INCORPORATING MANDATORY ARBITRATION EMPLOYMENT CLAUSES INTO COLLECTIVE BARGAINING AGREEMENTS: CHALLENGES AND BENEFITS TO THE EMPLOYER AND THE UNION

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ABSTRACT

Even with the increase in the use of alternative dispute resolution (ADR), a fair amount of debate still surrounds the incorporation of mandatory employment arbitration provisions in Collective Bargaining Agreements (CBA). This method of resolving all employment disputes outside the courtroom, but through the CBA, will present challenges to both the union and the employer. When negotiating and adopting these provisions, both parties must balance a wide array of often-conflicting interests to ensure equity, fairness, and due process for all those involved in disputes.

Written from the perspective of an employment and labor arbitrator, this Article walks the reader through a detailed survey of both the benefits and the disadvantages of mandatory arbitration to the union and the employer. The use of mandatory employment arbitration in collective agreements is not all bad, nor is it all good.

This Article begins with an overview of the two key decisions by the U.S. Supreme Court, which sanctioned the use of such clauses in a CBA, then followed by the major challenges of incorporating mandatory arbitration of statutory claims into the CBA. This Article presents a timely and challenging issue faced by employers, unions, and bargaining unit employees as they attempt to negotiate and implement such clauses in to the CBA.

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1. Increase in the Number of Demands for Arbitration From Union
I. INTRODUCTION

The United States Supreme Court has issued two decisions that sanctioned the use of mandatory arbitration provisions in collective bargaining agreements ("CBA"). First, in 1998, the Supreme Court in Wright v. Universal Maritime Service Corporation 1 paved the way for employers and unions to negotiate a waiver provision within the CBA, which prohibited employees from litigating an individual statutory claim in court. Although the Court did not uphold the waiver provision in Wright, it held that such a provision is valid if the language is "clear and unmistakable." 2 Next, in 2009, the Supreme Court issued the second case, 14 Penn Plaza LLC v. Pyett, which held that a mandatory arbitration clause in the CBA was valid and enforceable. 3 The waiver clause in Pyett specifically stated that the "grievance and arbitration procedures" were the sole and exclusive procedures for processing statutory claims. 4

2Id. at 82 ("[T]he collective-bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination. We do not reach the question whether such a waiver would be enforceable.").
4Id. at 252. Pyett's waiver provision (§ 30 – NO DISCRIMINATION) states: There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as
Prior to Wright and Pyett, the Supreme Court had issued a number of decisions related to mandatory arbitration of individual statutory claims.5 The Court's decisions in Alexander,6 Gilmer,7 Circuit City,8 and Waffle House9 sanctioned, and to a certain extent encouraged, the use of mandatory arbitration agreements in employment. With some limitations, the Pyett decision was right in line with the Court's position that parties to an agreement may include a provision requiring that disputes be resolved outside the judicial system.10

the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

Id. (quoting App. to Pet. for Cert. 48a).

5See Alexander, 415 U.S. at 59-60 (holding that employees could still pursue a statutory claim in court even if it was previously arbitrated). Even though this case seems to suggest that CBAs cannot prevent employees from filing a statutory claim against the employer outside of the CBA, the Supreme Court in Pyett stated that Gardner-Denver does not control the outcome, because "the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims." Pyett, 556 U.S. at 263-65. For a detailed discussion of Gardner-Denver, see generally Michele M. Hoyman & Lamont E. Stallworth, Arbitrating Discrimination Grievances in the Wake of Gardner-Denver, 106 MONTHLY LAB. REV. (1983).


7Circuit City, 532 U.S. at 119-21 (holding that an employee may waive their right to litigate a statutory claim in court by signing a mandatory arbitration agreement in a private employment contract). For a discussion of Circuit City, see generally David R. Wade & Curtiss K. Behrens, Opening Pandora's Box: Circuit City v. Adams and the Enforceability of Compulsory, Prospective Arbitration Agreements, 86 MARQ. L. REV., 1 (2002).

8Waffle House, 534 U.S. at 298 (explaining that simply because ordinary principles of law apply to EEOC claims, that does not contradict the decisions at hand). For a detailed discussion of Waffle House, see generally Marc A. Altenbernt, Will EEOC v. Waffle House Signal the Beginning of the End for Mandatory Arbitration Agreements in the Employment Context, 3 PEPP. DISP. RESOL. L.J., 221 (2003), and Mark A. Spognardi & Staci L. Ketay, Having Your Waffle and Eating It Too: The EEOC's Right to Circumvent Arbitration Agreements, 28 EMP. RELAT. L.J., 115 (2002).

9See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 640-41 (1985). Although this is an antitrust case, it is often cited in employment arbitration cases to support the principle that arbitration agreements between the parties will be upheld by the court. See e.g., Aggarao v. Mol Ship Mgmt. Co., Ltd., 675 F.3d 355, 371-73 (4th Cir. 2012) ("The Supreme Court has recognized this two stage approach, adhering to the arbitration-enforcement and award-enforcement stages in both Mitsubishi and Sky Reefer."). The antitrust dispute was subject to arbitration under the Federal Arbitration Act (FAA). Id.; see also Rodriguez de Quijas v. Shearson/Am. Express, 490 U.S. 477, 483-85 (1989) (finding the pre-dispute agreement to arbitrate claims under the Securities Act was enforceable because resorting to the arbitration process did not inherently undermine the substantive rights under
There has been extensive research and articles written by leading scholars on Wright\textsuperscript{11} and Pyett\textsuperscript{12}; therefore, the Author has only provided an overview of their history and a summary of the Supreme Court's decisions. Since the decisions in Wright and Pyett, there has been an ongoing concern regarding the fairness of these decisions on the rights of individuals who are required to waive their rights to a judicial forum to resolve their disputes. The theme of this Article is that mandatory arbitration in collective agreements is not all bad, nor is it all good. Clearly, there are benefits to both the employer and the union to incorporate a mandatory employment arbitration clause into the CBA.\textsuperscript{13} Simultaneously, there are disadvantages to both parties in incorporating an arbitration provision into the CBA.\textsuperscript{14} Consequently, both parties must balance their interests against one another, including the employee's decision to negotiate such a provision in the CBA.

As an employment and labor arbitrator, this Article is written from the arbitrator's perspective.\textsuperscript{15} Arbitrators tend to seek a balance of interests between the parties to ensure equity, fairness, and due process. This Article outlines the interests of employers and unions in negotiating

the Securities Act); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 233-34, 242 (1987) (holding claims under § 10(b) of the Securities Exchange Act were arbitrable under pre-dispute arbitration agreements, and customer's agreement with broker to arbitrate was enforceable as to their RICO claim for treble damages); EEOC v. Luce, 345 F.3d 742, 746-54 (9th Cir. 2003) (holding agreements requiring arbitration of Title VII claims as a condition of employment are enforceable); Nghiem v. NEC Elec., Inc, 25 F.3d 1437, 1440 (9th Cir. 1994) (holding that the arbitrator had authority over claim because the employee voluntarily submitted to binding arbitration and is, therefore, bound by arbitrator's decision).


\textsuperscript{13}See infra Part IV (discussing advantages for employers); infra Part VI (discussing advantages for unions).

\textsuperscript{14}See infra Part V (discussing disadvantages for employers); infra Part VII (discussing disadvantages for unions).

\textsuperscript{15}Professor Weatherspoon is a labor, employment, and commercial arbitrator and a member of the National Academy of Arbitrators.
a mandatory arbitration clause into the CBA. First, this Article provides a brief overview of the Supreme Court's decisions and reasoning in *Wright* and *Pyett*. Next, Part III discusses challenges to incorporating mandatory arbitration of statutory claims into the CBA. Part IV discusses the employer's benefits of incorporating mandatory arbitration of statutory claims into the CBA. Part V discusses the employer's disadvantages of incorporating mandatory arbitration of statutory claims into the CBA. Part VI provides a discussion of the union's advantages of incorporating mandatory arbitration of statutory claims into the CBA.20 Finally, Part VII provides a discussion of the union's disadvantages of incorporating mandatory arbitration of statutory claims into the CBA.21

II. THE SUPREME COURT SANCTIONS THE USE OF MANDATORY ARBITRATION PROVISIONS IN THE COLLECTIVE BARGAINING AGREEMENT (CBA)

A. Supreme Court Decision in *Wright* v. Universal Maritime Service Corp.

In *Wright*, an employee filed a claim of discrimination and alleged violations of the Americans with Disabilities Act of 1990.22 The employee filed the claim of discrimination with the Equal Employment Opportunity Commission (EEOC), the state civil rights organization, and ultimately the federal court. The employer asserted the affirmative defense that the employee had not exhausted his remedies under the CBA as well as the relevant Seniority Plan.24

The lower court held that the employee failed to pursue their grievance under the CBA.25 The Supreme Court held that statutory claims are "not subject to a presumption of arbitrability . . . ."26 The Court emphasized that a waiver of employee rights to a judicial forum

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16 See infra Part II.A.
17 See infra Part III.
18 See infra Part IV.
19 See infra Part V.
20 See infra Part VI.
21 See infra Part VII.
23 Id. at 74-75.
24 Id. at 75.
25 Id.
26 Wright, 525 U.S. at 79.
must be "clear and unmistakable." The waiver must, on its face, clearly and unmistakably state that union members waived their rights to pursue a statutory employment claim outside of the CBA grievance process. In Wright, the Supreme Court held that the general arbitration clause in the CBA was insufficient to deny the employee the right to proceed with their statutory claim in court. The clause in Wright did not clearly and unmistakably waive the judicial forum. The Court did not have to decide whether it overruled its earlier decision, Alexander v. Gardner.

A general arbitration clause in a CBA does not require the employee to use the arbitration procedure. For example, in Combs v. Highlands Hospital Corp., the employee filed a state claim of age discrimination and retaliation after the union refused to pursue the case to arbitration. The CBA stated that the employer agreed to "comply with all applicable laws with respect to discrimination because of age." The District Court stated that "[n]one of this language demonstrates that the parties intended to subject employment-discrimination claims to binding arbitration." Clearly, without explicit language that waives employees' rights to file statutory claims, courts will not enforce such provisions in a CBA.

B. Supreme Court's Decision in Penn Plaza, LLC v. Pyett

In 2009, the Supreme Court, in a 5-4 decision, upheld the right of employers and unions to negotiate a mandatory arbitration provision in

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27 Id. at 79-80.
28 Id. at 80.
29 Id. at 80-83.
30 Wright, 525 U.S. at 82-83.
31 See id. at 76 ("We have followed the holding of Gardner-Denver in deciding the effect of CBA arbitration upon employee claims under other statutes.").
32 See id. at 78-79.
34 Combs, 2012 WL 1902170, at *1.
35 Id. at *4 (internal quotation marks omitted).
36 Id.
37 Id. at *4-*5.
the CBA requiring the arbitration of statutory employment claims. The Corporate employers in particular have overwhelmingly embraced the use of mandatory arbitration of individual employment claims, in lieu of court action. The Supreme Court's approval of mandatory arbitration provided an opportunity for unionized employers to negotiate mandatory waivers with unions in their CBA.

The issue of arbitration initially arose in 2003, involving Temco Service employees who worked as night watchmen and porters in a commercial office building owned in part by 14 Penn LLC. As a result of Penn LLC contracting with a new security services contractor, the employees claimed they were assigned to less desirable positions. The employees filed a grievance with the union alleging that employees over fifty years of age were wrongfully transferred, denied overtime, and discriminated against on the basis of age. The union filed a grievance on behalf of the employees but refused to raise the age discrimination claim.

The multi-employer CBA included a mandatory arbitration provision for discrimination claims. The union processed the grievance through the arbitration stage without raising the discrimination claim. Subsequently, the employees filed a suit in federal district court alleging age discrimination under state federal and local laws. The district court and the court of appeals concluded that mandatory arbitration provisions in a collective bargaining agreement "which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable." At the Supreme Court, Justice Thomas, writing for the majority, reversed and remanded the holding of the court of appeals, and held that "a collective-bargaining agreement that clearly and

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39Roy, supra note 11, at 1347 ("[M]ore and more employers require their workers to agree to mandatory arbitration clauses . . . .").
40Pyett, 556 U.S. at 255-60.
41Id. at 252-53.
42Id.
43Id. at 253.
44See Pyett, 556 U.S. at 253.
45Id. at 256.
46Id. at 253.
47Id. at 253-54.
unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.\textsuperscript{50}

The decision in Pyett sanctioned the use of mandatory arbitration provisions in the CBA.\textsuperscript{51} The Court established clear guidelines on the verbiage that the parties are required to include to validate the clause.\textsuperscript{52}

III. WHAT ARE THE CHALLENGES TO INCORPORATING MANDATORY ARBITRATION OF STATUTORY CLAIMS INTO THE CBA?

A. The Union Has to Convince its Membership of the Benefits

Unions will be reluctant to negotiate a mandatory arbitration employment clause in a CBA for a number of reasons. First, in traditional labor arbitration disputes involving disciplinary actions, the union will argue that the employer failed to meet the just cause standard to justify the disciplinary action.\textsuperscript{53} An element of just cause that the employer must establish is that employment policies have been consistently applied to all union members.\textsuperscript{54} Often, the union will argue there was disparate treatment in the enforcement of company policies among its members.\textsuperscript{55} Similarly, in Title VII claims, an employee will argue that he was treated differently in the enforcement of the company's policies based upon race, color, sex, national origin, or religion.\textsuperscript{56} Under the Americans with Disabilities Act ("ADA"), the employer will be

\textsuperscript{50}Id. at 274. Also, as a result of the decisions, lower courts have denied plaintiffs an opportunity to bring a statutory employment claim if the CBA prohibited such action. See, e.g., Mathews v. Denver Newspaper Agency LLP, 649 F.3d 1199, 1206-08 (10th Cir. 2011) (discussing precedent on the CBA and similar claims). In Mathews, the 10th Circuit reversed the district court's granting of summary judgment for the employer, holding that the submission of employee's contractual claims did not result in a waiver or preclusion of his statutory claims. Id. ("Applying Supreme Court precedent to the facts of Mathew's case, it is evident no waiver of judicial forum has occurred. Again, such a waiver may only occur where the arbitration agreement expressly grants the arbitrator authority to decide statutory claims.").

\textsuperscript{51}Pyett, 556 U.S. at 260.

\textsuperscript{52}See id. at 258-59.

\textsuperscript{53}FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS §§ 15-4—15-6, (7th ed. 2012).


\textsuperscript{55}See, e.g., Garcia v. Spun Steak Co., 998 F.2d 1480, 1483 (9th Cir. 1993) (showing employee's Title VII claim on theory that English-only policy was unfairly enforced).

required to accommodate individuals with covered disabilities. Under the Age Discrimination in Employment Act ("ADEA"), an older employee will allege they were treated less favorably than a younger employee. Unlike labor arbitration disputes, civil rights claims tend to engender hostilities and animosity among union members, even though claims of disparate treatment focus on different treatment among employees. The reason why there is hostility between employees when a civil rights claim is raised is because the claim is based on the employee's immutable characteristics, e.g., race, gender, etc. The issue of disparate treatment in union grievances focuses primarily on different treatment in the application of an employer's employment policy.

Processing these statutory claims will intensify conflicts between members who claim they were denied an opportunity and those who received the benefit. Moreover, the federal civil rights statutes provide protection based on an individual status while the CBA provides protection to all members equally. The unions will undoubtedly receive opposition from those who view individual civil rights claims as a process of giving preference to various union members, especially race and gender claims.

Aside from the hostility that may flow from processing statutory employment claims under the CBA process, there is also a question of whether union members want their leadership to expand from traditional labor claims of "just cause" to the complex defenses involving statutory claims. For example, in Pyett, one of the Respondent's main arguments was that "labor arbitration's focus on the 'law of the shop' is ill-suited to

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57Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 319-320 (3d Cir. 1999) (requiring employers, employment agencies, labor organizations, and joint labor-management committees to provide reasonable accommodations).


64See Alexander, 778 F. Supp. at 1405.

65But see Isaacson & Zifchak, Agency Deferral to Private Arbitration of Employment Disputes, 73 COLUM. L. REV. 1383, 1384 (1973) ("[T]here is an increasing tendency for a single case to involve both statutory charges and contractual claims.").
resolve statutory discrimination claims.\textsuperscript{66} The law of the shop, which includes unwritten policies and practices, has been understood and accepted by both parties over an extended period of time.\textsuperscript{67} Statutory claims, however, will be analyzed on legal precedents.\textsuperscript{68}

A waiver provision might not be acceptable to all members of the bargaining unit.\textsuperscript{69} Unions may find it difficult to convince its members that advocating for members' individual rights may also protect the rights of all members.\textsuperscript{70} The union must persuade its members that by advocating for individuals' rights, all members will benefit.\textsuperscript{71} Moreover, the union can claim that arbitration will allow it to combat discrimination against its members and violations of other employment laws.\textsuperscript{72}

There are benefits to both sides in having input in selecting the arbitrator to hear an employment arbitration. However, minorities and female\textsuperscript{73} union members may be reluctant to waive their right to proceed with their claim before a hired arbitrator rather than a federal judge, who is a life-term appointment. More specifically, labor and employment arbitrators are overwhelmingly over fifty years old, white, and male.\textsuperscript{74}

\textsuperscript{68}Id. at 57-58.
\textsuperscript{70}See, e.g., Marion Crain, Strategies for Union Relevance in a Post-Industrial World: Reconceiving Antidiscrimination Rights as Collective Rights, 57 LAB. L.J. 158, 168 (2006) (arguing that advocating for individual rights will benefit unions).
\textsuperscript{71}See id.
\textsuperscript{72}See id. (arguing that successful antidiscrimination claims benefit unions by raising wage and benefit levels at nonunion companies).
\textsuperscript{73}Michael H. LeRoy, Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards, 16 STAN. L. & POL'Y REV. 573, 581 & n.42 (2005) (discussing a study by the General Accounting Office that employment panels are primarily white older males that might disadvantage women complainants).

In recent information captured by William Gould regarding leading arbitration service providers, JAMS and the American Arbitration Association (AAA), he stated: "The fact is that a small percentage of arbitrators are blacks, other minorities, or women . . . [t]hus, it is said that the typical arbitrator in a JAMS individual contract case is both white and male. The AAA has done somewhat better: Of the 664 members of [the]
Some members may perceive that the outcome may be biased, and the system may be flawed and unfair.  

B. The Waiver Must Be Clear and Must Not Limit Substantive Rights

There should be no ambiguities surrounding the waiver provision incorporated into the CBA. As mandated by the Supreme Court in Wright, the statutes covered by the waiver should be clearly listed and explained to members.  

In addition, the employer must ensure that the waiver does not limit or eliminate substantive rights provided by state and federal statutes. The Supreme Court set forth this principle in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. The Court stated that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."

The court will refuse to uphold the waiver provision if it prevents union members from "effectively vindicating" their "federal statutory rights in the arbitral forum." Lower courts, for example, have rejected

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employment panel nationally, 220 are women. Of that same panel of 664, 54 have identified themselves as minority." Id. (quoting William B. Gould, IV, Kissing Cousins: The Federal Arbitration Act and Modern Labor Arbitration, 55 EMORY L.J. 609, 658 (2006) (footnotes omitted)).


See Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 79-82 (1998). But see Clarke v. UFI, Inc., 98 F. Supp. 2d 320, 336-37 (E.D.N.Y. 2000) (upholding a waiver even though the state and federal discrimination statutes were not specifically listed). The Clarke court stated, "[I]t is difficult to resist the conclusion that it presents precisely the sort of 'clear and unmistakable waiver' contemplated in Wright, at least as concerns Title VII claims of sexual harassment. Indeed, the CBA's language concerning such claims could not be clearer or more unmistakable." Id. at 332 (internal citations omitted); see also Parker v. Hahnemann Univ. Hosp., 234 F. Supp. 2d 478, 492-93 (D. N.J. 2002) (holding that in order to prove a FMLA entitlement claim, an employee must show they were entitled to restatement, and were denied restatement upon their return from leave).


Id.

Id. at 628.

mandatory arbitration when the waiver limits the statute of limitations,\cite{footnote1} the shifting fee provisions are burdensome,\cite{footnote2} and the arbitration provision is not specific, but only general requirements.\cite{footnote3}

The challenge for the union and the employer is to write a "clear and unmistakable" waiver provision in the CBA that provides disclosure to union members that they will be prohibited from filing statutory claims in state or federal court.\cite{footnote4} When the terms are not clear, it will result in the employee defending their right to sue the employer in federal court for violating an employment law.\cite{footnote5}

The Supreme Court in \textit{Gilmer} argues that the mandatory arbitration provision is only a change of forum.\cite{footnote6} However, if the

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\textsuperscript{81}See Am. Express Merchants' Litig. v. Am. Express Travel Related Servs. Co., 634 F.3d 187, 199 (2d Cir. 2011) ("Thus, as the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable.").

\textsuperscript{82}See Randolph, 531 U.S. at 82 (concluding that an arbitration agreement that does not mention arbitration costs and fees is not per se unenforceable on theory that it fails to affirmatively protect a party from possible steep arbitration costs); Faber v. Menard, 367 F.3d 1048, 1054-55 (8th Cir. 2004) (holding that attorney fees provision in arbitration agreement was not unconscionable; here, party seeking to avoid arbitration failed to meet his burden of presenting specific evidence of likely arbitrators' fees and his financial ability to pay those fees); see also Ragone v. Atl. Video, 595 F.3d 115, 122-23 (2d Cir. 2010) (holding that the fee provisions in the arbitration agreement were not unconscionable); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1177-78 (9th Cir. 2003) (holding that the cost-splitting provision was substantively unconscionable); Bradford v. Rockwell Semiconductor Sys. Inc., 238 F.3d 549, 556-57 (4th Cir. 2001) (upholding the fee-splitting provision); Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280, 1287 (11th Cir. 2001) (refusing to sever the arbitration agreement); Cooper v. MRM Inv. Co., 119 F. Supp. 2d 771, 781-82 (M.D. Tenn. 2002) (refusing to compel arbitration).

\textsuperscript{83}Combs v. Highlands Hosp. Corp., 2012 WL 1902170, at *3-*4 (E.D. Ky. May 25, 2012); St. Aubin v. Unilever HPC NA, 2009 WL 1871679, at *4 (N.D. Ill. June 26, 2009) (holding that the general reference to anti-discrimination claims in CBA was insufficient to subject age discrimination claim to arbitration and did not constitute the "clear and unmistakable" requirement of \textit{Pyett}); Shipkevich v. Staten Island Univ. Hosp., 2009 WL 1706590, at *6 (E.D.N.Y. June 16, 2009) (holding that the arbitration clause was not an "explicit statement" that discrimination claims were covered by the mandatory arbitration provision).


\textsuperscript{85}See, e.g., \textit{id.} (stating the general arbitration provision in the CBA was insufficient to prohibit the employee from bringing Title VII and § 1981 claims in federal court); McLean v. Garage Mgmt. Assoc., 819 F. Supp. 2d 332, 334 (S.D.N.Y. 2011) (citing McLean v. Garage Mgmt. Corp., 2011 WL 1143003, at *5-*6 (S.D.N.Y. Mar. 29, 2011)) (discussing district court's denial of defendants' motion to dismiss and to compel arbitration because the CBA did not clearly and unmistakably apply to the statutory claim); Jackson v. O.K. Grocery Co., Inc., 2011 WL 2173625, at *2 (W.D. Pa. June 2, 2011) (holding that the plaintiff's lawsuit could proceed because the union contract did not say arbitration is binding or that it is the sole remedy for discrimination complaints).

employee is denied the opportunity to proceed to arbitration by the union, and denied the opportunity to proceed to the court by the employer, this may circumvent the principles in *Gilmer.*

C. Union Decline to Arbitrate Employment Statutory Claims

One of the lingering issues remaining after *Pyett* is whether an employee may still pursue a claim in federal court, when the union refuses to proceed to arbitration with a statutory claim. In *Pyett,* the union members argued that, "the CBA operates as a substantive waiver of their ADEA rights because it not only precludes a federal lawsuit, but also allows the union to block arbitration of these claims." The Court refused to address the issue of whether the union's failure to proceed to arbitration on a statutory claim, alongside the CBA's prohibition of union members proceeding to federal court, prevented union members from "effectively vindicating" their rights under the statute. A number of lower courts that have been faced with this issue have permitted the union member to at least proceed to arbitration.

The District Court in *Pricilla de Souza Silva v. Pioneer Janitorial Services* addressed the conflict between the employer, the union, and the employee over the interpretation of the CBA's mandatory waiver provision. The union chose not to pursue her grievance through arbitration. Interestingly, the court in *Silva* held that even if "the CBA's waiver provision is clear and unmistakable, it is unenforceable as it deprived Silva of a forum in which to have her dispute resolved." This is a dilemma for the employer and the union. If the union proceeds

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87 Brown v. Servs. for the Underserved, 2012 WL 3111903, at *2 (E.D.N.Y. July 31, 2012) ("When a CBA contains a mandatory arbitration clause for claims that vindicate statute-based rights and the CBA also allows the union to block arbitration of its members' claims, the arbitration clause may be unenforceable. This is because such a CBA arguably extinguishes its members’ statutory rights by denying them the unfettered ability to seek any remedy—either judicial or arbitral—for a violation of those rights." (citations omitted)).


89 See id. ("Resolution . . . would be particularly inappropriate in light of our hesitation to invalidate arbitration agreements on the basis of speculation.").


91 777 F. Supp. 2d at 207 (finding that the CBA's arbitration option constituted impermissible waiver of plaintiff's rights).

92 Id. at 199.

93 Id. at 205-206.
through the grievance process, but refuses to proceed to arbitration with a statutory claim, may the employee proceed to arbitration to pursue their statutory claim? In *Gildea v. Bldg Management*, the district court answered this question in the affirmative, when the union failed to pursue the union member's claim to arbitration. The court held that the waiver in the CBA did not prevent the employee from proceeding to arbitration without the union, but at the same time, the CBA prohibited the employee from proceeding to file a claim in federal court. Similarly, in *Kravar v. Triangle Service*, the court denied the employer's motions to compel arbitration after the union failed to pursue the employee claim of employment discrimination to arbitration. The court indicated that mandatory arbitration of employment disputes is permissible and valid when it is incorporated into the CBA. However, the court emphasized that under *Pyett*, the Supreme Court carved out an exception to "the enforceability of a union- negotiated arbitration agreement . . . ." If the answer to this question is yes, then the employer may be forced to defend statutory claims in federal court, when the goal of the waiver is to avoid court action. This may also force unions to proceed to arbitration, even with weak claims, to avoid being joined as a defendant, or to intervene in a federal court action brought by an employee. Because the Supreme Court has left unanswered the question of whether a union employee may proceed with a court action when the union

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95 *Id.* ("Accordingly, the Court finds that the CBA does not prevent Plaintiff from seeking to arbitrate his claim without Union participation.").

96 *Id.* at *4 (discussing plaintiff-employee's argument that the union's refusal to adjudicate his claim through the internal grievance process entitled him to pursue a federal court action). However, the court found that the CBA unequivocally waived the plaintiff's recourse to litigation on statutory discrimination claims. *Id.* at *6.


98 *Id.* at *3.

99 *Id.* at *1.

100 *See infra* Part VI.D (discussing issues when a union is a party to the suit).
refused to arbitrate a statutory claim, district courts have reached different conclusions on this unanswered question.\textsuperscript{103}

IV. WHAT ARE THE EMPLOYER'S BENEFITS OF INCORPORATING MANDATORY ARBITRATION OF STATUTORY CLAIMS INTO THE CBA?

A. "The Simplicity, Informality, and Expedition of Arbitration"\textsuperscript{104}

The employer and the union will benefit by developing procedures to arbitrate statutory claims in a manner that is fair and simple, but also protects the employees' rights guaranteed by the statute.\textsuperscript{105} In \textit{Gilmer v. Interstate/Johnson Lane}, the Supreme Court insisted that arbitration of disputes has advantages over litigation of cases.\textsuperscript{106} The Court stated "[a]lthough those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'\textsuperscript{1107} Without doubt, the use of mandatory arbitration of all employment-related disputes reduces the cost\textsuperscript{108} and time of litigating cases in federal and state courts.\textsuperscript{109} Typically, employment arbitrators control the discovery process to ensure it does not turn into a lengthy court proceeding.\textsuperscript{110} In addition, the protracted and sometimes


\textsuperscript{106}\textit{Gilmer}, 500 U.S. at 27-28.

\textsuperscript{107}Id. at 31 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

\textsuperscript{108}Lewis L. Maltby, \textit{Employment Arbitration and Workplace Justice}, 38 U.S.F. L. REV. 105, 116 (2003) [hereinafter \textit{Workplace Justice}] ("Arbitration is much less expensive, allowing attorneys to accept much smaller cases, in terms of the damages involved in the cases."); see also Lewis L. Maltby, \textit{Private Justice: Employment Arbitration and Civil Rights}, 30 COLUM. HUM. RTS. L. REV. 29, 54-55 (1998) [hereinafter \textit{Private Justice}] ("[I]t is likely that legal fees in arbitration may be far lower than in civil cases. . . . The GAO also found that legal fees among its respondents were generally lower in arbitration.").

\textsuperscript{109}In \textit{Circuit City Stores v. Adams}, the Supreme Court stated that "[a]rbitration agreements allow parties to avoid the cost of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." 532 U.S. 105, 123 (2001).

\textsuperscript{110}See \textit{infra} Part IV.A (discussing analogous benefits for union-initiated arbitration).
hostile motion practice in court is reduced in arbitration.\(^{111}\) If the employment arbitrator controls the arbitration process, the parties will find the process is much simpler and offers a number of cost-saving measures.\(^{112}\)

The average time from filing an employment claim in federal court until it is dismissed or settled is approximately two and a half years,\(^ {113}\) whereas the typical time frame for an employment arbitration claim may take 8.6 months.\(^ {114}\) Bringing closure to employment disputes in a shorter period of time also benefits the employer because its employees are not being deposed, investigated, or made to testify in a lawsuit. This may permit the workplace to return to some normalcy and enhanced worker productivity.

It should be pointed out that arbitrating statutory disputes is normally faster and less protracted than in court, but not faster than labor arbitrations.\(^ {115}\) There is little to no motion practices or complex case law to be analyzed.\(^ {116}\) Advocates for unions, in particular, will have to adjust their processes and expand their knowledge for defending the various types of employment claims, if they take on the defense of such disputes.\(^ {117}\) The union and the employer may also find it necessary to incorporate strict arbitration procedures into the CBA, such as limiting

\(^{111}\) See id.

\(^{112}\) See Gregory & McNamara, supra note 12, at 456 ("Labor arbitration has many virtues, ranging from time and cost efficiency, due to minimal discovery and no pre-hearing motion practice, to no shifting of compensatory or punitive damages or attorney's fees to the loser."). These same principles could be applied in employment arbitration cases.

\(^{113}\) Private Justice, supra note 108, at 55 ("According to the Federal Judicial Center, it is almost two years (679.5 days) from the time the average employment discrimination case is filed in federal district court until the time it is resolved. Arbitration results, however, are reached relatively quickly. The average case in arbitration is resolved in 8.6 months, less than half of the time required for civil litigation.").


\(^{115}\) See Mathiason & Uppal, supra note 114, at 894.

\(^{116}\) See infra Part V.C (suggesting there is flexibility in arbitration because neither the parties nor the arbitrator are strictly bound by the rules of evidence).

\(^{117}\) See infra note 263.
motion practice.118 This will benefit both the union and employer by expediting the processing of complex employment claims.119

B. Less Exposure to Juries Awarding Significant Monetary Damages

Under most employment statutes, especially Title VII, employees have a right to a jury trial.120 Under the Age Discrimination in Employment Act, plaintiffs have a tendency to persuade juries to reach verdicts in their favor and award large awards.121 Even though there are limits on monetary damages that can be awarded under Title VII, plaintiffs will join a variety of state civil rights and employment claims, where damages may be unlimited.122 This has resulted in employers fearing that juries may award large sums of money damages to

118 See infra Part V.C (suggesting that the CBA may govern the rules of evidence).
119 Gilmer, 500 U.S. at 31 ("Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985))).
   Damages in cases of intentional discrimination in employment: (c) Jury Trial - If a complaining party seeks compensatory or punitive damages under this section - (1) any party may demand a trial by jury; and (2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.
121 See, e.g., Chopra v. General Elec. Co., 527 F. Supp. 2d 230, 252-53 (D. Conn. 2007) (terminating the employee's retaliation action under Title VII, § 1981, ADEA, and Connecticut Fair Employment Practices Act, holding that the punitive damages award was excessive, and reducing it); Parks v. Univ. Hosps. Case Med. Ctr., 2011 WL 1828364 (Ohio Com. Pl. Mar. 9, 2011) (trial order) (awarding plaintiff $900,000.00 in age discrimination case); see also Frank J. Cavico & Bahaudin G. Mujtaba, Discrimination and the Aging American Workforce: Legal Analysis and Management Strategies, J. LEGAL ISSUES AND CASES IN BUS., 1, 9 (2012) ("Age discrimination settlements and jury awards are substantially higher than those awarded for race, sex, or disability cases."); Holland & Hart, When is a Release Meaningless and the Money Paid to Obtain it Wasted?, 2 IDAHO EMP. L. LETTER 6 (1998) ("Although there may be some disagreement concerning the kind of discrimination lawsuit that is the most dangerous from an employer's perspective, there is general agreement that one of the most dangerous is an age discrimination lawsuit. Juries are often sympathetic to discharged older employees who will have difficulty finding new jobs, particularly if the employee has had a long-term employment relationship with his or her employer. This sympathy often results in large jury verdicts being awarded to older employees who claim age discrimination.").
plaintiffs. Mandatory arbitration will eliminate the jury and place in the hands of arbitrators the authority to award monetary damages if the union proves a violation of the statute. Awards granted by arbitrators in statutory claims are often lower than damages granted by a jury. Employers will see this change as a major advantage to mandatory arbitration over jury trials and verdicts.

Juries are often unpredictable with their verdicts as well as the amount of damages they award, whereas arbitrators are more predictable and may be reluctant to grant large sums of damages (even where it has been shown a statute has been violated) or to grant punitive damages. The question still remains whether arbitrators will award full

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123 See Michael Z. Green, Debunking The Myth of Employer Advantage From Using Mandatory Arbitration For Discrimination Claims, 31 Rutgers L.J. 399, 401-407 (2000) (suggesting that the fear of widespread large jury award is unfounded as most employment type cases that reach trial are settled and never reach a jury).

124 See Workplace Justice, supra note 108, at 115.

125 Id. (citing Theodore Eisenberg & Elizabeth Hill, Employment Arbitration and Litigation: An Empirical Comparison, 2003 PUB. L. & LEGAL THEORY RES. PAPER SERIES 1, 14, 18 (2003)) ("[A study] compared the size of the awards in AAA arbitration proceedings to the size of awards in state court employment cases. The median AAA award was $63,120, while the median state court award was an almost identical $68,737. The mean awards, however, were quite different. The mean AAA award was around $153,000, but the mean state court award was about $462,000." (footnotes omitted); see generally Alexander J. S. Colvin, An Empirical Study of Employment Arbitration: Case Outcomes and Processes, 8 J. OF EMP. LEGAL STUDS. 1 (2011) (citing a number of studies finding that awards in employment litigated cases in federal court are higher than arbitration).


127 See, e.g., Murray, supra note 7, at 298 ("A chief benefit of arbitration to employers is the protection it provides from inconsistent liability in the form of large, emotion-influenced jury awards and settlements.").

128 See Boyd A. Byers, Mandatory Arbitration of Employment Disputes, 67 J. KAN. B. ASS'N 18, 20 (1998) ("Arbitration typically is more predictable than civil litigation. Arbitrators are less likely than juries to be swayed by corporate antipathy or the employee's personality. The parties thus are better able to predict the outcome of any given claim."); see also W. Terrence Kilroy & Adam P. Sachs, Arbitrating Employment Disputes: Greener Pastures for Employers?, 62 J. KAN. B. ASS'N 32, 33 (1993) ("These trends understandably concern employers who feel that juries are awarding excessive damages. Both the U.S. Supreme Court and Congress may be signaling relief for employers concerned about large jury verdicts and expenses often associated with jury trials. The possible relief: the option of arbitrating employment disputes. While most arbitration clauses give arbitrators the ability to issue damage awards consistent with the relevant statutes or common law, some believe that arbitrators are less likely than juries to grant especially high damage awards.").
remedies in employment cases, or whether they will reinstate an employee who was unlawfully terminated but without awarding back pay or punitive damages. In addition to lower monetary awards, arbitrators may order fewer remedies than a federal court. This will greatly benefit the employer.

C. Limited or No Judicial Review

An arbitrator's award is normally final, binding, and receives little or no judicial review. The award is presumed valid unless it can be shown that it violated the Federal Arbitration Act (FAA). Courts have repeatedly stated that the scope of judicial review of an award is extremely limited. However, the Supreme Court in Shearson/American Express Inc. v. McMahon held that "[a]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." The Supreme Court suggests that this leaves the door

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129 Kilroy & Sachs, supra note 128, at 33 (stating that even though most arbitration clauses give arbitrators the power to issue awards consistent with relevant statutes or common law, some believe that arbitrators are less likely than juries to grant high damage awards).

130 See Sherwyn, Estreicher & Heise, supra note 122, at 1560 (suggesting that the award of damages by arbitrators may be lower than in litigation).

131 9 U.S.C. § 10(a)(1)-(4) (2006). This section states:

(1) "[W]here the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or of either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id.; see also Biller v. Toyota Motor Corp., 668 F.3d 655, 661-662 (9th Cir. 2012) (citation omitted) ("Review of a final arbitration award is limited by the [Federal Arbitration Act (FAA)], which enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award. Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard [and] a court must confirm an arbitration award unless it is vacated, modified, or corrected as proscribed in [the FAA].").


133 Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987); see also Wilko v. Swan, 346 U.S. 427, 436 (1953) (stating that an award may be vacated if it can be shown it is in "manifest disregard" of the law).
open for a court to review and vacate an arbitration award if the decision is in conflict with the court's interpretation of an employment statute.\textsuperscript{134} However, courts have consistently held that arbitrator decisions will not be disturbed unless it can be shown that the decision was a "manifest disregard of the law,"\textsuperscript{135} or the arbitrator's decision was "completely irrational."\textsuperscript{136}

Limited or no judicial review of an arbitrator's award can be a benefit\textsuperscript{137} as well as a disadvantage to the employer and the union.\textsuperscript{138} However, in weighing the benefits and disadvantages, limited judicial review of the arbitrator's decision will mostly be a benefit to the employer.\textsuperscript{139} Once the arbitration award is issued, the decision is final, whereas, in employment litigation, there are opportunities for repeated appeals by the losing party.\textsuperscript{140} Litigated employment-related cases can take more than three years to work through the appeals procedures.\textsuperscript{141} In arbitration, the employer will not be concerned about the possibility of an appellate court or the United States Supreme Court overturning an arbitrator award, which would trigger large back-pay amounts and possibly reinstatement.\textsuperscript{142}

\textsuperscript{134}See Shearson/American Express Inc., 428 U.S. at 231; see also Wilko, 346 U.S. at 436 (stating that an award may be vacated if it can be shown it is in "manifest disregard" of the law).

\textsuperscript{135}Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995) ("When faced with questions of law, arbitration panel does not act in manifest disregard of the law unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.").

\textsuperscript{136}Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1131 (3rd Cir. 1972) (quoting Lentine v. Fundaro, 29 N.Y.2d 382, 386 (1972)); see also Lentine v. Fundaro 29 N.Y.2d 382, 383 (1972) ("The order of the Appellate Division . . . should be affirmed. Save for 'complete irrationality,' arbitrators are free to fashion the applicable rules and determine the facts of a dispute before them without their award being subject to judicial revision.").

\textsuperscript{137}See infra Part VI.A (suggesting the benefit of expediency trumps the need for the availability of judicial review); see also infra Part IV.C (discussing that the benefit of additional representation by the union in arbitration improves the likelihood that an individual will prevail).

\textsuperscript{138}See infra Part V (discussing disadvantages to the employer); see also infra Part VII.A.F (discussing disadvantages to the union).

\textsuperscript{139}Sherwyn, Estreicher & Heise, supra note 122, at 1560 (suggesting that the award of damages by arbitrators may be lower than in litigation).

\textsuperscript{140}See e.g., Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992) (refusing to vacate an arbitration award on appeal).

\textsuperscript{141}See Fellows, supra note 114 ([A] 1998 comparison of arbitration and litigation published in the Columbia Human Rights Law Review noted that . . . [t]he average duration of an arbitrated claim was 8.6 months, compared to 2.5 years in litigation.").

\textsuperscript{142}See United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 591, 596 (1960) ("The refusal of courts to review the merits of an arbitration award is the proper
The disadvantage of limited judicial review occurs when the arbitrator interprets a provision in the CBA adversely to the employer and the employer will not have the luxury of appealing the decision to the court, unless it is clear that the arbitrator violated one of the four provisions in title 9 of the United States Code, section 10. The employer may see this as a disadvantage of having a mandatory arbitration provision in the CBA. The employer's perceived disadvantage will quickly dissipate once the CBA expires and at that time, the employer may then attempt to negotiate language in the CBA that will eliminate or modify the arbitrator's interpretation of a provision in the CBA.

This could also be a benefit or disadvantage to the union. For example, there will come a time when the union is in total disagreement with how the arbitrator interpreted a provision of the CBA. Just like the employer, the union could challenge the arbitrator's decision as outlined in title 9 of the United States Code, section 10.

D. Avoid Public Disclosure of a Finding of Discrimination (No Dirty Laundry)

Maintaining the confidentiality of employment arbitration awards is possibly the most important factor for the employers to consider when negotiating mandatory arbitration of employment disputes into the CBA. Employers and, to a lesser extent, employees strongly favor nondisclosure of the award. In court, however, the public has a right to

\[\text{approach to arbitration under collective bargaining agreements.}^{143}\]

\[\text{See 9 U.S.C. § 10 (2006).}\]

\[\text{See id. (stating the limited circumstances available).}\]

\[\text{See City of Wilmington v. Am. Fed'n of State, Cnty., Mun. Emp., 2005 WL 820704, at *5 (Del. Ch. Apr. 4, 2005) (discussing a CBA which prohibited the arbitrator from "modifying, amending, adding to, eliminating, or varying in any way the terms of the CBA").}\]

\[\text{Akers Nat. Roll Co. v. United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Int'l Union, 712 F.3d 155, 157 (3rd Cir. 2013) (showing an example of a CBA that included a process when the union and employer disagreed over the interpretation or application of the CBA).}\]

\[\text{See 9 U.S.C.A. § 10.}\]

\[\text{See Private Justice, supra note 108, at 42 ("Litigation results, of course, are a matter of public record, and the fear of adverse publicity can be a powerful incentive for employers to avoid discrimination. Arbitration, by contrast, is usually private, eliminating the fear of adverse publicity. Employers, however, are not completely safe from public exposure under the protocol. . . . Nothing in the protocol precludes them from sharing the information they gain from the ensuing discussions with other interested parties. . . . While these provisions will allow some degree of public scrutiny, they will not produce the same degree of openness found in the court system."); see also Byers, supra note 128, at 20 ("Arbitration provides confidentiality, which protects both parties from unwanted disclosure. In addition to the}\]
know about allegations of discrimination and violations of other laws.\textsuperscript{149} Normally, the employment arbitration award remains confidential unless the parties give permission to distribute or to publish the decision in a legal reporter.\textsuperscript{150}

In labor arbitration, the employer or the union may object to publication of arbitration awards, unless the employer is a governmental entity.\textsuperscript{151} Generally, in labor arbitration, the parties are not concerned if the decision is published, thus leaving the decision up to the arbitrator.\textsuperscript{152} However, employers will normally request that employment arbitration awards remain confidential. Thus, cases involving egregious claims of race and gender harassment that would normally be made public if in court, will remain confidential or filed away in arbitration.\textsuperscript{153}

A finding by a court that an employer has violated an employment law, especially Title VII's prohibition against racial or sexual harassment,\textsuperscript{154} will be widely published on social media, legal publication, and the general news outlets.\textsuperscript{155} Such publicity may negatively impact a company's reputation and product brand.\textsuperscript{156} Normally, employers will avoid such publicity by requiring awards to remain confidential.\textsuperscript{157} The employer will most likely negotiate such obvious benefits, privacy may facilitate reasonable settlements, since the parties are less apt to feel pressure to vindicate their position to the outside world.\textsuperscript{\textasciitilde{}}; Amy J. Schmitz, Untangling the Privacy Paradox in Arbitration, 54 U. KAN. L. REV. 1211, 1222-1240 (2006) (discussing the distinction that arbitration proceedings are generally more private, but not necessarily confidential).

\textsuperscript{149}See Private Justice, supra note 108, at 42 (discussing the issue of transparency and countervailing concerns for expediency and public image).
\textsuperscript{150}See Mathison & Seiler, supra note 126, at 186 (discussing that the use of private arbitration "protects the parties from unwanted public disclosure.").
\textsuperscript{152}See Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, NAT'L. ACAD. OF ARBITRATORS, art. 2.C, http://naarb.org/code.asp. (stating that arbitration must be kept confidential unless waived by both parties or disclosure is permitted by law).
\textsuperscript{153}See Private Justice, supra note 108, at 42 ("Litigation results, of course, are a matter of public record, and the fear of adverse publicity can be a powerful incentive for employers to avoid discrimination. Arbitration, by contrast, is usually private, eliminating the fear of adverse publicity.").
\textsuperscript{156}See Mark Litvak, When Products Become Stars, 23 WTR DEL. LAW. 8, 12 (2006) (discussing brand awareness of negative publicity from arbitration disputes).
\textsuperscript{157}Byers, supra note 128, at 20 ("Arbitration provides confidentiality, which protects both parties from unwanted disclosure. In addition to the obvious benefits, privacy may
language into the CBA, to prohibit the publication of employment arbitration awards, or deny permission for awards to be published.

Employment awards issued in accordance with a CBA will more likely remain confidential at the request of the employer. To ensure labor and employment awards are treated in the same manner, the employer will negotiate a confidentiality provision in the CBA to cover labor awards. Even if there is no prohibition on the publication of an employment award, the advocates of confidentiality, especially the employer, may object to publication of the award where they have been the losing party.

E. No Legal Precedent of Arbitration Decisions

Unlike litigation, arbitrator awards have little to no legal precedent. In other words, arbitrators are not required to follow previous arbitrator awards, even if the parties are the same in a subsequent case. A lack of legal precedent can be a disadvantage as well as an advantage. Without a legal precedent, the losing party may facilitate reasonable settlements, since the parties are less apt to feel pressure to vindicate their position to the outside world.

See Private Justice, supra note 108, at 42 ("Litigation results, of course, are a matter of public record, and the fear of adverse publicity can be a powerful incentive for employers to avoid discrimination. Arbitration, by contrast, is usually private, eliminating the fear of adverse publicity. Employers, however, are not completely safe from public exposure under the protocol. . . . Nothing in the protocol precludes them from sharing the information they gain from the ensuing discussions with other interested parties. . . . While these provisions will allow some degree of public scrutiny, they will not produce the same degree of openness found in the court system.").

Mollie H. Bowers, W. Sue Reddick, & E. Patrick McDermott, Arbitrating Sexual Harassment Discipline Pursuant to Collective Bargaining Agreements, 12 No. 2 PRAC. LITIG. 7, 8-9 (2001) ("Reviewing arbitral awards is not always possible since the vast preponderance of awards is not published. For example, NAA arbitrators cannot submit any award for publication without the permission of both parties, and even when permission is obtained, both the Bureau of National Affairs and Commerce Clearing House staff make the final decision about which awards will be published.").

However, note that arbitrator awards can be vacated if they "fly in the face of clearly established legal precedent." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995). Other courts have found that courts may set aside an arbitration award if it explicitly conflicts with other laws and legal precedents. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987); see also City of Ansonia v. Stanley, 854 A.2d 101, 110 (Conn. 2004) (stating that arbitration agreements may be set aside if the terms violate public policy or the award creates an "explicit conflict" with other laws).

ELKOURI & ELKOURI, supra note 53, at 568-70; see also Ashley M. Sergeant, The Corporation's New Lethal Weapon: Mandatory Binding Arbitration Clauses, 57 S.D. L. REV. 149, 164-65 (2012) (discussing the fact that although some arbitrators are specialized, they are not required to be lawyers, to know or follow the law, to adhere to any legal precedent, to publish a written decision or even to provide any justification for their ruling).
repeatedly pursue arbitration until they select an arbitrator more supportive of their position. A new arbitrator may reach a different conclusion on the same issue. For example, two different arbitrators may be selected to hear two termination cases involving the same set of facts, but different grievants. One arbitrator may find no just cause and require the first employees to be reinstated. A few months later, the second arbitrator may find just cause and deny the reinstatement of the other employee. Clearly, an advantage of having no legal precedent, the party who disagrees with an arbitrator's decision may not be required to apply it in a future case. But for the fact these are two different arbitrators, and one decision is not binding on the other, the arbitration results in two different conclusions.

To address this issue, parties to the negotiated arbitration provision could negotiate that all or certain cases have precedential value. In statutory types of claims, arbitrators will be required to follow legal precedents from the court, and a failure to do so could be grounds for setting aside the award by a court.

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162 But see W. Mark C. Weidemaier, Toward a Theory of Precedent in Arbitration, 51 WM. & MARY L. REV. 1895, 1900 (2010) ("There undoubtedly are other cases in which past awards play a less substantial but still material constraining role. But arbitral awards need not serve this constraining function to constitute precedent.").

163 ELKOURI & ELKOURI, supra note 53, at 567-70.

164 Id. at §§ 15-3—15-6.

165 Weidemaier, supra note 162, at 1903-1906 (arguing that arbitration is capable of generating precedent).

166 See Groton v. United Steelworkers of Am., 757 A.2d 501, 512 (Conn. 2000) (holding that the arbitration award, which reinstated employee discharged for entering plea to embezzlement, violated clear public policy against embezzlement, and was properly vacated); Decatur Police Benevolent and Protective Ass'n Labor Comm. v. City of Decatur, 968 N.E.2d 749, 758 (Ill. App. Ct. 2012) (holding that the arbitration award, which reinstated police officer discharged for domestic battery and untruthfulness, violated strong public policy against domestic violence, and was properly vacated); see also State v. AFSCME, Council 4, Local 391, 7 A.3d 931, 940 (Conn. App. Ct. 2010) (holding that the arbitration award, which reinstated police officer discharged for sexual harassment, violated relevant public policy against workplace sexual harassment); Chi. Transit Auth. v. Amalgamated Transit Union, Local 241, 926 N.E.2d 919, 930-31 (Ill. App Ct. 2010) (holding arbitration award, which reinstated bus driver convicted of aggravated criminal sexual abuse of his daughter, violated public policies of safely transporting public, including children, and protection of public from convicted sex offenders).
F. Limited Discovery

The exorbitant cost of litigating and defending an employment dispute case is primarily incurred during the discovery period.\footnote{See Mitchell L. Marinello, Protecting the Natural Cost Advantages of Arbitration, 23 IN-HOUSE LITIGATOR 1, 8-9 (2008).} It is at the discovery stage of litigation where the parties battle it out for evidence to use for filing dispositive motions.\footnote{Id. at 9.} The parties try to uncover evidence to support their respective positions.\footnote{Taylor v. Pilot Travel Ctrs., LLC, 2011 WL 542123, at *2 (S.D.S.D. Feb. 8, 2011) ("The federal discovery rules allow for discovery that 'appears reasonably calculated to lead to the discovery of admissible evidence.'" (quoting Fed.R.Civ.P. 26(b)(1))).} Unlike discovery in traditional labor arbitration cases, if we can call it discovery, discovery in employment cases typically engender extensive discovery from both sides.\footnote{See Richard A. Epstein, On Pleading and Discovery: Reflections on Twombly and Iqbal with Special Reference to Antitrust, 2011 U. ILL. L. REV. 187, 191-92 (discussing that in modern employment discrimination cases, discovery is extensive in disparate treatment and disparate impact cases: "[D]emands in discovery are arduous").} Plaintiff's attorneys will engage in a battle to garner a laundry list of documents—such as business records and employee records—will depose a long list of witnesses, and will submit a package of interrogatories for opposing counsel to respond.\footnote{Marinello, supra note 167, at 1, 8 (stating that if the parties do not limit discovery, depositions and document requests can substantially raise the cost).} Undoubtedly, the parties will also file motions to compel the submission of documents and motions in limine.\footnote{Id. at 9.} The discovery cost to employers can be extremely high.\footnote{See id. at 1, 8.} Including a provision in the CBA that eliminates or substantially limits discovery during arbitration will be a major benefit to employers.\footnote{Private Justice, supra note 108, at 33 ("Another 'neutral' provision is to limit discovery. While this can be presented as a way of simplifying the process that affects both parties equally, the reality is quite different. The employee has the burden of proof and needs discovery to obtain the information necessary to meet this burden. The employer, by contrast, already has the relevant employment records and access to the key witnesses, who are generally other employees.").}

The Supreme Court in Gilmer held that mandatory arbitration of employment disputes is just exchanging one forum for another to resolve an employment dispute.\footnote{Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 21 (1991) ("Moreover, compulsory arbitration does not improperly deprive claimants of the judicial forum provided for by the ADEA: Congress did not explicitly preclude arbitration or other non-judicial claims resolutions; the ADEA's flexible approach to claims resolution, which permits the EEOC to pursue informal resolution methods, suggests that out-of-court dispute resolution is} However, the use of discovery in arbitration
will be more limiting than in federal or state courts. 176 Indeed, employers will write into their arbitration procedures limitations on the production of documents and the use of depositions and interrogatories. 177 This concern was raised in Gilmer. 178 The Supreme Court, citing extensively to its decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 179 stated that although those procedures might not be as extensive as in the federal courts, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" The court failed to recognize that giving employers the power to limit discovery could also hamper plaintiff's ability to uncover the violation of a federal employment statute. 181

Employers will greatly benefit from procedures that limit the use of discovery. 182 Often plaintiff attorneys are attempting to gather

consistent with the statutory scheme; and arbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts, since arbitration also advances the objective of allowing claimants a broader right to select the dispute resolution forum.

176 See Martha Nimmer, The High Cost of Mandatory Arbitration, 12 CARDOZO J. CONFLICT RESOL., 183, 207 (2010) ("Discovery tools, such as interrogatories, requests for admission and mental examinations, are often not used in arbitration.").

177 Marinello, supra note 167, at 8-9. (suggesting that parties stipulate to how much discovery will be permitted to help limit the costs).

178 Gilmer, 500 U.S. at 31 ("Gilmer also complains that the discovery allowed in arbitration is more limited than in the federal courts, which he contends will make it difficult to prove discrimination.").


180 Gilmer, 500 U.S. at 31 (quoting Mitsubishi Motors Corp., 473 U.S. at 628).

181 See David S. Schwartz, Mandatory Arbitration and Fairness, 84 NOTRE DAME L. REV. 1247, 1275 (2009) ("The fact that arbitration law empowers the arbitrator to subpoena witnesses and documents, and that some employment arbitration rules allow the parties to take one or two depositions and submit a request for production of documents . . . can fall far short of what a claimant needs to meet her burden of proof"); see also Erica F. Schohn, The Uncertain Future of Mandatory Arbitration of Statutory Claims In The Unionized Workplace, 67 LAW & CONTEMP. PROBS., 321, 335 (2004) ("Providing limited discovery might slightly increase the costs of arbitration, but the altered process would still be much less expensive than litigation." (citing Joshua M. Javits & Francis T. Coleman, High Court to Revisit Issue of Mandatory Arbitration, NAT'L L.J., at B05, B08 (1998))).

182 Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-58 (1974) ("Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."); see also Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956) ("Arbitration carries no right to trial by jury . . . ."); Wilko v. Swan, 346 U.S. 427, 435-437 (1953) (stating that judicial review of arbitration is limited). But see Joseph Z. Fleming, Handling Grievances and Arbitrations Under Union and Individual Employment Contracts After 14 Penn Plaza LLC et al. v. Pyett,
evidence to meet the difficult burden of proving a violation of an employment statute, or to defeat a request for a motion for summary judgment. Employers normally hold all of the cards of evidence, and they hold this evidence close to them until ordered to share with the opposing side. Arbitrators may be reluctant to grant motions to compel the requested evidence, unless it is blatantly clear that the documents requested are crucial. Labor arbitrators, in particular, have not engaged in discovery wars between the parties and may not freely order extensive discovery when requested by a party. On the other hand, if the arbitrator fails to control the discovery process and the lucrative motion practice, the benefits of arbitration will slip through the hands of politicians.

G. Limited Involvement of State and Federal Civil Rights Enforcement Agencies

Mandatory arbitration of employment discrimination claims may have the effect of lessening the impact of the U.S. Employment Opportunity Commission (EEOC) on enforcing civil rights statutes. Arbitration may become the dominant method of addressing claims of discrimination in the workplace. The EEOC will not be a party to the

SR017 ALI-ABA 583, 614 (2010) ("Employers should insist on allowing discovery by arbitrators and on written awards to confirm reasons for decisions, since absence of such decisions may be a basis for invalidation of arbitration awards.").

183Schwartz, supra note 181, at 1275 ("The fact that arbitration law empowers the arbitrator to subpoena witnesses and documents, and that some employment arbitration rules allow the parties to take one or two depositions and submit a request for production of documents . . . can fall far short of what a claimant needs to meet her burden of proof.").

184Id. ("The employer typically has sole control of the overwhelming majority of evidence required to sustain the plaintiff's burden of proof.").

185See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 648-49 (1985) (noting that arbitration's "informal procedures" do not provide all rights and procedures of a civil trial).

186Schwartz, supra note 181, at 1268 ("In particular, limits on discovery (and to a lesser extent on pretrial motion practice) hold down the actual costs of arbitration relative to litigation.").

187Id. ("It should be noted that this evidentiary complexity raises process costs for both sides. Process costs are to some degree interactive, in that a defendant will incur higher process costs responding to the plaintiff's efforts to obtain and present evidence, and will typically seek to drive up plaintiff's process costs by resisting plaintiff's procurement and presentation of evidence as a defense tactic, driving up its own process costs at the same time.").


189Id.
arbitration process, nor have an input in the arbitrator's decision. The employer will not be under the watchful eye of the EEOC, unless the employee files a charge of discrimination against the employer. Because of the mandatory arbitration provision in the CBA, employees may be unaware that they still can file a charge with the EEOC, just not a complaint in federal court.

The EEOC has been an opponent of mandatory arbitration agreements that require employees to waive their statutory right to file discrimination claims in federal court as a condition of employment. In 2002, the EEOC won a partial victory in EEOC v. Waffle House, when the Supreme Court held that the EEOC was not prohibited from bring a court action on behalf of an employee who had signed an agreement to only arbitrate employment claims. The Court stated:

Because the EEOC is not a party to the contract and has not agreed to arbitrate its claims, the FAA's proarbitration policy goals do not require the agency to relinquish its statutory authority to pursue victim-specific relief, regardless of the forum that the employer and employee have chosen to resolve their disputes.

Similarly, in U-Haul Company of California and Machinist District 190, the National Labor Relations Board (NLRB) struck down an employer's mandatory arbitration policy that limited the employees' rights to file an unfair labor claim with the NLRB.

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190 See id.
191 See id.
192 Policy Statement, supra note 188.
193 Id.; see also Richard A. Bales, Compulsory Employment Arbitration and the EEOC, 27 PEPP. L. REV. 1, 19-20 (1999) (stating that the EEOC opposes compulsory binding arbitration agreements); Michelle Hartmann, A Myriad of Contradiction with Title VII Arbitration Agreement—Duffield as the Past, Austin as the Future, and the EEOC as the Target of Restructuring, 54 SMU L. REV. 359, 383-84 (2001) (describing the EEOC's policy against employment arbitration agreements as "hypocritical" and "create[ing] an inconsistent plight").
195 Id. at 280.
196 U-Haul Co. of Cal. et al., 190, 347 N.L.R.B. 375, 389 (2006); see also D.R. Horton, 357 N.L.R.B. No. 184, 17 (2012) (holding that the employer's mandatory arbitration agreement which required only individual arbitration of employment-related claims and excluding access to any forum for collective claims, interfered with employees' rights).
While the EEOC has authority to bring litigation in cases where employees have signed mandatory arbitration agreements, the EEOC also has budgetary restraints and limited resources. Therefore, realistically, the EEOC will not be in a position to litigate any significant number of cases. For example, the EEOC reports that in 2011 they filed and resolved only 300 enforcement suits in federal court. In addition to the EEOC, other federal agencies lack the resources to bring federal lawsuits on behalf of employees. A grievant may not be aware that they can still file a discrimination claim with the EEOC, but not pursue litigation. Without the right to proceed in federal court, or without the federal agencies' support, union employees will rely on the union to proceed to arbitration.

V. WHAT ARE THE EMPLOYER'S DISADVANTAGES OF INCORPORATING MANDATORY ARBITRATION OF STATUTORY CLAIMS INTO THE CBA?

A. No Opportunity to Appeal Adverse Arbitration Decisions

As stated earlier, the employer will have limited authority to appeal an arbitrator's decision in court. The authority to overturn an

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198 Policy Statement, supra note 188.
200 Id.; see also Evan Pontz, Labor: Dealing with the "new" EEOC, INSIDE COUNS. (Nov. 14, 2011) available at http://www.insidecounsel.com/2011/11/14/labor-dealing-with-the-new-eeoc ("The EEOC has limited resources. In fact, its budget for FY 2012 is 2 percent less than its FY 2011 budget. To litigate these nearly 200 newly filed cases (along with the cases it will file in the coming months and all of the cases it filed in the first 10 months of this past year or which were still pending from prior years) takes money and the time of EEOC attorneys and officials. Since they are spending more time and resources on litigation, there will necessarily be fewer resources for existing and new Charges [sic], especially those that do not present opportunities for high-profile litigation.").
201 For instance, the United States Department of Labor: Wages and Hours (enforces federal labor laws such as minimum wage, overtime pay, child labor, FMLA, etc.); Office of Federal Contract Compliance (enforces contractual promise of affirmative action and equal opportunity required of those who do business with the federal government); Occupational Safety and Health Administration (ensures safe and healthy working conditions). See U.S. DEP'T OF LABOR, A-Z Index of U.S. Government Departments and Agencies, http://www.usa.gov/directory/federal/index.shtml.
203 See, e.g., Dean v. Sullivan, 118 F.3d 1170, 1171 (7th Cir. 1997) ("A loser at commercial or labor arbitration might very well wish to circumvent the arbitrator's decision and head unencumbered for the courts. But if final and binding arbitration is to serve its purpose,
arbitrator's decision is very limited and narrow,\textsuperscript{204} even if the arbitration award appears to be unreasonable.\textsuperscript{205} The Federal Arbitration Act (FAA) provides limited provisions to set aside an arbitrator's decision.\textsuperscript{206} Even if the employer challenges the decision under the FAA, the cost of litigation may be prohibitive, especially where the likelihood of the court setting the award aside is very limited. In most cases, the federal court will reject the employer's request to vacate the award; therefore, the time invested and the litigation costs may not have been merited.\textsuperscript{207}

If employment cases are not incorporated into the CBA, the employer will have the opportunity to challenge a federal court decision all the way to the U.S. Supreme Court.\textsuperscript{208}

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\textsuperscript{204}Private Justice, supra note 108, at 41 (citations omitted) ("Employees are also arguably worse off under the protocol because they have limited rights of appeal. The protocol provides that 'the arbitrator's award should be final and binding and the scope of review should be limited.'" (quoting Prototype Agree on Job Bias Dispute Resolution, 1995 DAILY LAB REP. (BNA) No. 91, at D-34 (May 11, 1995))); see also Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1994) ("Judicial review of arbitration awards is tightly limited; perhaps it ought not to be called 'review' at all.").

\textsuperscript{205}Byers, supra note 128, at 20-21 ("Limited judicial review of arbitration awards, which provides a tremendous time and cost savings, offers little protection from 'runaway' arbitrators. This may be of particular concern to employers, as arbitrators historically are thought to be less receptive than courts to 'technical' procedural arguments . . . .[However] any potential for extreme arbitrator awards . . . is mitigated by institutional pressure on arbitrators to make reasonable decisions or risk non-selection by similarly situated parties in the future.").

\textsuperscript{206}g U.S.C. § 10 (2006) states:

(a) in any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

\textsuperscript{207}9 U.S.C. § 10 (2006). In addition to the FAA, the courts have also developed a few limited opportunities for an employer to challenge an arbitration award. See id. § 10(c).

\textsuperscript{208}Questar Capital Corp. v. Gorter, 909 F. Supp. 2d 789, 827 (E.D. Mich. 2012) (refusing to vacate the arbitration award upon a petition by the employer).

\textsuperscript{209}See generally McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793-98 (1973) (evidencing an employment case which was appealed to the Supreme Court).
B. Arbitrators Less Likely to Grant Motion for Summary Judgment

Employers have a number of advantages by incorporating a waiver provision into the CBA. However, in exchange for the waiver employers may lose their major legal arsenal—the motion for summary judgment, which is routinely granted in federal court. Title VII claims, especially, are often dismissed in federal court once a motion for summary judgment is filed. Arbitrators, on the other hand, tend to be more conservative in granting a motion for a summary judgment without having a full hearing on the merits of the case. This is a perceived advantage for the grievant, because the arbitrator is more likely to deny a dispositive motion (e.g., motion for summary judgment or motion to dismiss) until there is a full record before the arbitrator. In addition, the mandatory arbitration agreement may be silent as to whether the arbitrator has authority to rule on such motions. The courts, however,

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209See also Steptoe & Johnson PLLC, Arbitration or Litigation: When Might It Make More Sense to Arbitrate?, 14 No. 9 W. VA. EMP. L. LETTER 7 (2009) ("Generally, courts are far more likely than arbitrators to grant summary judgment requests . . . . In fact, some arbitrators won't even entertain a request for summary judgment but will instead proceed to a hearing on the merits of an employment claim, no matter how feeble it may be.").


211Workplace Justice, supra note 108, at 113 ("Summary judgment in AAA arbitration is so rare as to be statistically insignificant. Virtually all employees who take their disputes to AAA arbitration receive a hearing on the merits."); see also Michael D. Young, Arbitrators Less Prone To Grant Dispositive Motions Than Courts, (June 26, 2009), http://www.jamsadr.com/arbitrators-less-prone-to-grant-dispositive-motion-than-court-06 (finding that the arbitrators are not only reluctant to grant a motion for a summary judgment but also a motion to dismiss); Jacquelin F. Drucker, Effective Advocacy in Employment Arbitration, GEO. UNIV. L. CENTER CONTINUING LEGAL EDUC.: EMP. L. & LITIG. INST., 2004 WL 2800510, at *20 ("Arbitrators may be less willing to entertain motions of summary judgment, in part because of the preparation of documentation in support of such motion and the process of assessing whether there are issues of material fact may become so extensive that they will seriously delay the preliminary processes, substantially increase the costs, and prevent swift movement to hearing.").

212Marinello, supra note 167, at 9 ("Careful arbitrators are wary of motions to dismiss or for summary judgment and often will discourage or even forbid them."). But see Hamilton v. Sirius Satellite Radio, Inc., 375 F. Supp. 2d 269, 278 (S.D.N.Y. 2005) (holding that the granting of summary judgment by the arbitrator was valid).

213See Sherrock Bros., Inc. v. Daimlerchrysler Motors Co. LLC, 260 Fed. App’x 497, 502 (3rd Cir. 2008)
have indicated that based on the mere fact the mandatory arbitration agreement or American Arbitration Association's Commercial Rules\(^2\) do not address whether the arbitrator has authority to grant or deny dispositive motions, arbitrators clearly have the authority to grant such relief.\(^2\)

C. Arbitrators May Not Strictly Follow the Rules of Evidence

In labor arbitration proceedings, the parties typically do not strictly follow the rules of evidence.\(^2\) When there are objections to the admissibility of evidence, arbitrators will normally indicate that they will admit the evidence at that time, but will review the objection at the time the decision is written.\(^2\) Unless the CBA requires the strict compliance with rules of evidence, arbitrators hearing statutory claims will most likely follow the same practice from labor arbitration.\(^2\) This will put the employer at a disadvantage because hearsay and other types of prejudicial evidence may come into the record.\(^2\) Even though the


\(^2\)Sherrock Bros., Inc., 260 Fed. App'x at 502 (holding that the arbitration panel did not deny automobile dealer a fundamentally fair hearing and did not exceed its authority in granting summary judgment); Hamilton, 375 F. Supp. 2d at 278 (holding that the arbitrator, in granting summary judgment for employer, did not demonstrate manifest disregard of the law); Martindale v. Sandvik, Inc., 2006 WL 1450586, at *5 (N.J. Super. Ct. May 26, 2006) (holding that the arbitrator did not exceed his scope of authority when granting employer's motion for summary judgment without holding a hearing on the merits).

\(^2\)ELKOURI & ELKOURI supra note 53, at 341; see also Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-58 (1974) ("The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.").

\(^2\)Michael Z. Green, No Strict Evidence Rules in Labor and Employment Arbitration, 15 TEX. WESLEYAN L. REV. 533, 534 (2009) ("Whether an arbitrator applies the rules of evidence usually depends on whether the parties have contractually agreed to do so"); see also Bruce A. McAllister & Amy Bloom, Evidence in Arbitration, 34 J. MAR. L. & COM. 35, 38 (2003) ("Arbitrators are the judges of relevance and materiality; . . . Arbitrators may reject even relevant and material evidence in order to streamline the process; and . . . Arbitrators' decisions on these subjects are final and may not be overturned unless they amount to a failure to provide a fundamentally fair hearing.").

\(^2\)Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-58 (1974) ("The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.").

\(^2\)See Dean Witter Reynolds, Inc. v. Deislinger, 711 S.W.2d 771, 772 (Ark. 1986) ("Even though Unif.R.Evid. 406 may have permitted some of the excluded evidence to have been considered in a court of law or equity, the exclusion of this evidence in an arbitration
arbitrators may discount or ignore such evidence when rendering an award, they nevertheless will have heard inadmissible evidence prohibited by courts.\textsuperscript{220}

VI. **WHAT ARE THE UNION'S BENEFITS OF INCORPORATING MANDATORY ARBITRATION OF STATUTORY CLAIMS INTO THE CBA?**

\textbf{A. "The Simplicity, Informality, and Expedition of Arbitration"}\textsuperscript{221}

Similar to the benefits for the employer discussed earlier, there are also benefits for the union. Typically, unions prefer a system that is simple, informal and less costly than proceeding through the courts.\textsuperscript{222} Having an informal system benefits the union more than the employer. In employment arbitration, the employer often has the resources to defend claims of discrimination and often brings an entire team of legal professionals to present their case before the arbitrator.\textsuperscript{223} The arbitrator may insist that the proceeding be more in line with traditional labor arbitration procedures, which are less legalistic.\textsuperscript{224} The goal is for both sides to have a full opportunity to present their case with less procedural trickery.\textsuperscript{225}

\textsuperscript{220}Id.; Frantz v. Inter-Insurance Exch. of Auto. Club of S. Cal., 40 Cal. Rptr. 218, 221 (Ct. App. 1964) ("[A]rbitrators are not bound by strict adherence to legal procedure and to the rules on the admission of evidence applicable in judicial trials."); see also 76 AM. JUR. TRIALS 1, Arbitration Evidence: Putting Your Best Case Forward § 4 (2000) ("Evidence that properly may be excluded in court might still be allowed in arbitration; conversely, evidence that may be admissible in court might be excluded by an arbitrator."); Arbitration Rules, supra note 214, at 19 (2009) ("The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary.").


\textsuperscript{222}Id. ("Although these procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985))); see also Preston v. Ferrer, 552 U.S. 346, 357-58 (2008) ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985))).

\textsuperscript{223}Jonathan C. Sterling, Refusing to Arbitrate Isn’t Retaliatory, 16 No. 8 Conn. Emp. L. Letter 1 (2008) ("Employers with unionized workplaces devote substantial resources to addressing employee grievances, which can include defending against claims at arbitration. They also devote substantial resources to defending claims of discrimination before the Equal Employment Opportunity Commission . . . ").

\textsuperscript{224}Gilmer, 500 U.S. at 30-31.

\textsuperscript{225}Folkways Music Publisher v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993) (stating the goals of arbitration are to settle the dispute in an efficient manner and to avoid expensive litigation).
B. Bargain For Other Substantial Benefits (i.e. Wages, Benefits)

Companies have whole-heartedly embraced the use of arbitration in employment, consumer, commercial, and labor disputes.\textsuperscript{226} Employers believe that arbitration, unlike the courts, will reduce the cost and length of time for resolving disputes.\textsuperscript{227} Due to the benefits of utilizing arbitration to resolve labor and employment disputes in lieu of litigation, employers will be highly motivated to negotiate this clause with the union into the CBA.\textsuperscript{228} In exchange, the union will seek additional benefits for its members.

This negotiation will be an opportunity for unions to make demands for benefits that they have found difficult in the past to negotiate; the union may propose increases of benefits, wages, insurance, and pensions.\textsuperscript{229} Unions will be inclined to agree to a waiver of individuals' rights to proceed with a statutory claim for benefits of all members.\textsuperscript{230}

C. Provide Additional Representation to its Membership

Union members will benefit greatly if the union represents them in arbitration. The union, unlike individual union members, may have the resources to present a discrimination claim in arbitration.\textsuperscript{231} Many victims of discrimination lack the resources, especially the legal fees, to proceed with a claim against their employers.\textsuperscript{232} Thus, those claims, as

\textsuperscript{226}See supra Part IV.
\textsuperscript{227}See supra Part IV.
\textsuperscript{228}See supra Part IV.
\textsuperscript{229}See Fleming, supra note 182, at 592 ("Employers will want such arbitration of statutory disputes for reasons stated (such as speed, minimal discovery and less cost, and waiver or lack of a jury trial. Unions do not favor such arbitration, so far, since it seems to be an additional burden with additional risks. However, if unions can offer to trade arbitration of statutory disputes to obtain either recognition, or better CBA terms, or both, unions may change, or reconsider, their opposition to union contracts requiring arbitration of statutory disputes.")
\textsuperscript{230}Id.
\textsuperscript{231}Michael Z. Green, Reading Ricci and Pyett to Provide Racial Justice Through Union Arbitration, 87 IND. L.J. 367, 382 (2011).
\textsuperscript{232}See Theodore J. St. Antoine, Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?, 15 T.M. COOLEY L. REV. 1, 7-8 (1998) (discussing how employees may benefit from mandatory arbitration because a lack of resources to present their claims in court); Private Justice, supra note 108, at 116 ("In many cases, however, the employee does have a valid legal claim and cannot obtain counsel for financial reasons. Most people cannot afford to hire an attorney on an hourly basis, even when they are employed. For an attorney to accept a case on a contingency fee basis, the potential
well as other potential violations of major employment laws, go unchallenged.233 Often, employees would like to pursue a case in federal court but find that the cost is prohibitive.234 Unions will be in a position to assist its members by incurring the cost and fees of representing its members in employment arbitration disputes. The employer may also agree to pay all of the arbitration fees and the cost of arbitration, if the union agrees to the waiver.235 Moreover, if the union is pursuing the claim to arbitration, studies suggest that the complainant will have a greater opportunity for prevailing in arbitration, versus pursuing the claim in court.236

In Pyett, petitioners argue that, contrary to concern, unions may actually have incentive to adhere to the duty of fair representation.237

[T]he concern over conflict rests on outmoded assumptions that the interests of the majority will generally oppose potentially meritorious discrimination claims. That is not the reality of today's integrated workforce and diverse unions. . . . if anything, unions have an interest in ensuring that claims of discrimination are grieved and arbitrated to enhance their prestige with members and strengthen their stature as collective bargaining representatives.238

recovery and the probability of victory must be high enough to justify the substantial investment of time required to prosecute the case."; Murray, supra note 7, at 297 ("Moreover, arbitration provides a crucial benefit to aggrieved employees in facilitating their access to counsel.").

233Murray, supra note 7, at 295 ("One of the more compelling arguments for mandatory arbitration, stated simply, is that it allows a greater number of aggrieved employees to have their discrimination claims heard than would otherwise would be the case.").

234See Antoine, supra note 232, at 7-8 (discussing that employees benefit from arbitration because they may lack the resources to present their claims in court).

235See Fleming, supra note 182, at 613.

236See Sherwyn, Estreicher & Heise, supra note 122, at 1578 (stating that employees may fare better in arbitration than in litigation).


238Id. at 44.
VII. WHAT ARE THE UNION'S DISADVANTAGES OF INCORPORATING MANDATORY ARBITRATION OF STATUTORY CLAIMS INTO THE CBA?

A. The Potential Increase in Duty of Fair Representation (DFR) Claims

Unions may undoubtedly face an increase in claims that they breached their duty of fair representation, especially if there is an alleged statutory violation and the union refuses to process the grievance to arbitration. To prove a claim that the union breached its duty of fair representation, the employee must establish that the union's conduct was "arbitrary, discriminatory, or in bad faith."240

Unions cannot possibly proceed with every statutory claim raised by employees, and will have to make the difficult decision of which claims will proceed to arbitration.241 Applying the Supreme Court decision in Vaca v. Sipes,242 the union is given discretionary authority in deciding which cases will be processed through the grievance procedures, and which cases, if any, will proceed to arbitration.243 Consequently, as employees file grievances related to alleged violations of a state or federal statute or common law, the union may legitimately decide not to pursue the claim all the way through each step of the grievance process and onto arbitration.244 In determining whether to pursue the claim to arbitration, the union will be forced to review the "legal landscape" of a particular area to determine whether to proceed to

239See, e.g., Vaca v. Sipes, 386 U.S. 171, 173 (1967) (illustrating a case where the union refused to arbitrate a plaintiff's grievance).
240Id. at 190; see Air Line Pilots Ass'n Intl v. O'Neil, 499 U.S. 65, 67 (1991); Marquez v. Screen Actors Guild Inc., 525 U.S. 33, 44 (1998); see also Ann C. Hodges, Protecting Unionized Employees Against Discrimination: the Fourth Circuit's Misinterpretation of Supreme Court Precedent, 2 EMP. RTS. & EMP. POL'Y J. 123, 145 (1998) ("The union is vested with the authority to determine which cases to pursue so long as the authority is exercised without hostility, discrimination or arbitrariness." (citing Vaca, 386 U.S. at 191)).
241See Vaca, 386 U.S. at 191.
242Id. (holding the union was not shown to have breached its duty by refusing to take employee's grievance with employer to arbitration).
243Id. ("In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration.").
244Id. at 190 ("Others have urged that the union be given substantial discretion (if the collective bargaining agreement so provides) to decide whether a grievance should be taken to arbitration, subject only to the duty to refrain from patently wrongful conduct such as racial discrimination or personal hostility.").
arbitration. For example, if the union member is alleging sexual harassment, the union must thoroughly review the standard for establishing a sexual harassment claim; there has been substantial litigation in this area. If the union only does a perfunctory review of case law in determining whether to proceed to arbitration, the union may be liable.

Once the union denies an employee's request to arbitrate a statutory or common law claim, employees may file a claim against the union and the employer. A conclusory claim of a breach by the union is insufficient to support a claim that the union conduct violated the standard in Vaca. Moreover, the mere fact that the union might make a decision that is considered a mistake or negligence does not

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245 Air Line Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65, 67 (1991) ("We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational." (quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953)).

246 See Merit Sav. Bank v. Vinson, 477 U.S. 57, 78 (1986) (holding a claim of hostile environment sexual harassment was a form of sex discrimination actionable under Title VII employment discrimination statute); see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) ("An employer subject to vicarious liability for hostile work environment created by supervisor with immediate (or successively higher) authority over employee"); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (holding sex discrimination constituting same-sex sexual harassment actionable under Title VII); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) (stating that the Meritor standard requires an objectively hostile or abusive environment, as well as the victim's subjective perception that the environment is abusive).

247 See Lindley v. Allied Sys., LTD, 2006 WL 516778, at *4 (W.D. Mo. Mar. 1, 2006) ("To show that the Union acted in a perfunctory manner, there must be evidence that the union acted 'without concern or solicitude, or gave plaintiff's grievance only cursory attention.'" (quoting Brown v. Trans World Airlines, Inc., 746 F.2d 1354, 1357 (8th Cir. 1984))).

248 See Spencer v. Loux, 2012 WL 3138632, at *3 (D. Mass. July 27, 2012); see also Messina v. 1199 SEIU United Healthcare Workers E., 453 Fed. Appx. 25, 27 (2d Cir. 2011) (stating that since the union refused to arbitrate employee's grievance against employer for refusing to rescind employee's retirement notice, employee's claim against employer and union failed because employee could not demonstrate (1) union's breach of duty of fair representation, and (2) employer's breach of CBA); Thompson v. Aluminum Co. of Am., 276 F.3d 651, 656 (4th Cir. 2002) (stating that the employee filed "hybrid 301" action under Labor Management Relations Act after his employer denied him a transfer, employee's grievance was denied, and the union failed to appeal employee's grievance).


250 Sawyer v. Am. Postal Workers Union, 2011 WL 6029925, at *6 (N.D. Tex. Nov. 30, 2011) (finding that even if the union negligently or mistakenly relied upon the incorrect forms, that would be insufficient to support a claim of breach of duty of fair representation); Jacoby v. NLRB, 325 F.3d 301, 310 (D.C. Cir. 2003) (holding that the union's failure to assign a member to a job according to the union's rules did not breach the union's duty of fair representation); Buffalo Police Benevolent Ass'n v. Pub. Emp't Relations Bd., 730 N.Y.S.2d
necessarily indicate that the union will be held liable to the grievant. The common-law claim of a breach of duty of fair representation requires evidence that union conduct was "far outside a 'wide range of reasonableness' . . . as to be irrational."252

Unlike collective bargaining, employment statutes are highly complex with legal precedents.253 This may force unions to employ competent employment lawyers to represent the unions during arbitration.254 Because employment arbitration has become much more legalistic,255 a union representative may not be competent to present an

820, 281-22 (App. Div. 2001) (finding in part that the union's dissemination of false and/or misleading information concerning status of pending grievances and improper practice charges did not constitute breach of duty of fair representation).

252 But see Ruzicka v. Gen. Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975) (finding that neglecting to file a timely grievance breached duty of fair representation, as union action which is arbitrary or discriminatory need not be motivated by bad faith to amount to unfair representation). Rather, "[s]uch negligent handling of the grievance, unrelated as it was to the Appellant's case, amounts to unfair representation. It is a clear example of arbitrary and perfunctory handling of a grievance." Id. However, the Court reasoned that "[m]ere hostility between the plaintiff and the union official is insufficient to show a breach (of the duty of fair representation under 29 U.S.C. §157 (1970))." Id. at 308; see also Thompson v. Aluminum Co. of Am., 276 F.3d 651, 658 (4th Cir. 2002) (finding that the union did not breach its duty of fair representation when it decided not to appeal a grievance to arbitration, as the union did not arbitrarily ignore the grievance and believed grievant would not prevail).

253 Air Line Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65, 67 (1991) (citing Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953)); see also Ford Motor Co., 345 U.S. at 338 ("A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.").


256 See Michael P. Wolf, Give 'Em Their Day in Court: The Argument Against Collective Bargaining Agreements Mandating Arbitration to Resolve Employee Statutory Claims, 56 J. MO. B. 263, 269 (2000) ("An additional concern is whether the arbitrator will have the background to properly decide the dispute. The problem here is that while the arbitrator the employer and union ultimately chooses will likely be competent in contractual interpretation, he or she may be far less-versed on employment law, which deals more with statutory interpretation and application."); see also Chapman, Host & Lebowitz, Employment Litigation in New York: Choosing Between Arbitrators, 13 N.Y. PRAC. § 10:27 ("The most important characteristic to consider when choosing an arbitrator for an employment discrimination case is whether the arbitrator has a good understanding of the substantive law applicable to the case. . . . [N]ot all arbitrators understand the burdens of proof and applicable legal principles that govern employment discrimination actions. Arbitrators with experience as litigators should be preferred, as should arbitrators with specific experience in discrimination cases.").
employment-type arbitration claim. The union will have a duty to provide employees with a union representative or attorney familiar with employment laws to arbitrate their claims. A failure to provide such representation may be considered a breach of the union's duty to adequately represent its members during arbitration.

B. Increase Number and Cost of Arbitrations

1. Increase in the Number of Demands for Arbitration From Union Members

There will likely be increased demand by union members for the union to process their statutory claims through arbitration because the CBA may limit their ability to proceed to state or federal court. If the union becomes entirely responsible for the cost of providing members with representation in the arbitration of employment disputes, the demand for arbitration will increase substantially. Employees will take the position that because they are paying union dues, and because there is a mandatory waiver in the CBA that prohibits them from filing a lawsuit, the union has a duty to represent them in arbitration.

The potential financial burden and lack of expert knowledge of substantive state and federal employment statutes may discourage the

256 Cf. Hodges, supra note 240, at 145-46 ("The union can use a lay representative, rather than an attorney to represent a grievant in arbitration, although the representative may have little or no expertise in statutory discrimination issues. The duty of fair representation does not require the union to provide the employee with an attorney for the arbitration, even in complex cases, or does it prevent the union from excluding the employee's private attorney from the arbitration. Furthermore, the union's lay representatives will not be held to the same professional standards as an attorney.").


258 See id. at *7-*10 (providing a detailed analysis of whether there was sufficient evidence that the union failed to adequately prepare to represent the grievant).

259 See Hodges, supra note 12, at 55.

260 See id. at 32.

union from negotiating a waiver into the CBA.262 There is, consequently, a major increase in the number of complaints filed with the EEOC.263

2. Cost of Arbitration Impacts Union Dues

A major disadvantage to the union will be a substantial increase in the cost of arbitrating statutory claims.264 Increased union dues may be necessary to cover the cost of representing members in employment arbitration cases. The daily rate for arbitrators in employment disputes is substantially higher than in labor disputes.265 For example, the per diem rate for arbitrators selected through the Federal Mediation and Conciliation Services (FMCS) is approximately $1,000.00.266 Hearings on labor disputes are typically one day, whereas hearings on statutory claims require three to five days.267 Consequently, the cost of arbitrating a one-day labor dispute, including study time,268 is approximately $4,400.00.269 The cost of arbitrating employment disputes, which normally take two days of hearing or more, three days of study time, one to two days to reply to motions, and three days to write and issues the

262 Joseph M. Gagliardo & Heather R.M. Becker, Supreme Court Upholds CBA Provision Requiring Union members to Arbitrate ADEA Claims, 8 EMP. & L. REL. L. REV. 16 (2009) ("[L]abor unions may have concerns that there will be an increased volume of cases to be arbitrated and whether they have the ability to represent effectively the interest of their individual members . . . .").

263 See EEOC Charge Statistics: FY 1997 Through FY 2012, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Nov. 16, 2013) (stating that in FY 2012, there were a total of 99,412 EEOC charges filed, as compared to 99,412 charges in FY 2012 from 75,768 charges in FY 2006). Research indicates that the poor economy is a strong contributor to the increase in EEOC charges. See, e.g., Daniels Baker, Now's the Time for More, Not Less, Employee Training, 19-7 IND. EMP. L. LETTER 5 (2009) ("EEOC charges will likely continue to increase in 2009 and beyond. With the economy still struggling, it remains difficult for employees to find new jobs in the current market, so they'll remain willing to explore every option available to keep their jobs or be compensated upon termination, including legal action. . . . Thus, we can expect to see employees to continue to file a large number of EEOC charges in the foreseeable future.").

264 See Hodges, supra note 12, at 32.

265 Id. at 50 ("Pyett will almost certainly encourage more employers to contest unionized employees' lawsuits, urging waiver on the basis of existing contract language.").


267 See id.

268 Id.

269 Id.
decision, will cost the employer and union many thousands of dollars.\textsuperscript{270} Still, the cost of employment arbitration is less expensive than litigation in court,\textsuperscript{271} but substantially more than labor arbitration.\textsuperscript{272}

Another factor that will substantially increase the cost of arbitration is the fees of employment arbitrators. Unlike labor arbitrators, employment arbitrators have the luxury of working in their firm as advocates.\textsuperscript{273} For example, an employment arbitrator may be a senior partner at large law firm while also serving as an employment arbitrator. Because of the complexity of employment laws and regulations, the parties may select a highly experienced employment arbitrator.\textsuperscript{274} Arbitrators must be a neutral during arbitration, while litigating in other cases where they are not serving as a neutral.\textsuperscript{275}

In a statutory claim, the American Arbitration Association requires a deposit of funds.\textsuperscript{276} This requires the union to use membership dues to pay the deposit for a hearing, which could be more than $10,000 per case,\textsuperscript{277} where normally no deposit is required in traditional labor arbitration disputes. Because of the complexity of statutory claims, there will be pre-hearing discovery disputes, preliminary motions, and both pre-hearing and post-hearing briefs.\textsuperscript{278} As a result of the formal trial-type hearing of statutory claims, unions will have to retain experienced attorneys to represent their interests.\textsuperscript{279}

\textsuperscript{270}See Hodges, supra note 12, at 32.
\textsuperscript{271}However, it is worth noting that on the contrary, some research indicates that perhaps employment arbitration is taking longer and becoming more expensive. See Charles D. Coleman, Is Mandatory Employment Arbitration Living Up to Its Expectations? A View from the Employer's Perspective, 25 ABA J. LAB. & EMP. L. 227, 233 (2010).
\textsuperscript{272}See Hodges, supra note 12, at 32.
\textsuperscript{274}See 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 268 (2009) (stating that arbitral tribunals are readily capable of handing the factual and legal complexities of cases). Here, Pyett cites to Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 232 (1987): "[W]e recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision . . . . [T]here is no reason to assume at the outset that arbitrators will not follow the law." Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 232 (1987).
\textsuperscript{275}See Pyett, 556 U.S. at 268-69.
\textsuperscript{276}See American Arbitration Roadmap, available at www.adr.org (search "AAA Arbitration Roadmap").
\textsuperscript{277}Id.; Pyett, 556 U.S. at 269.
\textsuperscript{279}Bales & Irion, supra note 254, at 1095 ("One problem with statutory employment cases is that they are complex and need experienced attorneys or former judges to arbitrate.").
C. A More Legalistic Approach to Arbitration (Statutes, Case Laws, Codes)

Employment statutes are complex and supported by substantial legal precedent. In addition, most statutes are enforced by state and federal agencies that have issued extensive guidelines and polices on each major employment statute. Moreover, state courts have issued decisions on common law employment claims. Without a doubt, the union will be required to employ an experienced employment lawyer to represent it when it decides to pursue a bargaining unit employee's claim through arbitration. In rendering an award in an employment claim, the arbitrator will not only rely on the CBA, but also will rely more on external laws and court decisions.

D. Conflict of Interest When the Union is also Named in the Complaint

There will be occasions when the union has participated in the employment decision that the grievant is alleging discrimination or violation of a state or federal statute. The grievant may allege that the union colluded with the employer and that both are liable. If the union

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280 However, the Supreme Court stated that arbitrations can handle this legal complexity. See Pyett, 556 U.S. at 268 (stating that arbitral tribunals are readily capable of handing the factual and legal complexities of cases).
283 See Bales & Irion, supra note 254, at 1095.
284 As an employment arbitrator, rarely have I heard cases where both parties were not represented by legal counsel. See Hodges, supra note 12, at 28 ("[T]he growing number of legal claims that overlap with contractual claims has forced arbitrators to decide how to treat the law. To the extent that the law is considered at all, it increases legalism, both substantive and procedural.").
285 See Deborah A. Widiss, Divergent Interests: Union Representation of Individual Employment Discrimination Claims, 87 IND. L. J. 421, 422-23 (2012) ("[T]here is a real danger that union leaders may themselves hold discriminatory bias and accordingly fail to support individual employees adequately in the grievance and arbitration process; although a union, like an employer, is prohibited from discriminating, it may be quite difficult for an employee to prove a union's actions were motivated by discriminatory animus.").
286 Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 324 (1977) (alleging that the employer engaged in pattern or practice of discriminating against African-American and Hispanic persons, while seniority system perpetuated such); York v. Am. Tel. & Tel. Co, 95 F.3d 948, 951 (10th Cir. 1996) (alleging sex-based discrimination due to employer's failure to promote her and union's failure to pursue subsequent grievance); Donnell v. Gen. Motors Corp., 576 F.2d 1292, 1295 (8th Cir. 1978) (alleging employer and the union both discriminated against him based upon race in regards to skilled trade training programs);
has played a role in the employment decision that is at issue, the union may find itself in a conflict-of-interest situation.\textsuperscript{287} Clearly, in those types of complaints, the issue of conflict of interest is always lurking.

E. Possible Conflict Between the Union and Women or Minorities Over the Processing of Gender and Race Claims

There has been a long history of discrimination by unions against women\textsuperscript{288} and minority groups.\textsuperscript{289} Clearly, as a result of federal laws prohibiting unions from engaging in discrimination against union members,\textsuperscript{290} the relationship has improved substantially. Indeed,

\begin{itemize}
  \item See e.g., Shaffer v. Farm Fresh, Inc., 966 F.2d 142, 143-147 (4th Cir. 1992) (reversing the District Court's conflict-of-interest ruling which barred the employee's counsel).
  \item See Thorn v. Amalgamated Trans. Union, 305 F.3d 826, 830 (8th Cir. 2002) (Title VII provides that it is unlawful "for a labor organization to discriminate against any member because she engaged in protected activity.) (citing 42 U.S.C. § 2000e-3(a)). Title VII of the Civil Rights Act of 1964, codified in scattered sections of 42 U.S.C. states:

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  \item It shall be an unlawful employment practice for a labor organization [to]: (1) . . . exclude or expel from its membership, or otherwise to discriminate against, any individual . . . (2) . . . limit, segregate, or classify its membership, or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit . . . or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) . . . cause or attempt to cause an employer to discriminate against an individual in violation of this section.

minorities and women have a more dominant role in certain unions. Nevertheless, if a union refuses to proceed with a grievance where a race or gender claim of discrimination is raised, the union may face a claim of a breach of the duty of fair representation.

The union's interest in pursuing a discrimination claim against the employer may be in conflict with the union's efforts to improve or maintain collaborative relationship with the employer. The individual claim of discrimination may become subordinate to the interest of the union's goals and objectives, especially during the negotiations of the CBA.

F. Potential Conflict Between Individual and Collective Rights

The union's decision to pursue individual statutory claims with union's limited resources will, without a doubt, engender conflict with
the collective body of union members. Employment statutes generally permit an individual to file a claim when one employee has allegedly been favored over another employee because of their immutable characteristics. This will result in claims filed by one union member against another union member over employment benefits. Such claims will be a difficult balancing act for the union to manage. The principle of majority rule will ultimately conflict with individual rights provided by federal and state statutes.

VIII. CONCLUSION

Unless Congress places limitations on incorporating mandatory arbitration provisions in a CBA, employers in particular will continue

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296McDonald v. City of W. Branch, Mich., 466 U.S. 284, 291 (1984) ("The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may represent the employee's grievance less vigorously, or make different strategic choices, than would the employee."); see also Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 735 (1981) (discussing that interests of some employees in a bargaining unit may have to be subordinated to the collective interests of a majority of their co-workers).


298Goodman v. Lukens Steel Co., 482 U.S. 656, 688-89 (1987) (Powell, J., concurring in part and dissenting in part) ("Like other representative entities, unions must balance the competing claims of [their] constituents. A union must make difficult choices among goals such as eliminating racial discrimination in the workplace, removing health and safety hazards, providing better insurance and pension benefits, and increasing wages.").

299See Rosette E. Ellis, Mandatory Arbitration Provisions in Collective Bargaining Agreements: The Case Against Barring Statutory Discrimination Claims From Federal Court Jurisdiction, 86 VA. L. REV. 307, 328-31 (2000) (stating that there are inherent problems within the union structure to permit the union to represent members in individual statutory claims in arbitration).

300Various attempts have been made to restrict mandatory arbitration provisions; most notably proposed legislation in Congress. See, e.g., 2013 S. 878, 113th Cong. (2013); 2013 H.R. 1844, 113th Cong. (2013); 2011 S. 1186, 112th Cong. (2011); 2011 H.R. 1873, 112th Cong. (2011); 2011 S. 987, 112th Cong. (2011). To date, the most recent bill introduced was May 7, 2013, in the 113th Congress, the Arbitration Fairness Act (AFA) of 2013. 2013 S. 878, 113th Cong. (2013); 2013 H.R. 1844, 113th Cong. (2013). The Senate version of the AFA was introduced by U.S. Senator Al Franken (D-MN), while the House version of the AFA was introduced by U.S. Representative Hank Johnson H.R. 1844, 113th Cong. (2013). Sec. 402(a): Validity and Enforceability stated, "Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute." See, e.g., 2013 H.R. 1844, 113th Cong. (2013). Under this bill, employees and consumers would be permitted to choose whether to proceed to arbitration or a jury trial after said dispute arose. Id.
incorporating mandatory arbitration employment clauses

To pressure unions to negotiate these provisions into the CBA. Even if the union rejects such a provision, the employer may have the legal authority to implement the provision once the parties have negotiated in good faith but reached impasse.301

As discussed earlier, there are advantages and disadvantages to the employer and the union in negotiating a mandatory employment arbitration provision in the CBA.302 The advantages for the employer clearly outweigh any disadvantages of such a provision.303 The union on the other hand must adopt these provisions with caution.304 A waiver provision that restricts union members' rights to pursue employment claims outside the CBA comes with an enormous amount of legal responsibility that the union should cautiously negotiate.


301 See NLRB v. Katz, 369 U.S. 736, 739-40 (1962); Duffy Toole & Stamping LLC v. NLRB, 233 F.3d 995, 998-99 (7th Cir. 2000); McClatchy Newspapers, Inc. v. NLRB, 131 F.3d 1026, 1027-28 (D.C. Cir. 1997).

302 See supra Part VI (discussing advantages for unions); Part IV (discussing advantages for employers).

303 See supra Part IV (discussing the advantages to the employer).

304 See supra Part VII.