. Daughtrey, Jr. & Donnie L. Kidd, Jr., 14 OHIO ST. J. ON DISP. RESOL. 29, 62 n.170 (1998).

[23] Sergeant, *supra* note 17 at 165.

[24] Cal. Code Civ. Proc. § 1281, et. seq.

[25] Similarly, the FAA, 9 U.S.C. §1, et. seq., only permits awards to be vacated for fraud, corruption, evident partiality, and exceeding one's powers or denying due process, although there is an ongoing debate as to whether "manifest disregard for the law" can also be used. *See Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009).

which have been stung by an excessive unchallengeable award or where the fees expended in the arbitration process exceeded what it would have likely cost to get the claim dismissed in court.

In light of this problem, some parties have contracted to provide for some form of judicial review of arbitral awards. *See Cable Connection, In. v. DirecTV*, 44 Cal.4th 1334 (2008) (enforcing clause stating that "The arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.") However, such provisions essentially have the effect of undermining the expeditiousness and finality of the arbitration process, and can lead to appellate litigation that is more akin to a judicial proceeding.

5. **Inconsistent Results**

Cases decided by different arbitrators may produce inconsistent results.[26] This is most likely to occur when cases having similar factual situations are decided by different arbitrators.[27] Inconsistent results can include differing rulings on party liability.[28] This is a risk that is less likely to occur with judicial claim resolution.

6. **Challenges to Enforceability of Agreements**

Challenges are routinely made to the enforceability of arbitration agreements, which creates a potential for "satellite litigation" over whether the parties are legally required to arbitrate a given dispute.[29] Those challenges can make arbitration more costly and time consuming than litigation. In addition, sometimes the agreements may be unenforceable, which will then require additional time attempting to resolve the claim in litigation.

7. **Larger Claim Volume**

Another disadvantage is that many people believe that arbitration is more accessible to employees because it is a cheaper means to address claims, which could lead to a larger volume of employee claims.[30]

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[26] Jonathan R. Waldron, *Resolving a Split: May Courts Order Consolidation of Arbitration Proceedings Absent Express Agreement By the Parties?*, 2005 J. DISP. RESOL. 177, 184 (2005); Darrick M. Mix, *ADR in the Construction Industry: Continuing the Development of a More Efficient Dispute Resolution Mechanism*, 12 OHIO ST. J. ON DISP. RESOL. 463, 472 (1997).
[27] Waldron, *supra* note 25.
[28] Mix, *supra* note 25.
[29] Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 NEV. L. J. 385, 386 (2007); David S. Schwartz, *If You Love Arbitration, Set it Free: How "Mandatory" Undermines "Arbitration"*, 8 NEV. L. J. 400, 421–22 (2007); Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1716 n.14 (2006).
[30] Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be An All or Nothing Proposition*, 87 IND. L.J. 289, 290 (2012); Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 791 (2008); Rudolph, *supra* note 18 at 862.

8. **Employee Morale**

While the availability of arbitration procedures as a dispute resolution mechanism can act to increase employee morale, it can have the opposite effect as well. Employees can view a mandatory arbitration agreement as an unfair way to control and decrease their rights as an employee.[31]

9. **Not Suitable for All Disputes**

Arbitration is not suitable for all employment disputes. The employer may wish to defend a principle or discourage other similarly situated employees. Therefore, an employer may prefer the civil process, which is more arduous, to potentially avoid other litigation.

C. **Other Considerations**

Aside from considering the advantages and disadvantages of arbitration as discussed above, an employer should also consider:

- Whether the arbitration program should be limited to new hires;
- Whether it should be mandatory or voluntary for existing employees;
- Will it apply to all employees or just employees of certain divisions;
- Whether there should be required steps before the arbitration, such as grievance and complaint procedures or mediation;
- What procedural rules should govern the arbitration;
- Whether the arbitration agreement should include class action waivers; and
- How costs will be handled

VI. CONCLUSION

Although arbitration has become a favorite remedy in the United States for resolving employment-related claims, viable challenges continue to be made to overreaching arbitration agreements which do not contain the basic procedural safeguards ensuring access to a fair forum in which an employee's statutory rights can be vindicated. Courts continue to address both the application and validity of arbitration agreements. Both judicial decisions such as the *Armendariz* case, and model guidelines such as the *Due Process Protocol*, have provided needed guidance to employers on how to draft enforceable agreements to withstand such challenges. Employers who decide to commit the resolution of their employees' claims to the private dispute resolution industry will be well served by paying close attention to the requirements for valid agreements which the courts continue to define, as well as legislative developments in Congress and the various states which attempt to limit the availability of such agreements. The arbitration landscape continues to evolve and employers should pay careful attention to the changing view on arbitration agreements make sure their arbitration agreements will be valid upon enforcement.

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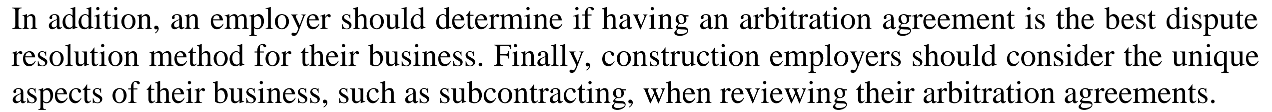
[31] Fred W. Alvarez, *Enforcement of California-Based Employment Arbitration Agreements*, A.L.I.–A.B.A. CONT. LEGAL EDUC, Mar. 2013, at 1.



In addition, an employer should determine if having an arbitration agreement is the best dispute resolution method for their business. Finally, construction employers should consider the unique aspects of their business, such as subcontracting, when reviewing their arbitration agreements.

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