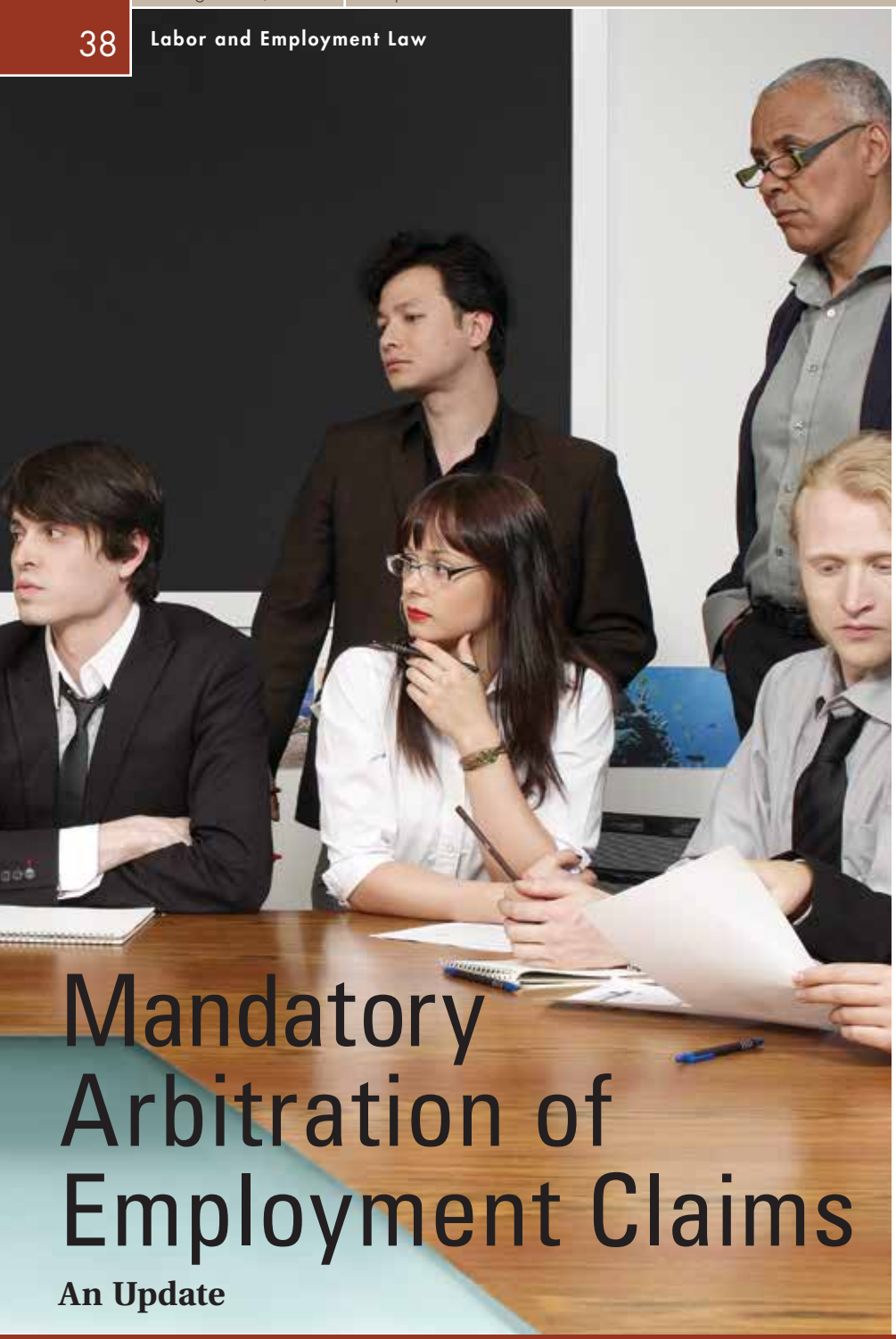


Mandatory Arbitration of Employment Claims

An Update

By Timothy H. Howlett and Christina K. McDonald

Over the last several years, the United States Supreme Court has issued a series of pro-arbitration decisions under the Federal Arbitration Act.[1] In *14 Penn Plaza, LLC v Pyett,*[2] the Court held that arbitration clauses can mandate that all employment-related claims, including statutory discrimination claims, are subject to binding arbitration. In *AT&T Mobility v Concepcion,*[3] the Court held that mandatory arbitration agreements can waive class action litigation, which could allow employers to insulate themselves from anything other than individual claims. The Court's increasing deference to arbitration agreements requires that lawyers and their clients evaluate the advantages and disadvantages of mandatory arbitration agreements.

The Supreme Court's Evolving Support for Mandatory Arbitration of Employment Claims

For years, *Alexander v Gardner-Denver Company,*[4] decided in 1974, governed the rights of employees to litigate claims covered by a collective-bargaining agreement. *Gardner-Denver* held that an employee covered by a collective-bargaining agreement could still file a lawsuit under Title VII of the Civil Rights Act of 1964. The Court reasoned that a grievance vindicates a "contractual right" under a collective-bargaining agreement while a lawsuit under Title VII asserts an "independent statutory right" granted by Congress. Under *Gardner-Denver,* statutory causes of action, including employment discrimination claims, could not be waived by a collective-bargaining agreement because "there can be no prospective waiver" of a statutory right to sue.[5]

FAST FACTS

Employees can now explicitly waive their rights to litigate statutory employment discrimination claims in mandatory arbitration agreements.

Employees can also waive their rights to initiate class action employment claims in mandatory arbitration agreements.

In 1991, the Court retreated from *Gardner-Denver* in *Gilmer v Interstate/Johnson Lane Corporation*.[6] In *Gilmer,* the Court held that a claim of age discrimination under the Age Discrimination in Employment Act of 1967[7] could be subject to compulsory arbitration. Relying on the federal policy favoring arbitration embodied in the Federal Arbitration Act, the Court held that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."[8]

Since *Gilmer,* the Court has issued several more pro-arbitration decisions. In *Circuit City Stores, Incorporated v Adams,*[9] the Court held that Section 1 of the Federal Arbitration Act, which excludes from the act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," is limited to excluding claims of transportation workers from arbitration. The Court compelled the plaintiff in *Adams,* a retail store employee, to arbitrate his claim under the employer's arbitration agreement contained in the employment application. *Adams* further held that the act applied in state courts and preempted state laws prohibiting employees from contracting away their right to pursue state law discrimination claims in court.

In 2009, the Court made another important pro-arbitration decision in *14 Penn Plaza, LLC v Pyett*.[10] In *Pyett,* the plaintiff was subject to a collective-bargaining agreement containing a mandatory arbitration clause. Under the agreement, all employment discrimination claims were subject to binding arbitration, and the clause specifically waived employees' rights to file a discrimination lawsuit. The petitioners filed a claim with the U.S. Equal Employment Opportunity Commission, and after receiving a right-to-sue notice, filed a lawsuit under the Age Discrimination in Employment Act. The employer moved to compel arbitration under the collective-bargaining agreement, and the district court denied the motion. The Second Circuit affirmed, holding that *Gardner-Denver* forbids enforcement of collective-bargaining provisions that require arbitration of Age Discrimination in Employment Act claims.

The Supreme Court reversed, holding that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law."[11] The Court held that *Gardner-Denver* and its progeny "do not control the outcome where…the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims."[12]

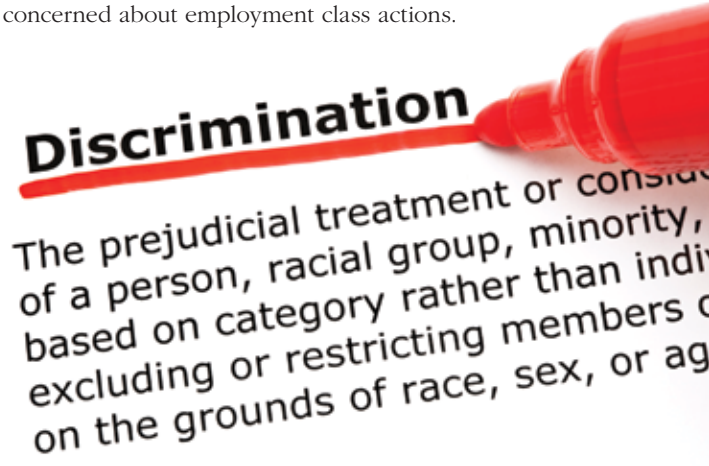
Gilmer and *Pyett* stand for the proposition that all statutory employment discrimination claims can be validly waived in a mandatory arbitration agreement as long as the waiver is "clear and unmistakable." Waivers must expressly state that the right to bring claims under specific employment statutes is waived.[13] When such waivers are freely negotiated, courts are bound to uphold them and compel arbitration of discrimination claims under the Supreme Court's binding authority.[14] The holding in *Pyett* can be read to apply to a host of statutory claims that could be brought by employees including claims under the Family and Medical Leave Act,[15] Americans with Disabilities Act of 1990,[16] Age Discrimination in Employment Act, Title VII,[17] and even statutory state law employment claims.

Pyett did not, however, do anything to change the Court's holding in *Equal Employment Opportunity Commission v Waffle House, Incorporated*.[18] In *Waffle House,* an employee submitted a claim under the Americans with Disabilities Act to the Equal Employment Opportunity Commission. The Commission filed a lawsuit in its own name against the employer, requesting injunctive and victim-specific relief including back pay, reinstatement, compensatory damages, and punitive damages. The employer argued that the Commission was not entitled to sue under the Americans with Disabilities Act because the employee was subject to a mandatory arbitration agreement of all employment claims. The Court held that the Commission was not bound by the arbitration agreement because it was not a party to the agreement. Rather, the Commission has independent statutory authority to bring a lawsuit, including a suit requesting victim-specific relief, against the employer. The Court reasoned that the Federal Arbitration Act does not mention enforcement by public agencies but instead ensures the enforceability of private agreements to arbitrate.

Employers with mandatory arbitration provisions in their employment agreements should be advised that the Equal Employment Opportunity Commission can always bring a claim for a violation of employment discrimination, even if the agreement waives an employee's right to bring the same claim in court.

Class Action Litigation Can Be Waived Through Compulsory Arbitration

In *AT&T Mobility v Concepcion,*[19] the Court ruled that contracting parties can effectively waive the right to file class action lawsuits in mandatory arbitration agreements. *Concepcion* involved a cellular telephone contract that provided for arbitration of all disputes and required claims be brought in an "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." Both the California district court and the Ninth Circuit held that the arbitration provision was unconscionable under California's *Discover Bank* decision, which held that all arbitration provisions disallowing classwide proceedings were unconscionable as a matter of law. The Supreme Court reversed and struck down California's *Discover Bank* decision, holding that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" through the Federal Arbitration Act.[20] The ability to eliminate classwide actions in employment agreements, and in form contracts in general, could significantly benefit employers concerned about employment class actions.



As long as arbitration agreements are drafted properly, employers and employees can agree to mandatory arbitration of employment claims, including claims for discrimination. They will, however, also need to decide if they want to.

In a June 2013 decision in *Oxford Health Plans LLC v Sutter,*[21] the Supreme Court held that when parties agree to allow an arbitrator to decide whether the parties agreed to class action arbitration, the arbitrator's interpretation of the arbitration clause will be upheld on judicial review. The Court reserved ruling on the issue whether availability of class arbitration is a "question of arbitrability" presumptively for the courts to decide because the parties agreed in *Sutter* that it was an issue for the arbitrator. *Sutter* demonstrates the need for the parties to be clear and unmistakable whether class arbitrations are permitted and delegate who should make determinations regarding class action arbitration.

In a subsequent June 2013 decision, *American Express Company v Italian Colors Restaurant,*[22] the Court held that the Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration because a plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery. In summary, under recent Court precedent, specific waivers of class actions will be upheld.

The National Labor Relations Board Takes an Opposite Approach to Waivers in Compulsory Arbitration

While the Court continues to decide cases in favor of the Federal Arbitration Act, the National Labor Relations Board has taken the opposite approach. The Board recently held a mandatory arbitration agreement that waives employees' rights to participate in class actions is unlawful under the National Labor Relations Act.[23] The Board reasoned that the broad language in Section 7 of the act giving employees the right to "engage in…concerted activities for the purpose of collective bargaining or other mutual aid or protection" includes the right to file a class or collective action over wages, hours, or working conditions, whether in court or before an arbitrator. When a mandatory arbitration agreement bars employees from filing class lawsuits, the Board will find the arbitration agreement violates the act.[24] This issue has not been addressed by the Supreme Court.[25]

The Arbitration Fairness Act May Completely Change Compulsory Arbitration

Congress has introduced legislation that would completely eradicate the Supreme Court's pro-arbitration precedent. The Arbitration Fairness Act of 2011[26] was introduced just after the Court decided *Concepcion* in an effort to eliminate employee waivers of the right to litigate certain disputes. Section 2 of the act sets forth Congress's findings, which include a finding that "[m]andatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions." Therefore, the act proposes to make a law that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute."[27]

Not only would the Arbitration Fairness Act eliminate an employee's ability to waive the right to litigate certain claims, it would eliminate compulsory arbitration of employment disputes and discrimination claims altogether. The bill is currently in the Committee on Judiciary, where it has been since 2011.

Mandatory Arbitration in Michigan

Michigan's arbitration jurisprudence changed substantially when the Revised Uniform Arbitration Act[28] took effect July 1, 2013. The Michigan Arbitration Act[29] has long governed[30] statutory arbitration while the Michigan Supreme Court's decision in *Wold Architects & Engineers v Strat*[31] addressed common law arbitration. The recently enacted Revised Uniform Arbitration Act applies to all agreements to arbitrate entered into on or after July 1, 2013, while the Michigan Arbitration Act applies to arbitration agreements predating the revised act. The revised act is designed to reduce litigation over arbitration agreements, implement minimum standards for procedures, and, importantly, add rules for confirming or invalidating arbitration awards in court.[32] However, it does not affect state common law regarding mandatory arbitration of employment discrimination claims.

Employment claims can be subject to mandatory arbitration provisions under Michigan common law. In *Rembert v Ryan's Family Steak Houses, Incorporated,*[33] the Michigan Court of Appeals held that agreements requiring mandatory arbitration of employment claims, including agreements that require arbitration of statutory employment discrimination claims, will be enforced:

> [C]ontracts providing for compulsory arbitration of discrimination claims must, of course, meet the general rules regarding the validity of contracts….[W]e do hold, as a matter of law, that an arbitration agreement that does not diminish the rights and remedies guaranteed by the relevant employment discrimination statute and that is fair procedurally is not an unenforceable contract of adhesion.[34]

The Michigan Supreme Court has identified the essential elements of fairness in arbitration proceedings in *Renny v Port Huron*

Hospital.[35] The essential elements necessary to fair adjudication in administrative and arbitration proceedings are:

- adequate notice to persons bound by the adjudication;
- the right to present evidence and arguments and the fair opportunity to rebut evidence and argument by the opposing argument;
- a formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status;
- a rule specifying the point in the proceeding when a final decision is rendered; and
- other procedural elements as may be necessary to ensure a means to establish the matter in question. These will be determined by the complexity of the matter, the urgency with which it must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

Lawyers drafting mandatory arbitration agreements should make certain the agreements conform to *Rembert* and *Renny*.

Summary

In short, as long as arbitration agreements are drafted properly, employers and employees can agree to mandatory arbitration of employment claims, including claims for discrimination. They will, however, also need to decide if they want to. Arbitration is a private process, and the parties have more control over the procedure. Arbitration, however, may not necessarily be more efficient or less expensive than going to trial. Discovery in arbitration has in many cases become comparable to discovery in court cases. While arbitration usually reduces the risk of excessive awards, the parties lose their appeal rights and are generally less likely to obtain summary disposition. As a result, employers, in particular, will need to evaluate whether to take advantage of the increased availability of arbitration. ■

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ENDNOTES

1. 9 USC 1 *et seq.*
2. *14 Penn Plaza, LLC v Pyett,* 556 US 247; 129 S Ct 1456; 173 L Ed 2d 398 (2009).
3. *AT&T Mobility v Concepcion,* ___ US ___; 131 S Ct 1740; 179 L Ed 2d 742 (2011).
4. *Alexander v Gardner-Denver Co,* 415 US 36; 94 S Ct 1011; 39 L Ed 2d 147 (1974).
5. *Id.* at 51.
6. *Gilmer v Interstate/Johnson Lane Corp,* 500 US 20; 111 S Ct 1647; 114 L Ed 2d 26 (1991).
7. 29 USC 621 *et seq.*
8. *Gilmer,* n 6 *supra* at 26.
9. *Circuit City Stores, Inc v Adams,* 532 US 105; 121 S Ct 1302; 149 L Ed 2d 234 (2001).
10. *Pyett,* n 2 *supra.*
11. *Id.* at 274; but see *Stolt-Nielsen v Animalfeeds Int'l Corp,* 559 US 662; 130 S Ct 1758; 176 L Ed 2d 605 (2010) (holding that arbitrators cannot impose or infer class action arbitration where it is not expressly provided for in the arbitration agreement).
12. *Id.* at 264.
13. See generally *Pyett,* n 2 *supra;* see also *Hergenreder v Bickford Senior Living Group, LLC,* 656 F3d 411 (CA 6, 2011) (holding that an employee did not agree to arbitration where a handbook referenced a separate arbitration clause but did not itself constitute an agreement between the employer and employee to arbitrate disputes).
14. See *Compucredit Corp v Greenwood,* ___ US ___; 132 S Ct 665; 181 L Ed 2d 586 (2012) (holding that credit card agreement claims under the Credit Repair Organizations Act can be subject to mandatory arbitration because the act is silent on whether claims can proceed in arbitration, and the Federal Arbitration Act requires that arbitration agreements are enforced according to their terms).
15. 29 USC 2601 *et seq.*
16. 42 USC 12101 *et seq.*
17. 42 USC 2000e.
18. *EEOC v Waffle House, Inc,* 534 US 279; 122 S Ct 754; 151 L Ed 2d 755 (2002).
19. *AT&T Mobility,* n 3 *supra.*
20. *Id.* at 1753.
21. *Oxford Health Plans LLC v Sutter,* 569 US ___; 133 S Ct 2064; 186 L Ed 2d 113 (2013).
22. *American Express Co v Italian Colors Restaurant,* 569 US ___; 133 S Ct 2304; ___ L Ed 2d ___ (2013).
23. See *DR Horton, Inc,* 357 NLRB No 184 (January 3, 2012), petition for review pending; see also *Canning v NLRB,* ___ US App DC ___; 705 F3d 490 (2013) and *NLRB v New Vista Nursing & Rehabilitation,* 719 F3d 203 (CA 3, 2013) (casting considerable doubt on *DR Horton, Inc* because the NLRB did not have a valid quorum at the time the order was issued, among other reasons).
24. See also *24 Hour Fitness USA, Inc,* 20-CA-035419 (November 6, 2012) (holding that class action bans in arbitration agreements are unlawful under Section 7 of the NLRA).
25. *Concepcion* was not an employment case, and the Supreme Court was not required to address or decide issues pertaining to rights under the NLRA, which was the issue presented before the NLRB in *In re DR Horton, Inc.*
26. SB 987.
27. *Id.* at § 4.
28. See 2012 PA 371 and 2012 PA 370.
29. MCL 600.5001 *et seq.*
30. The MAA was enacted in 1961. See 1961 PA 236.
31. *Wold Architects & Engineers v Strat,* 474 Mich 223; 713 NW2d 750 (2006).
32. For more details and practice pointers on the Revised Uniform Arbitration Act, see Bedikian, *What Michigan attorneys and arbitrators must know about the new Revised Uniform Arbitration Act,* 92 Mich B J 42 (May 2013), available at <http://www.michbar.org/journal/pdf/pdf4article2202.pdf> (accessed August 5, 2013).
33. *Rembert v Ryan's Family Steak Houses, Inc,* 235 Mich App 118; 596 NW2d 208 (1999).
34. *Id.* at 211.
35. *Renny v Port Huron Hosp,* 427 Mich 415; 398 NW2d 327 (1986).