MANDATORY EMPLOYEE ARBITRATION AND CLASS ACTION WAIVERS

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On October 2, 2017, the United States Supreme Court heard oral argument on whether employee arbitration agreements which contain class action waivers violate the National Labor Relations Act ("NLRA"). This issue, which has now caused a split in the lower circuits, has been hotly contested since the National Labor Relations Board ("NLRB") issued its controversial decision in *D.R. Horton.*[1] There, the NLRB ruled that the NLRA prohibits class/collective action waivers in employment arbitration agreements. Three cases were consolidated and argued before the Court this past fall: *Epic Systems Corporation vs. Lewis*,[2] 16-285; *Ernst & Young, LLP vs. Morris*,[3] 16-300; and *NLRB vs. Murphy Oil USA, Inc.*,[4] 16-307.

This presentation will address mandatory employee arbitration in the private sector as it stands today and then will review the more specific question of class/collective action waivers and the recent arguments before the Court.

I. RECENT USE OF MANDATORY EMPLOYEE ARBITRATION IN THE PRIVATE SECTOR

The Supreme Court in *Gilmer vs. Interstate/Johnson Lane Corp.*[5] suggested that by agreeing to arbitrate, parties trade "procedures and opportunity and review of the courtroom for the simplicity, informality, and expedition of arbitration."[6] In *Circuit City Stores vs. Adams,*[7] the Court said there are "real benefits" to arbitration, and those benefits do not "somehow disappear" in the "employment context." "Arbitration agreements allow parties to avoid the cost of litigation, a benefit that may be of particular importance in employment litigation."

In 2016, approximately 31,000 federal lawsuits were filed in five categories of employment cases: "civil rights cases: employment," "ADA" (Americans with Disabilities Act), "FLSA" (Fair Labor Standards Act), "ERISA" (Employee Retirement Income Security Act), and "FMLA" (Family and Medical Leave Act). At least one report suggests that the vast majority of the 8,686 FLSA lawsuits filed in 2016 were filed as class or collective actions.[8] In addition to the 31,000 federal lawsuits filed in 2016, Professor Mark Gough of Penn State College concluded, based on two separate studies of state court litigation, that approximately

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[1] 357 NLRB 2277 (2012).
[2] *Lewis vs. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S.Ct. 809.
[3] *Morris vs. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016).
[4] *NLRB vs. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015).
[5] *Gilmer vs. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
[6] *Gilmer*, 500 U.S. at 31.
[7] 532 U.S. 105, 122-123 (2001).
[8] *U.S. District Courts – Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2012 Through 2016,* U.S. Courts, http://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2016.pdf [https://perma.cc/8428-MMJ5].

195,000 employment lawsuits per year were filed in state courts of general jurisdiction.[9] To an employer, these numbers are staggering. It is no wonder that as the safety net of mandatory arbitration has become more desirable, employers have moved towards its protection.

The Economic Policy Institute published a review in September 2017 of a study regarding the use and application of mandatory arbitration agreements in the employment context.[10] Prior to this study, no one had looked at the issue since the early 2000s. What is clear is that since the Supreme Court's decision in *Gilmer*,[11] the flood gates have opened for the use of mandatory arbitration in private employment.

According to the Stone and Colvin study referenced by the Economic Policy Institute above, from 1991 to roughly 2000, those workers who were subject to mandatory arbitration rose from just over 2% (in 1992) to almost a quarter of the workforce by the year 2000.[12] The study went on to opine that since the early 2000s, the share of workers subject to mandatory arbitration has more than doubled and now exceeds 55%. Among companies with 1,000 or more employees, 65.1% have mandatory arbitration procedures. Additional findings of the study revealed:

- Of the employers who require mandatory arbitration, 30.1% also include class action waivers.
- Large employers are more likely than small employers to include class action waivers so the share of employees affected is significantly higher at the share of employers engaging in this practice.
- Of employees subject to mandatory arbitration, 41.1% have also waived their right to be part of a class action claim. Overall, this means that 23.1% of private sector, non-union employees, or 24.5 million American workers, no longer have the right to bring a class action claim (*unless the cases currently pending before the Supreme Court find that class action waivers violate the National Labor Relations Act and are thus unlawful.*)

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[9] New York University School of Law Public & Legal Theory Research Paper Series, Working Paper No. 18-07, "The Black Hole of Mandatory Arbitration" by Cynthia Estlund, April 2018. Mark D. Gough, Assistant Professor, Penn State Coll. of Liberal Arts used the most recent (2013) data from the National Center for State Courts ("NCSC") showing that over 5.9 million civil cases were filed in state courts of general jurisdiction. *See* Nat'l. Ctr. for State Courts, Examining the Work of State Courts: An Overview of 2013 State Court Caseloads (2015), http://www.courtstatistics.org/~/media/microsites/files/csp/ewsc_csp_2015.ashx [https://perma.cc/G2QL-VG8R]. Gough then used the Civil Justice Survey of State Courts ("CJSSC") finding that 3.3% of civil *verdicts* in 2005 were in employment disputes. *See* U.S. Dept. of Justice, Civil Bench and Jury Trials in State Courts, 2005 Statistics 2 tbl.1 (2008) https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf [https://perma.cc/EFA4-QZRL].

[10] Alexander J. S. Colvin, Econ. Policy Inst., Report, The growing use of mandatory arbitration (2017)

[11] *Gilmer*, 500 U.S. 20.

[12] Katherine V. W. Stone & Alexander J. S. Colvin, Econ. Policy Inst., The Arbitration Epidemic 5 (2015), http://www.epi.org/files/2015/arbitration-epidemic.pdf [https://perma.cc/M65J-JXNT] (describing differences between arbitration and court proceedings).

Perhaps the two most important arbitration related cases of this era in the employment context were *Gilmer*[13] and *Circuit City Stores vs. Adams.*[14] Both address the reach of the Federal Arbitration Act (hereinafter "FAA") in relation to mandatory employment dispute arbitration agreements. In *Gilmer*, a man was required to register as a securities representative with the New York Stock Exchange ("NYSE") as a condition of his employment. Part of his registration application to the NYSE included a provision which stated that he "'agree[d] to arbitrate any dispute, claim or controversy' arising between him and [his company]" that his company required to be arbitrated. Enforcing this waiver, the Supreme Court held that "it is . . . clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA," and that a valid contract that requires arbitration must be enforced according to its terms "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."

The Court in *Adams* held that even though *Gilmer* did not involve an employment contact, its holding was at least potentially valid in the employment context.[15] In *Adams*, Circuit City employees were required to sign an arbitration agreement that stated that "[employees] agree that [they] will settle any and all . . . claims disputes or controversies arising out of . . . [their] employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration.*[16] Finding this arbitration agreement to be enforceable, the Court concluded that the only employment contracts that are categorically excluded from the FAA are contracts involving transportation workers.[17] Thus, the Supreme Court has held unabashedly and positively that the FAA's reach is broad enough to govern arbitration agreements in the employment context.

II. THINKING THROUGH THE USE OF MANDATORY ARBITRATION AGREEMENTS

Regardless of the Court's ultimate decision in the *Epic Systems* trilogy and the use of class action waivers, private employers will continue to have the right to use mandatory arbitration agreements with their employees. The question is what considerations should go into such a decision and, if used, what those agreements should look like. Below are some thoughts for and against implementing an alternative dispute resolution policy that includes binding arbitration. *See* Appendix A, Sample Dispute Resolution Agreement.

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[13] *Gilmer*, 500 U.S. 20.
[14] *Circuit City Stores,* 532 U.S. 105.
[15] *Id.* at 113.
[16] *Id.* at 109-10 (quoting the arbitration agreement).
[17] *Id.* at 119.

Favor

- A potential reduction in the number of claims filed as many plaintiff lawyers shy away from claims which can only be arbitrated.
- A likely reduction in employment practice insurance ("EPLI") premiums.
- On average, arbitration costs as compared to civil litigation costs are less.
- Very important is the lessened risk of a "runaway" jury verdict.
- Arbitration is usually quicker and more streamlined than typical civil litigation in either state or federal court.
- The findings are, for the most part, final and binding.

Against

- The findings are, for the most part, final and binding.
- More employees may choose to pursue arbitration on a *pro se* basis.
- Many states require mutuality of the right to arbitrate. This means that employers may not be able to fully carve out claims for injunctive relief for violations of trade secrets, restrictive covenants, non-compete clauses, or other instances when they may wish to resort to a court instead of arbitration.
- Arbitrators are paid by the hour or by the day and administrative costs can end up being considerable for hearings lasting more than a day.
- Very important - Arbitration proceedings are less likely to be decided by a dispositive motion than are court proceedings.
- Arbitrators are less likely to accept procedural defenses.
- Arbitrators are more likely to allow hearsay and irrelevant witnesses or evidence.
- An arbitration policy generally will be ineffective and unenforceable with regard to the filing of claims and charges before administrative agencies, and cannot prevent the United States Department of Labor, the Equal Employment Opportunity Commission, or similar agencies from bringing suit, including class and collective actions.

Fairness vs. Unconscionability

In addition to the foregoing considerations, prior to implementing a mandatory arbitration policy, an employer must consider the fairness of that policy and its enforceability in the various venues where it does business. An arbitration agreement must clearly specify what claims are covered, the time allowed to assert a claim, and the process to be followed to resolve a claim.

The following are suggestions to avoid the defense of unconscionability which, at a minimum, should be considered when drafting a mandatory arbitration policy. The agreement should:

- Provide for the selection of a neutral arbitrator;
- Provide for reasonable and meaningful discovery;
- Allow for the recovery of all types of relief that would otherwise be available in court (specifying the various statutory claims which are subject to the arbitration agreement is important).
- Require the employer to pay most, if not all, of the costs, including the fees of the arbitrator;
- Require written award to allow for potential judicial review (though in reality it doesn't exist);
- Be signed by both employer and employee;
- Not unreasonably minimize available discovery tools;
- Include a copy of all applicable arbitration rules or provide reference to where such rules can be found;
- Avoid reserving the right to retroactive modification or amendment;
- Acknowledge availability and standards of a summary judgment procedure;
- Require proceedings to be confidential;
- Contain class/collective action waivers (if ultimately permitted).
- Should not attempt to alter or shorten statutes of limitation.
- Savings Clause – The inclusion of a severability provision should be considered to save enforceability of a mandatory arbitration provision should a review in court find that any portion thereof is unenforceable.
- Delegation Clause – Provide for the arbitrator and not a court to decide whether or not the arbitration agreement covers a particular dispute or is otherwise enforceable.
- Clearly identify employees to be covered by the arbitration agreement.

Some things that the arbitration clause should specifically exclude:

- The right to file a charge before a governmental agency such as the EEOC, NLRB, or DOL;
- The right to file a worker's compensation claim;
- The right to file an unemployment compensation claim.

Cautions:

- The importance of a stand-alone agreement cannot be overemphasized. Rather than simply including it as just one more policy in a handbook, the arbitration agreement should be presented to the employee separately, requiring a directive to review and approve prior to signature. It doesn't hurt to advise the employee that he/she may seek legal counsel before signing.

- Obviously, employers should keep a copy of each signed arbitration agreement in the employee's personnel jacket.

- Some states do not consider the offer of continuing employment to be sufficient consideration of consent. To ensure their enforceability when possible and protect the notion of mutual consent, agreements should be presented upon an initial offer of employment and upon re-employment. Courts have consistently approved this form and timing of consent. Requiring existing employees to sign as a condition of continued employment is typically a matter of state law where and when the agreement is signed.

III. THE ARGUMENT FOR CLASS ACTION WAIVERS AND MANDATORY ARBITRATION AGREEMENTS

In all three cases argued this past October before the Supreme Court involving class action waivers, the plaintiffs, who had previously signed arbitration agreements containing waivers, asserted collective action claims under the FLSA as well as state law wage claims. The employers all moved to dismiss the collective actions and compel individual arbitration of the employees' claims. At issue in all three cases is whether the arbitration agreements prohibiting class and/or collective actions are enforceable or barred by the NLRA.

The October argument in this trilogy of cases boiled down to a clash of two significant federal statutes – the FAA and the NLRA. The seminal question is whether the two can coexist. In 2012, the National Labor Relations Board issued its decision in *D. R. Horton, Inc.*,[18] wherein the Board concluded that an arbitration agreement containing a class action waiver was a restriction of employees' rights to participate in concerted activity as protected by the NLRA. The Fifth Circuit, upon review, disagreed, explaining that such an agreement must "be enforced according to its terms" because the NLRA does not "contain a Congressional command overwriting application of the FAA."[19] Despite the decision from the Fifth Circuit, the Board reaffirmed its original *Horton* decision in October 2014 and concluded that Murphy Oil had violated the NLRA by requiring its employers to agree to resolve all employment related claims

[18] 357 NLRB 2277 (2012).
[19] *D. R. Horton, Inc. vs. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013).

through individual arbitration. Murphy Oil requested review by the Fifth Circuit which refused to enforce the Board's order, referring to its previous *Horton* decision.

In April 2014, Epic Systems Corp. sent an e-mail to its employees containing an arbitration agreement. Jacob Lewis, one of its employees who had signed the agreement, chose to pursue a lawsuit rather than arbitration for what he claimed to be wage and hour violations. Lewis joined a punitive class and collection of certain other employees claiming that they had been denied overtime wages in violation of the Fair Labor Standards Act and Wisconsin law, all in conflict with the class/collective action waiver contained in his arbitration agreement. Epic moved to dismiss his complaint and to compel arbitration. The district court held that the class action waiver was unenforceable because it violated an employee's right to engage in "concerted activities" under Section 7 of the NLRA and the Seventh Circuit affirmed. Not long thereafter, the Ninth Circuit in *Morris* also held that the NLRA precludes agreements requiring employees to waive concerted legal claims regarding wages, hours, and terms of employment.

Section 2 of the FAA declares that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contracts."[20] Petitioners in the *Epic* case argued that the NLRA does not contain a "clearly expressed Congressional intention" to bar class action waivers. They argued, rather, "the text of the NLRA makes no mention of class proceedings, and the NLRA was enacted long before the rules governing class and collective actions. The NLRA, just like the anti-trust laws in *American Express Co. vs. Italian Colors Restaurant,*[21] contains no Congressional command requiring rejection of class action waivers. The NLRA can also be reasonably construed to permit class waivers, consistent with the FAA.

The argument also addressed the question of substantive rights to engage in concerted activities as prohibited by Section 8(A)(1). Counsel for the employers pointed to the fact that the NLRA does not unambiguously prevent a party from channeling concerns into particular procedural forums.

The argument was further made that this is not the first time the FAA was alleged to conflict with other federal laws. In *Vimar Seguros y Reaseguros, S.A. vs. M/V Sky Reefer,*[22] which involved the FAA and the Carriage of Goods by Sea Act (COGSA), the Court held that because both statutes could be "given full effect," the Court found it "unnecessary to resolve the further question whether the FAA would override COGSA were COGSA interpreted otherwise. In *Shearson/Am. Express, Inc. vs. McMahon,*[23] two other federal statutes were compared against the FAA. The Securities and Exchange Act of 1934,[24] and the Racketeer Influence Corrupt

[20] 9 U.S.C. §2.
[21] 133 S.Ct. 2304 (2013).
[22] 515 U.S. 528 (1995).
[23] 482 U.S. 220 (1987).
[24] 15 U.S.C. § 78(j)(b).

Organizations Act (RICO).[25] In that case, the respondents argued that the Securities and Exchange Act and RICO invalidated agreements to arbitrate claims under the two statutes while the petitioners argued that the agreements were enforceable under the FAA. The Court found, after considering those two statutes, there was no "contrary Congressional command" in either.[26] Rather than read the Exchange Act and RICO as "exceptions" to the FAA, the Supreme Court elected to harmonize the statutes and deemed the arbitration agreements enforceable.

The same thing happened in the *Gilmer* decision. *Gilmer* involved the FAA and the Age Discrimination in Employment Act (ADEA).[27] The petitioner argued that the ADEA invalidated an agreement to arbitrate claims under that statute, while the respondent argued that the agreement was enforceable under the FAA.[28] In *McMahon,* the Court placed the "burden" on the party opposing arbitration to show that the other statute could not be reconciled with the FAA's mandate.[29] Because the petitioner failed to meet that burden, the Court upheld the enforceability of the arbitration agreement.[30] The Court similarly held in *Italian Colors*,[31] that there existed "no Congressional demand" in the Sherman and Clayton Acts "contrary" to the FAA. Ultimately, the arguments of counsel boiled down to whether the FAA and the NLRB can be harmonized. Counsel for Epic argued that the Court had "never" applied the savings clause of the FAA finding a conflict between it and another federal statute.

IV. RECAP OF ORAL ARGUMENT

Justices Thomas and Gorsuch were silent during the argument. That was not the case with the remainder of the Court. The questions and comments from the other justices were as expected.

Former Solicitor General Paul Clement, counsel for the employers, argued in favor of enforcing class/collective action waivers in employee arbitration agreements notwithstanding the NLRA. Mr. Clement asserted that "the FAA will only yield to a contrary Congressional demand" and that the "FAA should not yield" to the NLRA because it lacks such a command. Counsel for the United States, which appeared as amicus on behalf of the employers, argued that the NLRA does not contain a "clear Congressional command" overriding the FAA because it "doesn't say anything about arbitration or class or collective treatment." Counsel for the employers argued that there was "nothing sinister" about enforcing individual (bilateral) arbitration provisions; rather, such provisions are simply an "effort by the employer and the employee to agree to set the rules for the forum of arbitration."

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[25] 18 U.S.C. § 1961, *et seq.*
[26] *Id.* at 226, 238, 242.
[27] 29 U.S.C. § 621, *et seq.*
[28] *See Gilmer*, 500 U.S. at 23-24, 26-27.
[29] *Id.* at 26.
[30] *Id.* at 35.
[31] 133 S.Ct. at 2309-2310.

NLRB General Counsel Daniel Griffin argued that employers cannot force employees to waive their right to act collectively. In response to a hypothetical posed by Chief Justice Roberts about contracts incorporating arbitral rules to restrict class or collective proceedings (rather than express waivers), which Mr. Griffin acknowledged he might have misunderstood, Mr. Griffin suggested that an arbitral forum **could** prohibit an employee from engaging in class or collective action. During the argument he explained this was because the NLRA provisions only "run to employer interference," not outside forces. In response, Justice Alito asserted: "If that's the rule, you've not achieved very much because, instead of having an agreement that says . . . no class arbitration, you have an agreement requiring arbitration before the XYZ Arbitration Association, which has rules which don't allow class arbitration."

Daniel Ortiz, counsel for the employees, contradicted the NLRB's position to a certain degree, though he also argued that employers cannot demand a waiver of concerted rights. Ortiz, contrary to Griffin's comments, suggested that the arbitral forum cannot prohibit an employee from engaging in class or collective action through its rules, even if the employment agreement calls for application of those rules. Responding to a question from Justice Alito, Ortiz conceded that the NLRA is not violated "as long as joint legal action is available in one forum" because the "arbitral forum is equivalent to the judicial forum." Chief Justice Roberts and Justice Kennedy asked additional questions that expressed some skepticism with the positions of the NLRB and the employees.

After the hearing, former General Counsel Griffin submitted a letter to the Court with respect to the obvious difference between the position of the NLRB and the employees regarding whether the arbitral forum rules can prohibit an employee from engaging in class or collective action through incorporation of those rules in the arbitration agreement. Griffin corrected his "inaccurate" response to Chief Justice Roberts' hypothetical and expressed that there was "no disagreement" between the NLRB and the employees regarding this position.

V. CONCLUSION

It goes without saying that employers today, especially large employers, may well be better off requiring their employees to arbitrate their employment claims rather than litigate them. This is certainly true if the Supreme Court finds no conflict between the FAA and the NLRA and class action waivers are held to be enforceable. However, even if the Court determines that the FAA and the NLRB are incompatible such that participation in a class or collective action is barred, arbitration can still be a viable choice for dispute resolution in the workplace.

THE MATERIALS CONTAINED IN THIS PRESENTATION WERE PREPARED BY THE LAW FIRM OF BREAZEALE, SACHSE & WILSON, L.L.P. FOR THE PARTICIPANTS' OWN REFERENCE IN CONNECTION WITH EDUCATION SEMINARS PRESENTED BY BREAZEALE, SACHSE & WILSON, L.L.P. ATTENDEES SHOULD CONSULT WITH COUNSEL BEFORE TAKING ANY ACTIONS AND SHOULD NOT CONSIDER THESE MATERIALS OR DISCUSSIONS THEREABOUT TO BE LEGAL OR OTHER ADVICE.

Appendix A
Sample Dispute Resolution Agreement

Notice to New Employees/Re-Hires

Any individual ("Employee") who wishes to be employed by ., and/or any other related or affiliated companies (collectively "the Company") must read and sign the following Dispute Resolution Agreement as part of their hiring package. If you desire, you may stop the hire-in process at this point and take the time to review the Dispute Resolution Agreement, which is found below. You must, however, sign the Dispute Resolution Agreement if you wish to continue the hire-in process and if you wish to be employed by the Company. All Company employees hired on or after January 1, 2017, are required to agree to the Dispute Resolution Agreement below[1]. Even if you do not sign the Dispute Resolution Agreement, you will be bound to it in accordance with applicable state law.

This Dispute Resolution Agreement will pertain to and govern any employment and any future re-employment with the Company. Once you execute or otherwise are bound by this Dispute Resolution Agreement, you agree, acknowledge, and confirm that it shall be fully enforceable against you and the Company each and every time you become employed or re-employed by the Company at a future date. You may sign or become otherwise bound by applicable state law to this form only once (but will still be bound in the future), and you and the Company specifically waive, renounce, release, discharge, and surrender any claim, right, or suggestion that the lack of re-execution of this form upon future re-employment is a defense to a claim that this Dispute Resolution Agreement is fully enforceable.

Introduction

The Company's success is founded in great part on the abilities, dedication, and efforts of all of its employees. The Company has always treated its employees with respect, and recognizes each employee as an important individual who contributes to the Company's success. We hope that workplace problems or disputes can be resolved quickly and fairly, usually through informal discussions between you and your supervisor. If you are not comfortable with taking your complaint to your supervisor, then you should contact the appropriate Human Resources manager, or you may call toll free at , and ask for the Employee Relations Department. When internal procedures do not resolve the issue, the Company has prepared and implemented an alternative to traditional litigation in the form of the below Dispute Resolution Agreement with all employees. These dispute resolution procedures in the Dispute Resolution Agreement will lead to a meaningful and fair result and will reduce the delay and costs associated with traditional litigation.

The Company expressly forbids any retaliation against any employee who has participated – or because he or she has participated – in these dispute resolution procedures. If you feel you have been the victim of any retaliation, please immediately report that to your supervisor, the Human Resources Department, the employee hotline number | | or the Employee Relations Department. The Arbitrator shall not have the authority to add to, amend, or modify existing law or alter your at-will employment status. While the Dispute Resolution Agreement establishes a mandatory program for resolving workplace disputes, it does not change your "at-will" employment status, or to the Company's right to discipline or terminate you or any employee.

Dispute Resolution Agreement ("DRA")

Both Employee and the Company agree to resolve any and all claims, disputes or controversies arising out of or relating to Employee's employment with the Company exclusively by binding arbitration to be administered by the American Arbitration Association (the "AAA") pursuant to its Employment Arbitration Rules and Mediation Procedures (the "Rules"). The Rules are available on the AAA website as amended from time to time (www.adr.org). In addition, copies of the Rules are available from the Human Resources Department and/or the Employee Relations Department. An example of some, but not all, of the types of claims covered by this DRA are: unpaid wages, overtime, or other compensation; discrimination or harassment on the basis of race, sex, age, national origin, religion, disability or any other protected class; breach of contract; retaliation (including without limitation workers' compensation retaliation actions); wrongful discharge; claims regarding benefits and benefit plans [unless a separate mandatory dispute resolution procedure is provided]; common law or tort claims such as defamation; and claims arising under any statutes or regulations applicable to employees or applicable to the employment relationship, such as the Civil Rights Acts (Title VII and § 1981), the Age Discrimination in Employment Act, the Americans with Disabilities Act (as amended) (both Title I and Title III), the Family and Medical Leave Act, the Pregnancy Discrimination Act, the Genetic Information Nondiscrimination Act,

[1] Any and all previous versions/iterations of any dispute resolution procedures remain in effect until December 31, 2016 [the "Pre-2017 DRA"]. Any claim arising on or prior to December 31, 2016, shall be subject to the Pre-2017 DRA.

the Equal Pay Act, the Uniformed Services Employment and Reemployment Act, the National Labor Relations Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the Fair Labor Standards Act; as well as all claims arising under any and all state and/or local employment law[s].

Claims not covered by this DRA are claims or actions i.) seeking benefits pursuant to state workers' compensation or unemployment compensation statutes or regulations, ii.) for employee benefits which are subject to mandatory litigation and/or dispute resolution provisions contained in the applicable employee benefit plan document, iii.) to compel arbitration or to enforce an arbitrator's award under this DRA, and/or iv.) by the Employee and/or the Company for temporary and/or preliminary injunctive relief, or such other emergency injunctive and/or equitable relief until such time that an Arbitrator may be appointed. Any such temporary and/or injunctive relief entered by a court shall remain binding on the parties until such further action by the duly appointed Arbitrator. This DRA does not affect or limit an Employee's right to file a charge with a federal, state or other governmental administrative agency, including but not limited to the Equal Employment Opportunity Commission, the National Labor Relations Board, the United States Department of Justice, and/or the United States Department of Labor.

Except as expressly provided herein, the Company and the Employee expressly waive all rights to a trial in a court by judge, magistrate, and/or jury on all claims between them. Each employee's concerns are unique to him or her. Because this DRA is intended to resolve the particular dispute as quickly as possible, the Arbitrator shall not have the authority to consolidate or join the claims of other employees into a single proceeding, to fashion a proceeding as a class, collective or representative action, or to award relief to a class or group of employees. Any claim[s] on behalf of other employees will be maintained and decided under the AAA rules as individual claims. In addition, Employee and the Company waive, renounce, and relinquish any and all rights, claims, and/or privileges to form, constitute, or join a class or collective action to be adjudicated pursuant to this DRA, or to bring or institute any arbitral claim pursuant to this DRA on behalf of any class or collection of individuals.

To the extent practical, and subject to available venues with the AAA, the arbitration shall be held in or near the city in which the Employee works, or was last employed by the Company. The Employee or Company may appeal a decision to the United States District Court for the district in which the Arbitration was brought; however any such appeal rights are and shall be limited pursuant to 9 U.S.C. § 10(a) of the Federal Arbitration Act. Any such appeal shall be filed within forty-five (45) days of an arbitrator's award, decision, or ruling.

Arbitrators shall i.) have substantial knowledge and experience in the area of the employment related law subject to the arbitration; and ii.) shall been previously appointed and accepted as an arbitrator in a similar AAA sanctioned arbitration proceeding.

Under no circumstances shall the Company or the Employee be required to pay any attorneys' fees incurred by the other party, unless ordered to do so pursuant to an arbitration award.

Consistent with the expedited nature of Arbitration, the Arbitrator shall have the authority to and shall expeditiously consider and rule on dispositive motions such as motions to dismiss or motions for summary judgment in accordance with the standards generally applicable to Rules 12 and 56 of the Federal Rules of Civil Procedure. The Arbitrator shall issue detailed written reasons in support of any ruling on dispositive motion(s). All written reasons issued in connection with DENIALS of dispositive motions shall be served on the parties not less than twenty-one (21) days before any scheduled arbitration hearing. The Arbitrator may issue subpoenas to compel the attendance of witnesses and the production of documents. The Arbitrator shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability, of this DRA, including, but not limited to, any claim that any part of this DRA is unenforceable, void, or voidable. Discovery will be generally limited in any arbitration under this DRA. Absent a showing of substantial need for additional discovery, the Arbitrator shall limit discovery to 25 interrogatories and document requests combined per party and 2 depositions per party.

Subject to administration and scheduling issues as handled by the AAA, it is anticipated that the arbitration hearing shall be held within 180 days of the Arbitrator's appointment. Employee and the Company agree that this DRA shall be enforceable pursuant to and interpreted in accordance with the provisions of the Federal Arbitration Act, and, to the extent applicable, the substantive laws of the state where the claim arose. Any party who initiates an arbitration with the AAA shall notify the other party directly and promptly. Notice to the Employee shall be to his or her last known address as reflected in the Company records. Notice to the Company shall be to

If an Employee or the Company files a lawsuit in court rather than a demand for arbitration under the DRA within the time allowed by applicable law for the filing of a lawsuit, and thereafter is ordered by the court to submit the dispute to arbitration in accordance with this DRA, the Employee/Company must initiate arbitration within 120 days of the date the court's order becomes final, unless the court sets a longer or shorter deadline. Failure to file the arbitration demand within the requisite time period will bar the claim.

If any provisions of the Rules or of this DRA are determined by the Arbitrator or by any court of competent jurisdiction to be unlawful, invalid, or unenforceable, such provisions shall be severed or modified so that the DRA or the Rules may be enforced to the greatest extent permissible under the law. All remaining terms shall continue in full force and effect.

The arbitral proceedings and Arbitrator's decision shall be confidential. Neither the Employee nor Company may publicly disclose the terms of any arbitral award unless: i) agreed to in writing by the other party, ii) subpoenaed by a court to testify, iii) required by law as communication to the Internal Revenue Service or other applicable government entity, or iv) necessary to enforce or collect on the arbitral decision or award in a filing with a court of competent jurisdiction. The Arbitrator may issue protective orders in response to a request by either party or by a third-party witness. Such protective orders may include, but are not limited to, sealing the record or the arbitration hearing, in whole or part, to protect the privacy, trade secrets, proprietary information, and/or other legal rights of the parties or the witnesses.

For the purposes of the scope of the DRA, "Company" shall include parent, subsidiary and related companies, and any applicable subsidiary companies, related companies, trade names, and alleged joint employers or any other individual or corporate co-respondents or defendants, as well as their respective officers, directors, managers, and employees (current and former).

Employee and Company understand that any and all claims and disputes covered by this DRA must be arbitrated against the other party and that neither party may file a lawsuit in any court in regard to any such claims or disputes. If the Employee or Company files a lawsuit for any such claims or disputes, including without limitation for those arising out of the Employee's employment, the other party may use this DRA to request a court to dismiss the lawsuit and require the party to participate in binding arbitration as provided in this DRA. The dispute resolution procedures described in this DRA shall survive the termination and/or cessation of the Employee's employment. This DRA supplements matters covered in the Company's employment handbook and other policies provided or applicable to the Employee.

This DRA may be modified or terminated by the Company after 30 days' prior written notice to Employee. Any modifications or termination shall be prospective only and shall not apply to any claims or disputes that are pending in any arbitration or that have been initiated by either party.

This DRA shall be governed by the laws of the state where any arbitration is required to be filed, exclusive of conflict or choice of law rules. The parties acknowledge that this DRA evidences a transaction involving interstate commerce. Notwithstanding the provision in the preceding sentence with respect to applicable substantive law, any arbitration conducted pursuant to the terms of this DRA shall be governed by the Federal Arbitration Act (9 U.S.C., Secs. 1-16).

Special Note: *This DRA and the Rules referenced above are important documents that affect Employee's and the Company's legal rights. Employee should read and understand them, and Employee may wish to consult with private legal counsel at his or her own expense before continuing with the hire-in process, which will evidence the Employee's acceptance of this DRA and the Rules.*

_____

Print Name of Employee

_____

Signature of Employee

_____

Last Four Digits of Social Security Number

_____

Date