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# Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements

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# Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements

*E. Gary Spitko\**

*On February 12, 2009, lawmakers in the U.S. House of Representatives introduced the “Arbitration Fairness Act of 2009.” This bill, if enacted, will invalidate any predispute arbitration agreement between an employer and its employee. Last year, the 110th Congress considered the narrower “Preservation of Civil Rights Protections Act of 2008,” which would have invalidated such predispute arbitration agreements if they required “arbitration of a dispute arising under” federal civil rights laws. This Article explores how best to structure any such invalidation of predispute employment arbitration agreements, both in light of the rationales for and against regulation of the employment relationship generally, and in light of the rationales for and against regulation of employment arbitration agreements specifically. Any legislation invalidating predispute employment arbitration agreements should be complete as to subject matter and cover both statutory employment discrimination claims as well as state common law employment claims. Moreover, any such legislation should exempt from its coverage claims by or against certain high-level employees and claims by or against certain small employers. This Article proposes an exemption for high-level employees that borrows and modifies concepts from the Age Discrimination in Employment Act, the Family and Medical Leave Act, and the National Labor Relations Act. Further, this Article proposes an exemption for small employers that borrows and modifies concepts from Title VII of the Civil Rights Act and 42 U.S.C. § 1981a.*

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#### INTRODUCTION

In 1991, the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.* that employee claims brought under the Age Discrimination in Employment Act ("ADEA") may be the subjects of valid predispute arbitration agreements.<sup>1</sup> In *Gilmer*, the Court began its analysis by

<sup>1</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991). Arbitration resulting from predispute arbitration agreements that are required as a condition of employment is frequently referred to as "mandatory arbitration." See, e.g., Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better than It Looks*, 41 U. MICH. J.L. REFORM 783, 783 (2008) (using term "mandatory arbitration" to mean "that employees must agree as a condition of employment to arbitrate all legal disputes with their employer, including statutory claims, rather than take them to court"). I agree with Professor Richard Speidel, however, that the use of "[t]he phrase 'mandatory arbitration' [in this context] is misleading because it connotes arbitration that is compelled by law regardless of consent." See Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1069 (1998); see also IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 2:36 n.5 (1995) (commenting that use of term "mandatory arbitration" to describe arbitration resulting from predispute arbitration agreements "is extremely confusing language because it ignores altogether the consensual element in contracts" and "its usage resolves linguistically the issues of the reality of consent and the effect to be given to consent by fiat, rather than by analysis revealing the nature of the issues"); Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 40-44 (2003) (arguing that "[a]rbitration is not mandatory when it arises out of a contract, because contracts are formed voluntarily"). While such an arbitration agreement is a contract of adhesion offered on a take it or leave it basis, the employee still has the choice to avoid the duty to arbitrate by declining the offer of employment. *Id.* at 42. In this Article, therefore, I refrain from using the term "mandatory arbitration." Rather, with apologies, I employ

asserting that “statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the [Federal Arbitration Act].”<sup>2</sup> Therefore, the party seeking to avoid arbitration of the ADEA claim bore the burden of demonstrating that Congress intended to preclude arbitration of ADEA claims.<sup>3</sup> One may find congressional intent to preclude arbitration of a statutory claim in the particular statute’s text or legislative history or in light of an “inherent conflict” between the statute’s purposes and arbitration of claims arising under the statute.<sup>4</sup>

The plaintiff in *Gilmer* conceded that neither the ADEA’s text nor its legislative history evidenced a congressional intent to preclude arbitration of ADEA claims.<sup>5</sup> Moreover, the Court rejected the plaintiff’s argument that arbitration of age discrimination claims was inconsistent with the ADEA’s purposes or structure.<sup>6</sup> In a critical passage, the Court reasoned that an agreement to arbitrate an ADEA claim is not a waiver of substantive rights, but merely an agreement to resolve claims arising from those rights “in an arbitral, rather than a judicial, forum.”<sup>7</sup> The Court concluded that “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”<sup>8</sup>

Lower courts subsequently applied *Gilmer*’s framework and reasoning to hold that claims arising under Title VII of the Civil Rights Act (“Title VII”)<sup>9</sup> and Title I of the Americans with Disabilities Act (“ADA”)<sup>10</sup> may also be the subjects of valid predispute arbitration agreements.<sup>11</sup> Consequently, employers have with much greater

the admittedly cumbersome description “arbitration arising from a predispute employment arbitration agreement.”

<sup>2</sup> *Gilmer*, 500 U.S. at 26.

<sup>3</sup> *Id.* (stating that “[a]lthough all statutory claims may not be appropriate for arbitration, [h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue” (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))).

<sup>4</sup> *Id.*; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

<sup>5</sup> *Gilmer*, 500 U.S. at 26.

<sup>6</sup> *Id.* at 27-32.

<sup>7</sup> *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

<sup>8</sup> *Id.* at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

<sup>9</sup> 42 U.S.C. §§ 2000e–2000e-17 (2006).

<sup>10</sup> 42 U.S.C. §§ 12111-12117 (2006).

<sup>11</sup> *See, e.g.*, *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 749-50 (9th Cir. 2003) (en banc) (ADA and Title VII); *Rosenberg v. Merrill Lynch, Pierce,*

frequency entered into predispute arbitration agreements with their employees.<sup>12</sup> Indeed, many employers now insist that their employees enter into such agreements as a condition of employment.<sup>13</sup>

Critics of arbitration arising from predispute employment arbitration agreements are legion.<sup>14</sup> Their concerns and criticisms have

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Fenner & Smith, Inc., 170 F.3d 1, 7 (1st Cir. 1999) (Title VII); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir. 1999) (Title VII).

<sup>12</sup> See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 189 (1997) [hereinafter Bingham, *The Repeat Player Effect*] (citing to studies that provide evidence of increase between 1991 and 1995 in number of employers using predispute employment arbitration agreements); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 225 (1998) [hereinafter Bingham, *Adhesive Contracts*] (asserting that “[t]he use of employment arbitration began to accelerate dramatically after the United States Supreme Court decided *Gilmer*”); Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007) (reviewing empirical studies and concluding that “[a]lthough there are limitations to the existing studies, they do show a consistent pattern of significant expansion of employment arbitration in the decade and a half since the *Gilmer* decision” and hypothesizing that “employment arbitration is likely already a more widespread system for governing employment relations than collective bargaining and labor arbitration”); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May-July 2003, at 10 (citing author’s interview with American Arbitration Association vice president in support of assertion that “between 1997 and 2001, the number of employees covered by employment arbitration plans administered by the AAA grew from 3 to 6 million”).

<sup>13</sup> See U.S. GEN. ACCOUNTING OFFICE, *EMPLOYMENT DISCRIMINATION-MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION*, GAO/HEHS-95-150 Appendix II at 28 (1995) (indicating that thirty-nine percent of employers who reported using arbitration as method of dispute resolution reported that their policy to use arbitration was “mandatory for all”); Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1041 (1998) (asserting that “[e]mployers now subject millions of their employees to [predispute employment arbitration] agreements”); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 100 (1996) [hereinafter Ware, *Voluntary Consent*] (“Since *Gilmer*, it appears that more employers have begun to insist upon arbitration agreements as a condition of employment.”).

<sup>14</sup> See, e.g., Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 470 (1996) (arguing that “pre-dispute arbitration agreements between parties with disparate negotiating incentives should not be enforced”); Haagen, *supra* note 13, at 1068 (proposing to require that “the party who wishes to compel arbitration [must] demonstrate either that genuine bargaining occurred, or that the arbitral procedures provided for are equitable and calculated to vindicate the parties’ legal rights”); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 701 (1996) (arguing that “[t]o the extent that the Supreme Court refuses to recognize that unregulated mandatory binding arbitration agreements can be detrimental to

focused on the bargaining power advantage that employers generally have with respect to employees, and on features of arbitration — such as often very limited discovery — that might make it more difficult for an employee to successfully assert a claim against his employer. Critics also have argued that because of its private nature, arbitration is a less effective means than litigation to serve the public interests grounding employment discrimination statutes.<sup>15</sup> In light of these asserted inadequacies and inequities of arbitration arising from predispute employment arbitration agreements, critics have called on Congress to amend the Federal Arbitration Act (“FAA”)<sup>16</sup> to prohibit enforcement of predispute employment arbitration agreements, at least with respect to civil rights claims.<sup>17</sup>

consumers, employees, and other little guys, Congress should step in to protect their interests”); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1050 (1996) [hereinafter Stone, *Yellow Dog Contract*] (arguing that “[b]y subjecting employment rights to a regime of private justice and cowboy arbitrations, we are eliminating most employment rights for most American workers”); see also EEOC Policy Statement on Mandatory Arbitration, Daily Lab. Rep. (BNA) No. 133, at E-4 (July 11, 1997) [hereinafter EEOC Policy Statement] (setting forth basis for EEOC’s position that “agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in [the nation’s employment discrimination] laws”).

The term “employment arbitration” refers to arbitration arising out of a contract between an employer and an individual employee. Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 737 (2000-2001) [hereinafter Ware, *The Effects of Gilmer*]. In contrast, the term “labor arbitration” refers to arbitration arising out of a collective bargaining agreement entered into between an employer and a union. *Id.* This Article is concerned with issues relating to employment arbitration.

<sup>15</sup> See *infra* notes 88-103 and accompanying text.

<sup>16</sup> 9 U.S.C. §§ 1-16 (2006).

<sup>17</sup> See, e.g., Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 173, 223-25 (1998) (endorsing Civil Rights Procedures Protection Act of 1997, which would have made void any predispute employment arbitration agreement as it pertained to rights arising under various federal employment statutes, and proposing additional legislative protections with respect to post-dispute employment arbitration agreements and any arbitration conducted pursuant to such agreement); Stone, *Yellow Dog Contract*, *supra* note 14, at 1050 (calling on Congress to “expressly repudiate the result of the *Gilmer* case” and “ensure that binding arbitration agreements are not made a condition of employment”); cf. JOHN T. DUNLOP, U.S. DEP’T OF LABOR, U.S. DEP’T OF COMMERCE, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS (“DUNLOP COMMISSION”), FINAL REPORT 59 (1994) [hereinafter DUNLOP COMMISSION REPORT] (calling on Congress to pass legislation that would forbid making agreement to arbitrate public law claims condition of employment).

Indeed, in light of *Gilmer* and its progeny, since the mid-1990s, Congress has repeatedly considered legislation that would prohibit enforcement of predispute arbitration agreements insofar as they relate to employment discrimination claims and other federal employment statutes. For example, the proposed Preservation of Civil Rights Protections Act of 2008 provided that “any clause of any agreement between an employer and an employee that requires arbitration of a dispute arising under the Constitution or laws of the United States shall not be enforceable.”<sup>18</sup> The proposed act, however, expressly would not have affected any arbitration agreement entered into after a dispute had arisen, or any arbitration agreement contained in a valid collective bargaining agreement.<sup>19</sup> Further, by limiting coverage to disputes “arising under the Constitution or laws of the United States,” the proposed act would not have affected arbitration agreements relating to state common law claims, such as wrongful discharge.

Earlier bills proposed similar employment arbitration limitations by expressly amending various federal civil rights and accommodation statutes to invalidate predispute arbitration agreements relating to claims arising under these statutes.<sup>20</sup> For example, the proposed Civil Rights Procedures Protection Act of 2001, similar to a series of earlier bills, would have amended Title VII, the ADEA, the Rehabilitation Act of 1973, the ADA, 42 U.S.C. § 1981, the equal pay requirements under

<sup>18</sup> H.R. 5129, S. 2554, 110th Cong. § 423 (2008). The 2008 proposed legislation mirrored earlier proposed legislation. See Preservation of Civil Rights Protections Act of 2005, H.R. 2969, 109th Cong. (2005) (proposing that “any clause of any agreement between an employer and an employee that requires arbitration of a dispute arising under the Constitution or laws of the United States shall not be enforceable”); Preservation of Civil Rights Protections Act of 2004, H.R. 3809, S. 2088, 108th Cong. (2004); Preservation of Civil Rights Protections Act of 2002, S. 2435, 107th Cong. (2002); Preservation of Civil Rights Protections Act of 2001, H.R. 2282, 107th Cong. (2001).

<sup>19</sup> H.R. 5129, S. 2554, § 423(b)(1)-(2).

<sup>20</sup> See Civil Rights Procedures Protection Act of 2001, S. 163, H.R. 1489, 107th Cong. (2001) (proposing to invalidate predispute employment arbitration agreements affecting civil rights claims); Civil Rights Procedures Protection Act of 1999, S. 121, H.R. 872, 106th Cong. (1999) (same); Civil Rights Procedures Protection Act of 1997, S. 63, 105th Cong. (1997) (same); Civil Rights Procedures Protection Act of 1996, H.R. 983, 105th Cong. (1996) (same); Civil Rights Procedures Protection Act of 1996, H.R. 3748, 104th Cong. (1996) (same); Civil Rights Procedures Protection Act of 1995, S. 366, 104th Cong. (1995) (same); Civil Rights Procedures Protection Act of 1994, S. 2405, H.R. 4981, 103d Cong. (1994) (same); cf. Protection From Coercive Employment Agreements Act, S. 2012, 103d Cong. (1994) (proposing to make it unlawful employment practice for employer to discriminate against applicant or employee because individual refuses to agree to submit employment discrimination claim to “mandatory arbitration”).



the Fair Labor Standards Act (“FLSA”), and the Family and Medical Leave Act (“FMLA”) “to prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination . . . .”<sup>21</sup> Like the Preservation of Civil Rights Protections Act of 2008, this proposed act and similar earlier bills would not have affected state common law claims arising from the employment relationship.

Much more sweeping in scope is the proposed Arbitration Fairness Act of 2009 as introduced in the House of Representatives in February 2009.<sup>22</sup> This bill provides that “[n]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of (1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights.”<sup>23</sup> On its face, the proposed Arbitration Fairness Act will invalidate predispute arbitration agreements as they relate to state common law claims and will apply regardless of the actual bargaining power of the employee relative to the employer.<sup>24</sup> Its findings suggest that the bill’s sponsors were concerned with the inequality of bargaining power between employers and employees and with the lack of meaningful choice and the potential for unfair arbitration procedures attendant to such inequality. Additionally, the findings indicate dissatisfaction with the lack of transparency in arbitration and the retarding effect that arbitration purportedly has on the development of public law.<sup>25</sup>

In light of the November 2008 election of President Obama and greater Democratic majorities in both the U.S. House of

<sup>21</sup> S. 163, H.R. 1489.

<sup>22</sup> H.R. 1020, 111th Cong. (2009). A substantially similar bill, with slightly different wording, was introduced in the Senate on April 29, 2009. *See* Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009) (proposing that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute”).

<sup>23</sup> H.R. 1020 § 4. The bill is similar to but more limited than the proposed Arbitration Fairness Act of 2007, which would have provided that “[n]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of (1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights *or to regulate contracts or transactions between parties of unequal bargaining power.*” H.R. 3010, S. 1782, 110th Cong. § 4 (2007) (emphasis added).

<sup>24</sup> The bill defines “employment dispute” as “a dispute between an employer and employee arising out of the relationship of employer and employee as defined by the Fair Labor Standards Act.” H.R. 1020, 111th Cong. § 3(6) (2009); *cf.* S. 931, 111th Cong. § 3(a) (2009) (defining “employment dispute” as “a dispute between an employer and employee arising out of the relationship of employer and employee as defined in section 3 of the Fair Labor Standards Act of 1938”).

<sup>25</sup> H.R. 1020, S. 931, 111th Cong. § 2 (2009).

Representatives and the Senate, the prospect of an amendment to the FAA invalidating at least some predispute employment arbitration agreements would seem much greater.<sup>26</sup> This Article explores how best to structure such legislation.<sup>27</sup> Specifically, this Article considers whether legislation invalidating these arbitration agreements should apply to statutory employment claims but not to state common law employment claims, and whether this legislation should apply to all employers and with respect to all employees.

Part I begins by considering the rationales for and against regulation of the employment relationship generally, and regulation of employment arbitration agreements specifically. In light of these rationales, the remainder of this Article considers how best to structure a proposed statute prohibiting enforcement of predispute employment arbitration agreements. Part II considers the soundness of invalidating predispute arbitration agreements as they relate to statutory employment law claims while not invalidating such agreements with respect to common law employment law claims. Part III explores whether it is appropriate in structuring an employment arbitration restriction to distinguish between high-level employees and low-level employees and, if so, how to best distinguish between those employees who should be within the restriction and those who should fall outside it. Specifically, this Part examines how Congress has distinguished between high-level and low-level employees in several federal employment statutes: the ADEA's exemptions for "bona fide executives" and "high policymaking employees" with respect to the ADEA's age discrimination prohibition as it relates to forced retirement; the FMLA's exemption concerning certain highly compensated employees with respect to the FMLA's reinstatement

<sup>26</sup> See Michael Fox, *It's Not EFCA, Now It's FAN*, JOTTINGS BY AN EMPLOYER'S LAW., Apr. 24, 2009, [http://employerslawyer.blogspot.com/2009\\_04\\_01\\_archive.html](http://employerslawyer.blogspot.com/2009_04_01_archive.html) (concluding that "odds are in favor of [the Arbitration Fairness Act of 2009's] passage"); Bob Lian, *The Potential Impact of the Obama Administration on the Labor and Employment Landscape*, WASH. LAB. & EMP. WIRE, Nov. 5, 2008, <http://washlaborwire.com/2008/11/05> (discussing potential impact of November 2008 federal elections on workplace legislation and regulation and predicting that "President-elect Obama will likely support this dramatic overhaul of the Federal Arbitration Act (FAA) if it is reintroduced in the 111th Congress").

<sup>27</sup> For an argument against any legislation prohibiting enforcement of adhesive predispute arbitration agreements, see Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements — With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 264 (2006) [hereinafter Ware, *Adhesive Arbitration Agreements*] (arguing that "the general enforcement of adhesive arbitration agreements benefits society as a whole by reducing process costs and, in particular, benefits most consumers, employees and other adhering parties").

requirement for employees who take FMLA leave; and the National Labor Relations Act's ("NLRA") exclusion of "supervisors" from the collective bargaining protections of the NLRA. Part III borrows concepts from each of these statutes to craft an exemption for high-level employees from any legislation invalidating predispute employment arbitration agreements. Finally, Part IV considers whether small employers should be exempt from any legislation prohibiting enforcement of predispute employment arbitration agreements and, if so, how best to structure such an exemption.

In sum, this Article concludes that the legislation pending in Congress to invalidate certain predispute employment arbitration agreements is too broad. Any legislation invalidating these arbitration agreements should be complete as to subject matter; that is, it should cover both statutory discrimination claims and common law and contract claims. Such legislation, however, should exempt claims by or against certain high-level employees and claims by or against certain small employers.

I. RATIONALES FOR AND AGAINST REGULATION OF THE EMPLOYMENT  
RELATIONSHIP GENERALLY AND OF EMPLOYMENT ARBITRATION  
AGREEMENTS SPECIFICALLY

In considering how best to structure any legislation invalidating predispute employment arbitration agreements, this Article is concerned principally with three variables: (1) whether the invalidation should apply only to statutory claims or also should apply to state common law claims; (2) whether the invalidation should apply regardless of the worker's position with the employer; and (3) whether the invalidation should apply regardless of the employer's size. This Article seeks to evaluate choices relating to these issues in light of the purposes of employment regulation generally, and in light of the commonly asserted justifications for regulating employment arbitration agreements specifically. The overarching inquiry of this Article is whether the costs of regulation outweigh its benefits.<sup>28</sup> This Part sketches out the rationales for and against regulating the employment relationship and the justifications for and against regulating employment arbitration. The remainder of this Article applies these rationales to the issues under consideration to best

<sup>28</sup> See SAMUEL ESTREICHER & GILLIAN LESTER, *EMPLOYMENT LAW* 12 (2008) ("In sum, the operation of the law may serve as a barrier to, rather than facilitator of, efficient allocation. For this reason, it is critical to assess whether the benefits justify the costs of [employment] regulation.").

structure a statute prohibiting enforcement of predispute employment arbitration agreements.

### A. *Rationales for and Against Regulation of the Employment Relationship*

#### 1. Reasons for Regulating the Employment Relationship

There are three commonly asserted rationales for regulating the employment relationship that are arguably very pertinent to a proposed statute invalidating predispute employment arbitration agreements. First, some employment regulation seeks to prevent gross exploitation of workers that might otherwise exist in light of the bargaining power advantage that most employers have with respect to most employees.<sup>29</sup> A mandate that employers pay a minimum wage is an example of this kind of regulation.<sup>30</sup> Arguably, such regulation benefits not only employees but also employers and society as a whole. This view regards “regulation as a means to promote social cohesion — to enhance the leverage of weaker groups so that they will have more of a stake in the society, and thus to channel conflict over the distribution of wealth into less socially destructive avenues than outright industrial warfare.”<sup>31</sup>

Second, a related but distinct rationale for regulating the employment relationship concerns correcting for “market failures.”<sup>32</sup>

<sup>29</sup> See Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?*, 76 IND. L.J. 29, 47-48 (2001) (asserting that “much of employment law uses [the rhetoric of ‘unequal bargaining power’] and related concepts of ‘protecting the little guy’ and ‘preventing employer exploitation’ as rationales for intervention” in employment relationship). *But see id.* at 47 (arguing that “unequal bargaining power is not a market failure” and “is not by itself an argument for regulation”).

<sup>30</sup> ESTREICHER & LESTER, *supra* note 28, at 6 (“Regulation, in the form of, say, laws mandating the provision of minimum or ‘living’ wages, may be viewed as a way of enhancing the returns to work so as to conform to some ideal of the terms that would have been reached if individuals did not have to bargain under necessitous circumstances.”); Schwab, *supra* note 29, at 33-34 (noting that minimum wage laws “are commonly explained as reactions to the harshness of unregulated markets, which would allow workers to work for near-starvation wages”).

<sup>31</sup> ESTREICHER & LESTER, *supra* note 28, at 6; Stone, *Yellow Dog Contract*, *supra* note 14, at 1043 (commenting that “statutory employment rights are enacted when a legislature believes that workers cannot adequately protect themselves simply by bargaining with their employers. That is, they reflect a legislature’s view of market failure in the contracting process.”).

<sup>32</sup> ESTREICHER & LESTER, *supra* note 28, at 7-10; Haagen, *supra* note 13, at 1059-60 (arguing that because “choices between arbitration and litigation are likely

These market failures or market inefficiencies might be caused by such things as employers with excessive market power, the presence of external costs or benefits, employers' and employees' incomplete knowledge or information, practical limitations on employee mobility, transaction costs relating to negotiation of individual employment contracts, or management objectives that do not seek to maximize profits.<sup>33</sup> An example of an employment regulation that seeks to correct for market failure would be the Occupational Safety and Health Administration's ("OSHA") regulations setting forth employer safety record-keeping requirements.<sup>34</sup> According to standard economic theory, if an employer has a relatively unsafe workplace, the employer will have to pay its workers relatively more to compensate them for the extra risk to their health and safety.<sup>35</sup> This risk premium will serve as an incentive to the employer to reduce workplace health and safety risks at its worksite.<sup>36</sup> This scenario breaks down, however, when one considers the cost and difficulty that employees and job applicants have in obtaining information about the safety records of various employers.<sup>37</sup> Thus, OSHA's record-keeping and access regulations "may . . . be justified as an attempt to correct this market failure in information."<sup>38</sup>

Third, another widely accepted rationale for regulation of the employment relationship is norm transformation and reinforcement.<sup>39</sup> Statutes that proscribe invidious employment discrimination, such as

systematically to be made by at least one of the parties on the basis of no information, inadequate information or misinformation, and . . . one party to the transaction is likely to know that," a market inefficiency arises that justifies requiring "the party seeking to impose a mandatory arbitration agreement[] to provide reliable information to the party being asked to give up the right to go to court").

<sup>33</sup> See also Cole, *supra* note 14, at 474-76, 482-83 (arguing against enforcing certain executory employment arbitration agreements in light of employers' bargaining advantage, employees' information deficiencies, and transaction costs relating to negotiating individual employment contracts); Schwab, *supra* note 29, at 35 (citing collective goods problems and asymmetric-information problems as examples of market failures that prevent employer from offering benefit to workers even though those workers value benefit more than it costs employer). See generally ESTREICHER & LESTER, *supra* note 28, at 8-10.

<sup>34</sup> ESTREICHER & LESTER, *supra* note 28, at 210.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (commenting that "[i]f there is asymmetrical access to information, the hazard premium may be set too low or not at all").

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 7 ("Another argument for regulation is that it provides a means whereby society seeks to implement its value system, its notion of the fair conditions under which people may be employed.").

Title VII and the ADEA, are prime examples of such employment regulations. Employment discrimination statutes seek not only to protect workers from discrimination in specific cases, but also seek to prevent harm to society as a whole by teaching and reinforcing that certain forms of employment discrimination are inconsistent with society's core values.<sup>40</sup>

## 2. Rationales Militating Against Regulating the Employment Relationship

There are two general concerns that one should keep in mind when evaluating the merits of any employment regulation. First, the regulation may directly or indirectly raise the cost to employers of doing business. For example, the FLSA requirement that an employer provide its employees a certain minimum wage or pay certain employees overtime for hours worked in excess of forty hours per week might raise the employer's labor costs.<sup>41</sup> Regulation might also impose indirect costs on the employer, such as the expenses an employer would need to incur to become sufficiently knowledgeable about the regulation to achieve compliance or the costs an employer might incur while defending litigation that challenges the employer's efforts to comply.<sup>42</sup> In response to these increased costs, the employer might pay its workers less, hire fewer workers (or more workers, to

<sup>40</sup> See generally Nan D. Hunter, *Lawyering for Social Justice*, 72 N.Y.U. L. REV. 1009, 1012 (1997) (arguing that although 1964 Civil Rights Act was culture-shifting for South at time of its enactment, it became culture-shifting for nation as whole primarily because of judicial interpretation); Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 975 (1997) (arguing that "[a]t least in part because of the Civil Rights Act of 1964 — the most important statutory embodiment of the ideal of racial justice — American culture, American government, and the American people have absorbed the concepts of equality and integration embodied in the Act as the proper ethical framework for the resolution of issues of race").

<sup>41</sup> See ESTREICHER & LESTER, *supra* note 28, at 10 ("A common objection to employment regulation is that regulation may raise the marginal cost of labor beyond its marginal contribution to the value of the firm's product or service and is therefore equivalent to an exogenous wage increase over the equilibrium wage.").

<sup>42</sup> See *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (noting congressional awareness of and concern with "the potentially crushing expense [for small employers] of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail"); DUNLOP COMMISSION REPORT, *supra* note 17, at 49 (noting that "aside from the direct costs of [employment] litigation, employers often dedicate significant sums to designing defensive personnel practices (with the help of lawyers) to minimize their litigation exposure").

avoid paying overtime), or pass the cost along to its customers.<sup>43</sup> Thus, employment regulation might make employers subject to the regulation less competitive relative to employers not subject to the regulation.<sup>44</sup>

Second, a related but distinct concern is that employment regulation often benefits one set of workers at the expense of another set of workers or at the expense of consumers.<sup>45</sup> Consider, for example, raising the minimum wage. Incumbent employees who were earning below the newly mandated minimum wage and who retain their employment will benefit from the increased minimum wage.<sup>46</sup> To the extent that the increase in minimum wage causes employers to hire fewer workers, however, the workers who are not hired at any wage lose out.<sup>47</sup> This redistribution or distortion in the market may be particularly troubling when the winners are those who already were relatively well off and who benefit at the expense of those workers or consumers who were relatively less well off,<sup>48</sup> or when a relatively few workers benefit at the expense of many.<sup>49</sup>

<sup>43</sup> ESTREICHER & LESTER, *supra* note 28, at 10-11; Ware, *The Effects of Gilmer*, *supra* note 14, at 742 (asserting that “[w]ith respect to universal employment mandates like Social Security, available data confirms the economic model’s prediction that much, but not all, of the mandate’s cost is paid by employees in the form of lower wages”); DUNLOP COMMISSION REPORT, *supra* note 17, at 49 (“These costs [of employment litigation and efforts to minimize employment litigation exposure] tend to affect compensation: as the firm’s employment law expenses grow, less resources are available to provide wage and benefits to workers.”).

<sup>44</sup> See Schwab, *supra* note 29, at 34 (predicting that in response to trends in labor markets, such as globalization, employment regulation in future will focus more on need for employers and economies to remain competitive).

<sup>45</sup> ESTREICHER & LESTER, *supra* note 28, at 10-11 (“The costs [of exogenous wage increases] are borne by those who cannot obtain jobs and, to the extent output (either quantity or quality) is reduced to meet increased labor costs, consumers.”); Ware, *The Effects of Gilmer*, *supra* note 14, at 744-46 (explicating how and when “targeted employment mandates [such as the ADA’s accommodation mandate] redistribute from employees outside the protected class to those in the protected class”).

<sup>46</sup> See ESTREICHER & LESTER, *supra* note 28, at 10 (noting that even those workers who seem to benefit directly from employment regulation “might prefer to trade away the statutory entitlements (e.g., a safer workplace or paid family leave) for other goods such as higher wages”).

<sup>47</sup> *Id.* at 10-11.

<sup>48</sup> *Id.* at 11.

<sup>49</sup> See Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1357 (1997) [hereinafter Estreicher, *Predispute Agreements*] (describing “downside” to jury trials and present “employment law landscape” and concluding “we have a system in which a few individuals in protected classes win a lottery of sorts, while others queue up in the administrative agencies and face reduced employment opportunities”); *cf.* Schwab, *supra* note 29, at 34

## B. Rationales for and Against Regulation of Predispute Employment Arbitration Agreements

### 1. Virtues of Employment Arbitration

The virtues of employment arbitration include the virtues of arbitration generally.<sup>50</sup> Arbitration of an employment dispute offers the promise of a more informed, timely, economical, and private resolution of the dispute as contrasted with adjudication of that dispute in court.<sup>51</sup> First, the parties to an employment arbitration can contract to select a decision maker with expertise in employment law matters.<sup>52</sup> Arguably, this allows for a more informed and predictable decision on the merits and, importantly, a decision that the parties would accept as being more informed and, therefore, legitimate.<sup>53</sup>

(“Increasingly lawmakers will respond to the idea that good employment laws are those that help labor markets produce the largest pie. It is unfair to intervene in labor markets to assist some while hindering others, if that shrinks the overall pie.”).

Professors Estreicher and Lester also point out a third concern raised by some employment regulation: “Regulation may also have the effect of ‘crowding out’ beneficial behavior that parties would engage in in the absence of regulation.” ESTREICHER & LESTER, *supra* note 28, at 12. For example, an employer that might otherwise consider adopting a leave policy that is in some ways more generous than the FMLA requires might be discouraged from doing so by the administrative complications that would arise from having a leave policy that differs from the one that the FMLA mandates. See TIMOTHY P. GLYNN ET AL., *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* 686 (2007) (suggesting that lawyer drafting employer’s leave policy to ensure compliance with FMLA should attempt to draft policy that is “both legal and administrable by the Human Resources Department”).

<sup>50</sup> See generally Cole, *supra* note 14, at 455-57 (discussing virtues of arbitration, including expert decisionmaking, flexible procedures, confidentiality, and limited judicial review).

<sup>51</sup> See David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 100 (1999) [hereinafter Sherwyn et al., *Mandatory Arbitration*] (“For employers, the reduced cost, increased speed, private nature, and elimination of juries make arbitration an attractive option.”). But see Haagen, *supra* note 13, at 1053 (pointing out that arbitration can be “slow, expensive, and cumbersome”).

<sup>52</sup> See Cole, *supra* note 14, at 455.

<sup>53</sup> See Edward Brunet, *The Core Values of Arbitration*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 3, 13 (Edward Brunet et al. eds., 2006) (“Trust of the expert arbitrator is essential to support the concept of finality.”); cf. W. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J.L. REFORM 843, 866 (2008) (suggesting that “[u]nlike judges, arbitrators can be selected for their sensitivity to local context, which might plausibly make them superior to courts at tailoring public norms to specific workplaces, not to mention better able to identify or create workplace-specific



Second, for several reasons, the parties will likely resolve an employment dispute in less time and with less expense in arbitration than in court.<sup>54</sup> Arbitration allows the disputants to avoid the long line of litigants awaiting their turn for a trial in court.<sup>55</sup> Moreover, arbitration typically provides for only limited discovery<sup>56</sup> and is less formal relative to civil litigation in court.<sup>57</sup> Finally, an arbitral decision is subject to only extremely limited judicial review<sup>58</sup> and, therefore, is less likely to be appealed than a trial court decision.

The speed, economy, and informality of arbitration may be especially valuable in the employment context. The expeditious and less formal resolution of the employment dispute may help to preserve a beneficial employment relationship that might otherwise have been irreparably harmed during protracted litigation.<sup>59</sup> It also might reduce

norms in areas not governed by external law”).

<sup>54</sup> See Colvin, *supra* note 12, at 425-26 (reviewing earlier empirical studies and reporting on his own empirical study and concluding that empirical research supports conclusion that “[a]n advantage of [employment] arbitration compared to litigation . . . is the relatively speedy time to hearing and a final decision in arbitration cases”); David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1564 (2005) [hereinafter Sherwyn et al., *Assessing the Case*] (evaluating empirical studies on employment arbitration and concluding that “arbitration provides a quicker resolution than litigation”); Ware, *Adhesive Arbitration Agreements*, *supra* note 27, at 287 (“When compared with litigation, most arbitration proceedings streamline the entire process: pleadings, discovery, motion practice, trial or hearing, and appeal[, resulting] in less lawyer time spent on a case and thus lower legal fees.”); Weidemaier, *supra* note 53, at 846-47 (reviewing empirical studies and, although cautioning about problems arising when comparing “the relative merits of arbitration versus the courts,” concluding that “the clearest area of research relates to disposition times and demonstrates that arbitrators resolve disputes much more quickly than courts”).

<sup>55</sup> See DUNLOP COMMISSION REPORT, *supra* note 17, at 55 (reporting Dunlop Commission’s finding that “employees bringing public law claims in court must endure long waiting periods as governing agencies and the overburdened court system struggle to find time to properly investigate and hear the complaint”).

<sup>56</sup> Brunet, *supra* note 53, at 20 (asserting that “[l]imited discovery is an important general characteristic of arbitration”).

<sup>57</sup> *Id.* at 17 (“Arbitration has responded to the undue formality and delay associated with rules of evidence by essentially barring the use of formal rules of evidence at arbitration hearings.”).

<sup>58</sup> See 9 U.S.C. § 10 (2006) (setting forth grounds for vacating arbitrator’s decision); see also Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 954-55 (1999) [hereinafter Stone, *Rustic Justice*] (discussing “narrow standard of judicial review of arbitral awards” under FAA and asserting that arbitral awards reviewed under FAA are “virtually bulletproof”).

<sup>59</sup> See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 564

the disruption to the workplace and limit the psychological or emotional toll on coworkers attendant to protracted employment litigation.<sup>60</sup> Finally, the relatively lower monetary cost of arbitration coupled with arbitration's informal nature allows and encourages some employees who otherwise would not be able to bring a claim against their employer to do so.<sup>61</sup>

(2001) [hereinafter Estreicher, *Saturns for Rickshaws*] (arguing that “unlike litigation where resolutions often come too late and the process itself is so divisive that reinstatement is rarely practicable, arbitration holds out the promise of a prompt resolution more suitable for claims by incumbent employees or even former employees truly desiring reinstatement”); Susan A. Fitzgibbon, *Teaching Unconscionability Through Agreements to Arbitrate Employment Claims*, 44 ST. LOUIS U. L.J. 1401, 1408 (2000) (“The informal, less adversarial aspects of the arbitration process especially contribute to the possibility of maintaining a continuing relationship between the parties to the dispute and the process may have a therapeutic effect on the parties.”); *id.* at 1413 (“An arbitration procedure that finally resolves cases relatively quickly (compared with judicial resolution) offers employees a more realistic opportunity for reinstatement.”); *cf.* DUNLOP COMMISSION REPORT, *supra* note 17, at 56 (concluding that “the litigation model of dispute resolution seems to be dominated by ‘ex-employee’ complainants, indicating that the litigation system is less useful to employees who need redress for legitimate complaints, but also wish to remain in their current jobs”).

<sup>60</sup> *Cf.* Rachel H. Yarkon, Note, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment*, 2 HARV. NEGOT. L. REV. 165, 170 (1997) (“The fact that the delay of trial is likely to exacerbate bad feelings is another incentive for early settlement.”).

<sup>61</sup> *See* Fitzgibbon, *supra* note 59, at 1412 (concluding that “[b]ased on experience in labor arbitration, *pro se* representation may also be used more effectively and with fewer risks than in court because of the more informal nature of arbitration”); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. ILL. L. REV. 635, 651-52 (asserting that “the savings in time and expense that arbitration brings may allow an employee to pursue claims that he or she would otherwise be reluctant or unable to press”); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 401, 445 (1999) (noting that “arbitration is the only viable forum for certain employees because it generally offers affordable and expeditious resolution of claims”); Sherwyn et al., *Assessing the Case*, *supra* note 54, at 1575 (concluding that “it is easier for a *pro se* plaintiff to prosecute his or her claim in arbitration than in litigation” in part because of arbitration's informal nature); St. Antoine, *supra* note 1, at 791-92 (asserting that for employees with low-value claims, “the cheaper, simpler process of arbitration is the most feasible recourse” because “[i]t will cost a lawyer far less time and effort to take a case to arbitration [and] at worst, claimants can represent themselves . . . in this much less formal and intimidating forum”). *But cf.* Sherwyn et al., *Assessing the Case*, *supra* note 54, at 1580 (arguing that lower costs and privacy typically associated with employment arbitration will encourage employers to defend suits they believe to be baseless rather than settle them for nominal amount).

Third, arbitration, unlike civil litigation in court, is private.<sup>62</sup> Arbitration of an employment dispute, therefore, allows for resolution of the dispute without the public disclosure of embarrassing, sensitive, or confidential information that the employee, employer, or coworkers would rather keep private.<sup>63</sup> For example, the salary and performance evaluations of a claimant and his coworkers might be relevant to the claimant's discrimination claim and, therefore, might be both discoverable and admissible in a hearing in litigation pertaining to that claim. The employer, the claimant, and the coworkers will likely want to maintain the privacy of this information. Arbitration of the employment dispute provides for a greater likelihood of doing so.

## 2. Vices of Employment Arbitration

Critics of employment arbitration assert that it risks impairing the interests of the employee and those of society to an unacceptable degree.<sup>64</sup> With respect to the employee's interests, critics focus on two broad concerns. The first concern is that the structure and procedures typical of arbitration tend to favor the employer.<sup>65</sup> The second concern is that employers typically enjoy informational and bargaining power advantages over their employees, and they might use these advantages to impose an arbitration process that favors the employer even more.<sup>66</sup> With respect to society's interests, critics of employment arbitration argue that it does not serve the public goals of employment discrimination law as well as public adjudication does.

<sup>62</sup> Brunet, *supra* note 53, at 8 (describing how “[p]rivacy and secrecy pervade the arbitration process”).

<sup>63</sup> *See id.* (commenting that “[t]he last thing a restaurant chain or a bank needs is a public airing of dirty linen involving allegations of discrimination” and asserting that “[t]he desire for secrecy can be a prime determinant in selecting arbitration”); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 42-43 (1998) (noting that employees may prefer privacy typically associated with arbitration given that “[m]any employment cases involve matters which are highly sensitive to the employee-plaintiff”); Yarkon, *supra* note 60, at 186-87 (noting several reasons why employee may value privacy of settlement, including fact that judicial resolution of dispute might “require publication of the intimate details of her life,” and also noting that “employers may wish to avoid the negative publicity associated with litigation to protect supplier, consumer, and employee relations”).

<sup>64</sup> *See infra* notes 67-103 and accompanying text. For a discussion and critique of many of the criticisms of employment arbitration arising from a predispute employment arbitration agreement, see Estreicher, *Predispute Agreements*, *supra* note 49, at 1352-59.

<sup>65</sup> *See infra* notes 67-81 and accompanying text.

<sup>66</sup> *See infra* notes 82-87 and accompanying text.

a. *Structural and Procedural Concerns*

Addressing arbitration's structure and procedures, critics worry that many of the distinctive attributes of arbitration might make it more difficult for employees to successfully assert claims against their employers.<sup>67</sup> This fear is articulated in three structural and procedure-based criticisms. First, costs unique to arbitration, such as arbitrators' fees, might make it prohibitively expensive for some employees to vindicate their rights against their employers or, at best, will provide a strong disincentive for the employee to assert such rights.<sup>68</sup> Courts have reacted to this criticism in a variety of ways. Some courts have held that arbitration agreements required as a condition of employment are not valid with respect to statutory claims unless the employer agrees to pay all of the arbitrator's fees.<sup>69</sup> Other courts have held that such agreements are not per se invalid but that the employee may avoid the obligation to arbitrate by demonstrating the likelihood that arbitral costs and fees would substantially deter him from enforcing his statutory rights.<sup>70</sup>

<sup>67</sup> See, e.g., GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE* 55 (2d ed. 2007) ("As a procedural matter, the concern is that the simpler and less costly procedures typical of arbitration will work systematically to the disadvantage of plaintiffs.").

<sup>68</sup> For a recent review of empirical studies concerning arbitration costs and accessibility, see Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813 (2008). But see Ware, *Adhesive Arbitration Agreements*, *supra* note 27, at 287-88 (arguing that it is "fundamental error" to look at forum fees in isolation from plaintiff's total cost of pursuing claim in arbitration and that "[a] costs-based challenge to an arbitration agreement . . . should fail unless the total cost the plaintiff faces in arbitration significantly exceeds the total cost the plaintiff would face in litigation").

<sup>69</sup> See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1996); *cf.* *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002) (stating that fee splitting provision in employment arbitration agreement "alone would render an arbitration agreement unenforceable").

<sup>70</sup> See *Faber v. Menard, Inc.*, 367 F.3d 1048, 1053-54 (8th Cir. 2004); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 607-10 (3d Cir. 2002); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556-57 (4th Cir. 2001); *Zumpano v. Omnipoint Comm'n, No. Civ. A. 00-CV-595*, 2001 WL 43781, at \*9-11 (E.D. Pa. Jan. 18, 2001); *cf.* *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 663 (6th Cir. 2003) (holding "that potential litigants must be given an opportunity, prior to arbitration on the merits, to demonstrate that the potential costs of arbitration are great enough to deter them and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum"); *Shankle v. B-G Maint. of Colo., Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999) (concluding that predispute employment arbitration agreement was unenforceable where plaintiff "could not afford" to pay one-half of arbitrator's fee, as required under arbitration agreement, "and it is unlikely other similarly situated employees could either").

A second widely voiced criticism is that the limited discovery typical in arbitration tends to favor the employer in a dispute with its employee.<sup>71</sup> The employee typically finds it extremely helpful and perhaps essential to utilize some formal discovery such as depositions, interrogatories, and document requests to gain access to the information possessed by the employer and the decision makers pertinent to his claim.<sup>72</sup> Conversely, the employer typically has access to most of the records, documents, and witnesses relevant to an employment claim without resorting to formal discovery.<sup>73</sup> Thus, the extremely circumscribed discovery available in arbitration, as contrasted with the more generous discovery available in civil litigation in court, tends to tilt the playing field in favor of the employer in arbitration.<sup>74</sup>

Professor Christopher Drahozal has reviewed the empirical studies of employment arbitration fees and costs and concludes as follows:

For some categories of disputes, administrative fees and arbitrators' fees exceed the filing fees in court. But provider organizations have capped those fees for small consumer claims and many employee claims, so that upfront costs in arbitration for those claims should be very similar to upfront costs in court. Whether arbitration is more or less costly than litigation overall depends on how attorneys' fees and other costs compare. Survey evidence and business experience provides some evidence that the total costs of arbitration are lower than in litigation, but the evidence is too limited to draw definitive conclusions.

Drahozal, *supra* note 68, at 840.

<sup>71</sup> See RUTHERGLEN, *supra* note 67, at 55 (noting concern that arbitration will systematically disadvantage employees and asserting that “[u]nlike employers, plaintiffs need modern procedural devices, such as discovery, to uncover evidence that disputed employment decisions are discriminatory”); Maltby, *supra* note 63, at 33, 40-41 (explaining how limited discovery typical of arbitration favors employer in dispute with its employee).

<sup>72</sup> See Richard A. Bales, *Beyond the Protocol: Recent Trends in Employment Arbitration*, 11 EMP. RTS. & EMP. POL'Y J. 301, 334 (2007) (noting that “plaintiffs in employment cases often need to depose fact witnesses, both to find out what happened, usually by deposing the supervisor and/or decision maker, and to gather information on comparators”); Green, *supra* note 17, at 220 (arguing that “[s]ince ordinarily the employer controls most of the relevant information for a dispute, it is critical that an employee’s right to discovery, which would be guaranteed in court, is observed in mandated arbitration”).

<sup>73</sup> Green, *supra* note 17, at 220; Maltby, *supra* note 63, at 33 (noting that, unlike the employee, “[t]he employer ... already has the relevant employment records and access to the key witnesses, who are generally other employees”); Yarkon, *supra* note 60, at 186 (noting that employer in employment litigation “has greater . . . control over potential witnesses and documentary evidence” than does employee).

<sup>74</sup> Maltby, *supra* note 63, at 33, 40-41.

A third structural criticism of employment arbitration centers on the so-called “repeat player” phenomenon.<sup>75</sup> The fear generally is that certain employers will gain an unfair advantage over their employees in employment arbitration due to the fact that certain employers are likely to participate in arbitration on numerous occasions, while an individual employee is likely to arbitrate only once in a lifetime.<sup>76</sup> The repeat-player employer arguably gains some advantage over its employees due to its greater familiarity with the arbitration process and with potential arbitrators.<sup>77</sup> As Professor Lisa Bingham has explained, repeat-player employers “may maintain institutional memory and are better able to use [their own] records regarding an arbitrator to make educated selections for the next arbitration case.”<sup>78</sup> The more serious concern, however, is that an arbitrator will tend to favor the repeat player employer in the hope that the employer might then return the favor to the arbitrator by selecting that individual to arbitrate a future dispute involving the employer.<sup>79</sup> Professor Bingham’s empirical studies demonstrate that repeat-player employers do better in employment arbitration compared to one-shot employers.<sup>80</sup> Her studies, however, do not purport to demonstrate that arbitrator bias is a reason for this advantage.<sup>81</sup>

<sup>75</sup> See generally Marc Galanter, *Why the “Haves” Come Out Ahead*, 9 L. & Soc’y REV. 95 (1974) (explicating typology of parties that divides litigants into “repeat players” and “one-shotters” and discussing each type of party’s incentives and advantages in legal system); Bingham, *The Repeat Player Effect*, *supra* note 12, at 191-202 (discussing repeat player phenomenon in the context of employment arbitration); Bingham, *Adhesive Contracts*, *supra* note 12, at 239-44 (discussing “several possible theoretical accounts for why a repeat player effect might arise in” employment arbitration); Cole, *supra* note 14, at 452-54 (discussing why “repeat players will have a distinct and systematic advantage in interactions with one-shot players”).

<sup>76</sup> Bingham, *The Repeat Player Effect*, *supra* note 12, at 190.

<sup>77</sup> *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1476 (D.C. Cir. 1996) (commenting that repeat player “employer gains some advantage in having superior knowledge with respect to selection of an arbitrator”); Cole, *supra* note 14, at 452-53, 474-77.

<sup>78</sup> Bingham, *Adhesive Contracts*, *supra* note 12, at 240.

<sup>79</sup> See *id.* at 242 (discussing possibility “that arbitrators, freed from the free market constraint of having to worry about future selection by both parties, might tend to rule in favor of the only party in a position to maintain an institutional memory and use arbitrators again in the future, namely the employer”); Cole, *supra* note 14, at 478 (“Economic coercion clearly plays some role in a system where an arbitrator who regularly finds in favor of complaining employees may expect that the employer will be reluctant to rehire him in the future.”); *EEOC Policy Statement*, *supra* note 14, at V-B (arguing that arbitration “results cannot but be influenced by the fact that the employer, and not the employee, is a potential source of future business for the arbitrator”).

<sup>80</sup> See Bingham, *The Repeat Player Effect*, *supra* note 12, at 208-13 (reporting

b. *Concerns Relating to Informational and Bargaining Power Advantages*

Turning to the second broad concern surrounding employment arbitration, critics fear that employers use their informational and bargaining power advantages to obtain the employee's acquiescence to an arbitration agreement that grossly favors the employer.<sup>82</sup> Such an agreement might provide for an arbitrator or pool of arbitrators tending to favor the employer, limit the employee's remedies, effectively reduce the applicable statute of limitations, or alter the burden of proof in a way that advantages the employer.<sup>83</sup> In this way, the employer might effectively insulate itself from liability for infringing upon the employee's statutory rights. Professor George Rutherglen sums up this concern:

results of her study in which in employment arbitrations, employees win less frequently and win less of what they demanded when arbitrating against repeat-player employer as compared to when arbitrating against one-shot employer); Bingham, *Adhesive Contracts*, *supra* note 12, at 238-39 (reporting results of her later empirical study as, "Among employee claims against employers, repeat player employers do better in employment arbitration than non-repeat player employers"); Lisa B. Bingham & Simon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in PROCEEDINGS OF THE NYU 53D ANNUAL CONFERENCE ON LABOR 303, 323 tbl.2 (Samuel Estreicher & David Sherwyn eds., 2004) (reporting results of third study in which employees prevailed in arbitration 62% of time against one-shot employer but only 29% of time against repeat player employer).

<sup>81</sup> See Bingham, *The Repeat Player Effect*, *supra* note 12, at 214 ("The above study does not establish a cause for the repeat player effect. It merely identifies its presence."); Bingham, *Adhesive Contracts*, *supra* note 12, at 238 (hypothesizing that repeat player effect might in part be product of "the underlying agreement to arbitrate as reflected in a personnel manual, rather than an individually negotiated contract").

<sup>82</sup> See Arbitration Fairness Act of 2009, H.R. 1020, S. 931, 111th Cong. § 2(3), (7) (2009) (asserting that "[m]ost consumers and employees have little or no meaningful option whether to submit their claims to arbitration" and that "[m]any corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals"); Stone, *Yellow Dog Contract*, *supra* note 14, at 1036 ("At the moment of hire, employees lack bargaining power and are needful of employment, so they frequently agree to [employer-dictated predispute arbitration agreements] without giving them much thought.").

<sup>83</sup> See Sherwyn et al., *Assessing the Case*, *supra* note 54, at 1563 (noting that "[c]ritics insist that mandatory arbitration should be prohibited because it . . . is unfair to employees because it can be expensive, limit damages, reduce the statute of limitations, alter the burden of proof, allow for untrained arbitrators to decide cases, limit discovery, and is biased in favor of employers; and . . . is the product of contracts of adhesion and unequal bargaining power").

In substantive terms, the question is whether allowing employees to bargain away their right to judicial remedies in favor of arbitration confers too great an advantage upon employers. If employers cannot offer contracts of employment that violate the law against employment discrimination, how can they offer contracts that set the terms for enforcing these laws? Employees cannot waive their protections under these laws because, it is believed, employers would otherwise use their superior bargaining power to obtain agreements that allowed continued discrimination. For the same reason, arbitration agreements cannot be used as a means of weakening enforcement of these laws, for instance, by giving employers effective control over the selection of arbitrators.<sup>84</sup>

The concern is not only that the employer has the bargaining power to force an employee to agree to an arbitration procedure that disadvantages the employee, but also that the typical employee lacks the knowledge to make an informed decision with respect to such an agreement.<sup>85</sup> The typical employee likely lacks understanding of what arbitration is, let alone what arbitration procedure entails.<sup>86</sup> Some argue that this market failure in information alone justifies increased regulation of employment arbitration contracts.<sup>87</sup>

*c. Concerns Relating to the Public Goals of Employment  
Discrimination Law*

Finally, critics of employment arbitration also argue that it does not serve the public goals of employment discrimination law as well as adjudication in court does.<sup>88</sup> Employment discrimination laws seek to remedy instances of discrimination that individual employees have suffered.<sup>89</sup> In this way, employment discrimination statutes serve private interests. These laws also seek to eradicate invidious

<sup>84</sup> RUTHERGLEN, *supra* note 67, at 55.

<sup>85</sup> Haagen, *supra* note 13, at 1059-60.

<sup>86</sup> *Id.* at 1059.

<sup>87</sup> *See id.* (“Because it is likely to be poorly understood, there is a good public policy reason to supervise contracts to substitute private dispute resolution mechanisms for public ones.”).

<sup>88</sup> *See generally* Moohr, *supra* note 61, at 396 (arguing that “arbitration is not an effective forum in which to satisfy the public goals of employment discrimination statutes, even when employees are accorded a fair hearing”).

<sup>89</sup> *Id.* at 420 (“Federal employment discrimination law is a network of statutes, each enacted as part of a broad congressional effort to protect employees from discrimination in the workplace.”).



discrimination from the workplace.<sup>90</sup> Therefore, employment discrimination statutes serve the public interest.<sup>91</sup>

Litigation of employment discrimination claims in court serves the public goal of eliminating invidious workplace discrimination in several ways.<sup>92</sup> First, public adjudication of employment discrimination claims serves a general deterrence function.<sup>93</sup> When an employer is held accountable in court for its discrimination, other employers see and appreciate that the first employer has been made to pay a price for its discrimination.<sup>94</sup> This example deters other employers from engaging in discrimination.<sup>95</sup> Second, litigation of employment discrimination claims in court develops and refines the laws proscribing employment discrimination.<sup>96</sup> This elaborated body of law then governs future disputes<sup>97</sup> and guides employers with respect to the appropriateness of their future conduct. Finally, litigation in court of employment discrimination claims educates the public about the legality of certain employment practices and develops and reinforces cultural norms that abhor invidious discrimination.<sup>98</sup>

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<sup>90</sup> *Id.* at 400, 421.

<sup>91</sup> Green, *supra* note 17, at 177 (noting that “when a decision is rendered on a civil rights claim, its effect is felt by society as a whole”); Moohr, *supra* note 61, at 421-23 (noting that Title VII has as its public policy goal “solv[ing] the general problem of discrimination” and explicating how eradication of employment discrimination serves public interest by confirming defining American value of equality, reducing racial tension, and removing barriers to economic growth);

<sup>92</sup> Moohr, *supra* note 61, at 400, 426-27 (“[J]udicial adjudication [of employment discrimination claims] generates specific and general deterrence, educates the public, creates precedent, develops uniform law, and forms public values.”)

<sup>93</sup> *Id.* at 427-31 (setting out how employment discrimination litigation and its attendant compensatory and punitive damage awards specifically and generally deter employers from future violations of employment discrimination statutes).

<sup>94</sup> *EEOC Policy Statement*, *supra* note 14, at IV-C (“By awarding damages, backpay, and injunctive relief as a matter of public record, the courts not only compensate victims of discrimination, but provide notice to the community, in a very tangible way, of the costs of discrimination.”).

<sup>95</sup> Moohr, *supra* note 61, at 400, 430-31 (setting out various ways in which “[t]he example of a sanctioned employer discourages others from engaging in similar practices” and how “[g]eneral deterrence more effectively induces compliance with the law than specific deterrence”).

<sup>96</sup> *EEOC Policy Statement*, *supra* note 14, at IV-A (noting that “[a]bsent the role of the courts, there might be no discrimination claims today based on, for example, the adverse impact of neutral practices not justified by business necessity, . . . or sexual harassment”); Moohr, *supra* note 61, at 400, 432-35.

<sup>97</sup> Moohr, *supra* note 61, at 432.

<sup>98</sup> *Id.* at 400, 437-38 (“In articulating the standard of acceptable conduct, an adjudication reaffirms these values and forms community standards.”).

Compared to public adjudication, arbitration of an employment discrimination claim, as it is typically structured, is less effective at general deterrence, development and refinement of the law, and development and reinforcement of cultural norms.<sup>99</sup> Because arbitration is private and the arbitrator does not produce a public reasoned decision, employers are less likely to learn of an arbitration award that punishes another employer's discrimination and are less likely to view any such award as a clear rebuke of specific employer behavior.<sup>100</sup> An arbitration award against an employer, therefore, is less likely to serve the function of general deterrence.<sup>101</sup> Moreover, arbitration of employment discrimination claims does not contribute significantly to a more developed law of employment discrimination. This is in part because of the private nature of arbitration and the lack of published, reasoned decisions supporting arbitration awards, and in part because arbitration awards do not serve as binding precedent beyond the case at hand.<sup>102</sup> Finally, these same features of arbitration,

<sup>99</sup> *Id.* at 439.

<sup>100</sup> *See id.* at 431 (noting that "the private and confidential nature of arbitration creates an environment in which only the parties know about the claim and its disposition").

<sup>101</sup> *EEOC Policy Statement*, *supra* note 14, at V-A-1 (arguing that arbitration's private nature weakens general deterrence); Moohr, *supra* note 61, at 432 (concluding that "arbitration foregoes general deterrence as a means of effecting Title VII and utilizes only specific deterrence of the party to the suit"); *see also* Arbitration Fairness Act of 2009, H.R. 1020, S. 931, 111th Cong. § 2(6) (2009) (asserting that "[m]andatory arbitration is a poor system for protecting civil rights . . . because it is not transparent"). This is not to say that arbitration awards do not well serve a specific deterrence function. *See* Fitzgibbon, *supra* note 59, at 1413 (postulating that "[a]n arbitration decision closer in time to the events or conduct in question will send a message to the workplace and exert a conduct regulating effect" and giving as example lessons learned by coworkers when fellow employee who had been discharged in violation of employment discrimination statute is promptly reinstated); Michael H. LeRoy & Peter Feuille, *Reinventing the Enterprise Wheel: Court Review of Punitive Awards in Labor and Employment Arbitrations*, 11 HARV. NEGOT. L. REV. 199, 203 (2006) (asserting that "[m]ulti-million dollar employment [arbitration] awards show that private judges are performing a public function by deterring reprehensible . . . misconduct").

<sup>102</sup> *See* H.R. 1020, S. 931, § 2(5) (2009) (asserting that "[m]andatory arbitration undermines the development of public law for civil rights and consumer rights because there is no meaningful judicial review of arbitrators' decisions"); *EEOC Policy Statement*, *supra* note 14, at V-A-2 (stating that "arbitration affords no opportunity to build a jurisprudence through precedent"); Moohr, *supra* note 61, at 403, 437 (noting that "arbitrators decide claims within a system in which each arbitrator is independent and in which no correcting hierarchy exists" and "[c]onsequently, arbitration does not produce a uniform or consistent law"); Stone, *Yellow Dog Contract*, *supra* note 14, at 1043 ("A . . . problem with mandatory arbitration of statutory rights is that statutory disputes are being decided in private tribunals which generate no publicly available

especially its private nature, make arbitration of employment discrimination claims less effective at developing and reinforcing cultural norms.<sup>103</sup>

In light of these perceived structural shortcomings of employment arbitration, commentators have called for reforms of employment arbitration aimed at safeguarding the ability of an employee to vindicate his statutory rights and at promoting the public interest in eliminating invidious workplace discrimination.<sup>104</sup> These proposed reforms seek enhanced discovery, a record of the arbitration hearing for purposes of an appeal, the writing of a reasoned opinion accompanying the arbitrator's decision, and enhanced judicial review of the arbitrator's decision for errors of law.<sup>105</sup> In short, these proposed reforms seek to alter employment arbitration to structure it more like public adjudication in the civil court system.<sup>106</sup> In this way, reform of employment arbitration threatens to make it redundant and not an "alternative" dispute resolution mechanism at all.<sup>107</sup>

norms to guide actors or decisionmakers in the future.”).

<sup>103</sup> Moohr, *supra* note 61, at 439 (concluding that “because arbitration is confidential, private, and final, it foregoes effective mechanisms — [including] . . . the formation and affirmation of public values — for enforcing the public policy” of employment discrimination laws); Stone, *Yellow Dog Contract*, *supra* note 14, at 1043 (predicting that increased use of arbitration agreements as condition of employment will “mean[] that the law cannot play an educational role of shaping parties’ norms and sense of right and wrong, and therefore it cannot shape behavior in its shadow”).

<sup>104</sup> See generally Gorman, *supra* note 61; Moohr, *supra* note 61; Speidel, *supra* note 1, at 1087-91.

<sup>105</sup> See Gorman, *supra* note 61, at 639, 679-80 (calling for “due process of arbitration” that would include enhanced discovery, recording of arbitration hearing for use on appeal, written reasoned decision by arbitrator, and enhanced judicial review of arbitrator's application of law); Moohr, *supra* note 61, at 447-50 (discussing enhanced judicial review of employment arbitration awards, which necessarily would require record of arbitration proceedings and written, reasoned arbitrator opinion, as means of promoting goal of ending employment discrimination by “incorporat[ing] some measure of the enforcement mechanisms of litigation into arbitration”); Stone, *Rustic Justice*, *supra* note 58, at 1025-30 (calling for minimal due process protections and de novo judicial review of questions of law in arbitrations between “insiders,” such as employers, who design and maintain arbitral system and “outsiders,” such as employees, who play no role in shaping arbitral system).

<sup>106</sup> See Haagen, *supra* note 13, at 1044 (commenting that proposed arbitration reforms “aim, in short, to make arbitration more ‘lawlike’”).

<sup>107</sup> Cf. Fair Arbitration Act of 2007, S. 1135, 110th Cong. (2007) (proposing to entitle parties to arbitration contract to certain minimum “fair procedures for arbitration” such as face-to-face hearing and written explanation of basis for arbitrator's decision); Moohr, *supra* note 61, at 454 (conceding that reforms she is considering would make arbitration more expensive and, in that regard, “less attractive to all involved”); *id.* (noting that “[i]f added costs make arbitration inaccessible to many employees, the reason for providing it disappears”). See generally

Instead of reform, other critics have called for legislation prohibiting enforcement of predispute employment arbitration agreements.<sup>108</sup> The rationales discussed above for and against regulating the employment relationship and employment arbitration allow for an evaluation of three questions regarding the ideal scope of legislation that would invalidate predispute employment arbitration agreements: first, whether Congress should invalidate predispute arbitration agreements relating to certain types of employment claims (namely, statutory discrimination claims) but not other types of employment claims (namely, state common law employment claims); second, whether Congress should exempt from any such legislation certain employees based on the employees' position with the employer; and third, whether Congress should exempt from any such legislation certain employers based on the employers' size. The remainder of this Article assesses these three questions.

## II. DISTINGUISHING BETWEEN TYPES OF EMPLOYMENT LAW CLAIMS FOR THE PURPOSES OF LEGISLATION INVALIDATING PREDISPUTE EMPLOYMENT ARBITRATION AGREEMENTS

Recently Congress has considered two approaches to legislation invalidating predispute employment arbitration agreements.<sup>109</sup> The first approach would invalidate any predispute arbitration agreement relating to an employment dispute.<sup>110</sup> The second approach would invalidate predispute employment arbitration agreements only as they relate to claims arising under federal law,<sup>111</sup> or under certain specified federal employment statutes.<sup>112</sup> Under this second approach, employers would still be free to force employees to enter into arbitration agreements regarding common law claims, such as breach of contract, wrongful discharge, defamation, or intentional infliction

Thomas Stipanowich, *Arbitration: The "New Litigation"* 7-8 (Pepperdine Univ. Legal Studies Research, Paper No. 15, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1297526](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1297526) (asserting that arbitration "has taken on more and more of the features of court trial" and that "[t]he higher costs associated with these developments is a leading cause for complaint about arbitration among business users").

<sup>108</sup> See *supra* note 17.

<sup>109</sup> See *supra* notes 18-25 and accompanying text.

<sup>110</sup> See H.R. 1020, S. 931, 111th Cong. (2009) (proposing this approach); see also Arbitration Fairness Act of 2007, H.R. 3010, S. 1782, 110th Cong. (2007) (same).

<sup>111</sup> See Civil Rights Act of 2008, H.R. 5129, S. 2554, 110th Cong. (2008) (proposing this approach).

<sup>112</sup> See, e.g., Civil Rights Procedures Protection Act of 2001, H.R. 1489, S. 163, 107th Cong. (2001) (proposing this approach).

of emotional distress, as a condition of employment or retention. For the reasons discussed below, any statute prohibiting enforcement of predispute employment arbitration agreements should adopt the first approach, embodied in the Arbitration Fairness Act of 2009, and invalidate predispute arbitration agreements with respect to any type of employment claim.

A. *The Role of the Public Interest in the Enforcement of Employment Arbitration Agreements*

Bills such as the Preservation of Civil Rights Protections Act of 2008 and the Civil Rights Procedures Protection Act of 2001 focus on federal statutory claims to the exclusion of contract and common law claims.<sup>113</sup> This focus likely arises from, and at a minimum comports with, the principal concern of preventing harms to society, rather than of protecting individual employees.<sup>114</sup> This assertion partly stems from the fact that criticisms of arbitration that are principally, or at least largely, concerned with protecting the individual — concerns with inequality of bargaining power, with market failures such as informational disadvantages, with features of arbitration such as limited discovery and high arbitration fees, and with the purported repeat player phenomenon — have equal force with respect to common law claims as with respect to statutory claims. Therefore, a preoccupation with statutory claims likely reflects the view that these types of claims, unlike common law claims, are of such great importance to society as a whole that special regulation of the arbitration of such claims is warranted.<sup>115</sup>

<sup>113</sup> H.R. 5129, S. 2554, 110th Cong. § 423 (2008); S. 163, H.R. 1489, 107th Cong. (2001).

<sup>114</sup> See Ware, *Voluntary Consent*, *supra* note 13, at 101-02 (asserting that argument that courts should enforce employment arbitration agreements if claim asserted arises from contract but not if claim asserted arises from employment discrimination law “is based on the notion that certain claims have such importance to people who are not parties to the dispute that the freedom of the parties to choose how to resolve their dispute should be restricted to advance the interests of these nonparties”).

<sup>115</sup> See EEOC Policy Statement, *supra* note 14, at II (“Federal civil rights laws, including the laws prohibiting discrimination in employment, play a unique role in American jurisprudence. They flow directly from core Constitutional principles, and this nation’s history testifies to their necessity and profound importance. Any analysis of the mandatory arbitration of rights guaranteed by the employment discrimination laws must, at the outset, be squarely based in an understanding of the history and purpose of these laws.”). For such an argument against allowing arbitration of employment discrimination claims, see Moohr, *supra* note 61, at 420-39 (arguing that strong public policy in favor of eradicating workplace discrimination militates against enforcing predispute employment arbitration agreements).

Even if Congress were solely concerned in regulating employment arbitration with preventing harms to society, legislation prohibiting enforcement of predispute employment arbitration agreements should extend beyond the arbitration of federal statutory claims and include also the arbitration of state tort claims for wrongful discharge in violation of public policy.<sup>116</sup> The basis for the public policy wrongful discharge tort is that, in the words of the *Restatement (Third) of Employment Law*, “certain discharges harm not only the specific employee but also third parties and society as a whole in ways contrary to established norms of public policy. . . . Recognition of this tort forces employers to internalize the costs of the harm they cause, and thereby encourages behavior consistent with those norms.”<sup>117</sup> Public policy, therefore, dictates that an employer should not be allowed to discharge an employee for behavior that furthers an overriding public interest where the discharge would tend to deter furthering that interest.<sup>118</sup> Prototypical examples include a discharge based on the employee’s refusal to engage in conduct that violates the law or insistence on engaging in conduct that is mandated by law.<sup>119</sup>

### 1. California Law

California law governing the enforcement of agreements to arbitrate wrongful discharge claims emphasizes the importance of society’s interests. A seminal wrongful discharge case is *Petermann v. International Brotherhood of Teamsters*,<sup>120</sup> in which the employee alleged that he was terminated because he failed to commit perjury before a committee of the California Assembly.<sup>121</sup> The *Petermann* court

<sup>116</sup> See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 732-33 (1999) (arguing that proper class of inarbitrable claims should be those relating to mandatory legal rules, whether statutory or common law, and class of arbitrable claims should be those relating to default legal rules, whether statutory or common law).

<sup>117</sup> RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 cmt. a (Tentative Draft No. 2, 2009).

<sup>118</sup> See *Petermann v. Int’l Bhd. of Teamsters*, 344 P.2d 25, 27 (Cal. Ct. App. 1959) (concluding that “in order to more fully effectuate the state’s declared policy against perjury, the civil law . . . must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee’s refusal to commit perjury”).

<sup>119</sup> See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02(a), (b) (Tentative Draft No. 2, 2009).

<sup>120</sup> 344 P.2d 25 (Cal. App. 1959).

<sup>121</sup> *Id.* at 26.

held that the employee had sufficiently stated a cause of action.<sup>122</sup> The court reasoned:

The presence of false testimony in any proceeding tends to interfere with the proper administration of public affairs and the administration of justice. It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee . . . on the ground that the employee declined to commit perjury.<sup>123</sup>

Given that society's interests are strongly offended by a wrongful discharge in violation of public policy, society arguably has a particularly strong interest in regulating the terms of any arbitration of public policy wrongful discharge claims.<sup>124</sup>

California law on employment arbitration reflects this broad view on when the law should subject employment arbitration to heightened regulation and scrutiny. In California, the test for whether heightened standards are required for an employment arbitration centers on whether the public interest is implicated. Thus, employment arbitrations adjudicating an unwaivable statutory or common law claim, such as the public policy exception to the at-will doctrine, must satisfy certain heightened requirements to ensure that the employee may effectively vindicate her unwaivable rights in the arbitration.<sup>125</sup>

In *Armendariz v. Foundation Health Psychcare Services, Inc.*,<sup>126</sup> the California Supreme Court held that when an employer imposes an arbitration agreement as a condition of employment, the arbitration of an employee's claims under the California Fair Employment and Housing Act ("FEHA") must meet certain minimum standards to guarantee that the employee can effectively vindicate his statutory rights in the arbitral forum.<sup>127</sup> The *Armendariz* decision set forth four specific requirements. First, the arbitrator must have the authority to award any remedies available under the statute.<sup>128</sup> Second, the

<sup>122</sup> *Id.* at 28.

<sup>123</sup> *Id.* at 27.

<sup>124</sup> Cf. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 cmt. e (Tentative Draft No. 1, 2009) ("The tort of employer retaliation in violation of public policy is available notwithstanding any agreement between an employer and its employees that purports to preclude such claims. This is so because the purpose of the tort is to protect third-party and public interests, not just the particular employee's.").

<sup>125</sup> *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 987 (Cal. 2003).

<sup>126</sup> 6 P.3d 669 (Cal. 2000).

<sup>127</sup> *Id.* at 674.

<sup>128</sup> *Id.* at 682-83.

arbitration process must provide for discovery that is sufficient for the employee to vindicate his statutory claim.<sup>129</sup> Third, the arbitrator must issue a written decision such that the award might be subject to judicial review “sufficient to ensure the arbitrators comply with the requirements of the statute.”<sup>130</sup> And fourth, the employer must “pay all types of costs that are unique to arbitration.”<sup>131</sup>

The *Armendariz* court grounded its holding on the notion that certain statutory rights are unwaivable.<sup>132</sup> For this proposition, the court cited first to California Civil Code section 1668, which provided that contracts to exempt a party from responsibility for “his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.”<sup>133</sup> The court cited also to California Civil Code section 3513, which provided that “[a]nyone may waive the advantage of a law intended solely for his benefit . . . [b]ut a law established for a public reason cannot be contravened by a private agreement.”<sup>134</sup> The court found that the FEHA was enacted to serve a public interest and, therefore, its protections were not waivable.<sup>135</sup> Given that a party could not waive the FEHA’s protections, the court held that any arbitration to adjudicate claims brought under the FEHA must not effect a de facto waiver of such rights.<sup>136</sup> That is, any such arbitration must meet the enunciated minimum standards to ensure that the employee can effectively vindicate his rights in arbitration.

<sup>129</sup> *Id.* at 683-85.

<sup>130</sup> *Id.* at 685 (holding that “in order for such judicial review to be successfully accomplished, an arbitrator in an FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based”).

<sup>131</sup> *Id.* at 689.

<sup>132</sup> *Id.* at 680. More precisely, certain statutory rights are unwaivable pre-dispute. See, e.g., Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 226 (2000) (noting that “the post-dispute arbitration agreement is analogous to a settlement decision”); Stephen J. Ware, *Interstate Arbitration*, in ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT, *supra* note 53, at 88, 114-15 (Edward Brunet et al. eds., 2006) (noting that “[p]ost-dispute settlement agreements are, of course, routinely enforced without any judicial review over how the parties chose to resolve claims arising out of mandatory rules”).

<sup>133</sup> *Armendariz*, 6 P.3d at 680; see also CAL. CIV. CODE § 1668 (West 1985).

<sup>134</sup> *Armendariz*, 6 P.3d at 680; see also CAL. CIV. CODE § 3513 (West 1997).

<sup>135</sup> *Armendariz*, 6 P.3d at 680-81; see also *id.* at 681 (noting that policy against sexual harassment and sex discrimination in employment “inures to the benefit of the public at large rather than to a particular employer or employee” (quoting *Rojo v. Kliger*, 801 P.2d 373, 375-77 (Cal. 1990))).

<sup>136</sup> *Id.* at 681 (commenting that “it is evident that an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA”).



The California Supreme Court later extended the *Armendariz* minimum requirements for arbitration of claims under the FEHA to certain claims of wrongful discharge.<sup>137</sup> In *Little v. Auto Stiegler, Inc.*,<sup>138</sup> the court reasoned that a claim for wrongful discharge in violation of public policy is “almost by definition unwaivable” given that, *inter alia*, the public policy grounding the wrongful discharge claim “must be public in that it affects society at large rather than the individual.”<sup>139</sup> Thus, “[A] legitimate [wrongful discharge in violation of public policy] claim is designed to protect a public interest and therefore cannot be contravened by a private agreement.”<sup>140</sup> Finally, the court reasoned that because the employee may not waive his claim for wrongful termination in violation of public policy, the employer “cannot impose on the arbitration of these claims such burdens or procedural shortcomings as to preclude their vindication.”<sup>141</sup> The court held, therefore, that the arbitration of a claim for wrongful discharge in violation of public policy must satisfy the minimum standards set forth in *Armendariz*.<sup>142</sup>

In sum, under California law, the standards for enforcement of a predispute employment arbitration agreement differ depending on whether the employee’s asserted claim principally implicates the public interest or only private rights.<sup>143</sup> If the former, the arbitration proceeding must meet the heightened standards set forth in *Armendariz*.<sup>144</sup> If the latter, the agreement is merely tested against conscionability standards.<sup>145</sup>

## 2. The Opposing View of the U.S. Court of Appeals for the District of Columbia Circuit

In contrast, the United States Court of Appeals for the District of Columbia Circuit has rejected the argument that the heightened requirements applied under the law of that circuit to employment

<sup>137</sup> *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 987 (Cal. 2003).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (internal quotation marks omitted).

<sup>140</sup> *Id.* (internal quotation marks omitted).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*; see also *id.* at 989 (commenting that “there is no reason under *Armendariz*’s logic to distinguish between unwaivable statutory rights and unwaivable rights derived from common law”).

<sup>143</sup> *Abramson v. Juniper Networks, Inc.*, 9 Cal. Rptr. 3d 422, 431-32 (Ct. App. 2004).

<sup>144</sup> *Id.* at 432.

<sup>145</sup> *Id.*

arbitrations of federal statutory rights should be extended to arbitrations of common law claims rooted in public policy.<sup>146</sup> In *Cole v. Burns International Security Services*,<sup>147</sup> the D.C. Circuit held that an employer may not require an employee to agree to arbitrate his statutory claims as a condition of employment if the arbitration agreement requires the employee to pay any of the arbitrator's fees or expenses.<sup>148</sup> The court reasoned that “[u]nder *Gilmer*, arbitration is supposed to be a reasonable substitute for a judicial forum.” Therefore, “it would undermine Congress’s intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.”<sup>149</sup>

Four years after deciding *Cole*, the D.C. Circuit held in *Brown v. Wheat First Securities, Inc.*<sup>150</sup> that the reasoning of *Cole* should not be extended to cover arbitration of an employee’s public policy-rooted common law claims. In *Brown*, the employee alleged, *inter alia*, that his employer had fired him for alerting the Securities and Exchange Commission to his employer’s alleged illegal activities and, thus, that the employer had wrongfully discharged him in violation of public policy.<sup>151</sup> The employee argued that because he was arbitrating pursuant to an arbitration agreement that was offered as a condition of employment, and because he was pursuing “public law” claims, *Cole* prohibited the arbitrators from assessing arbitration fees against him.<sup>152</sup> In declining to extend *Cole* to common law claims grounded in public policy, the D.C. Circuit remarked that “our central rationale [in *Cole*] — respecting congressional intent — does not extend beyond the statutory context.”<sup>153</sup> The question of past congressional intent, however, is not an impediment to future congressional legislation that would regulate or invalidate predispute employment arbitration agreements relating to certain types of claims. This reasoning in *Brown*, therefore, is irrelevant in considering the optimal scope of a statute prohibiting enforcement of predispute employment arbitration agreements.

<sup>146</sup> *Brown v. Wheat First Sec., Inc.*, 257 F.3d 821, 825 (D.C. Cir. 2001).

<sup>147</sup> 105 F.3d 1465 (D.C. Cir. 1997).

<sup>148</sup> *Id.* at 1485.

<sup>149</sup> *Id.* at 1484.

<sup>150</sup> 257 F.3d 821 (D.C. Cir. 2001).

<sup>151</sup> *Id.* at 823.

<sup>152</sup> *Id.* at 823-24.

<sup>153</sup> *Id.* at 825.

### 3. Drawing a Line Between the Public and Private Interest

The *Brown* court went on to argue that if it were to extend *Cole* to wrongful discharge claims merely because such claims are grounded in public policy, it would be difficult to find any common law claims falling outside of *Cole*'s protections. The court reasoned:

All claims not based on contract — including . . . defamation and tortious interference claims . . . implement values that society has in one way or another thought deserving. Even contract . . . rests ultimately on social decisions to support fulfillment of promises either as a good in itself or as an instrumental good, facilitating people's investment in projects that depend on other's adherence to their promises.<sup>154</sup>

A meaningful line can be drawn, however, between public policy claims and other common law claims such as defamation and tortious interference. The critical issue is not whether the cause of action merely touches upon the public's interest, but whether the cause of action *significantly and directly* "inures to the benefit of the public at large," as in the case of the public policy wrongful discharge claim.<sup>155</sup> This contrasts with causes of action that exist principally to vindicate the particular employee's or employer's private interests, as in the case of a claim of defamation or tortious interference with contract.<sup>156</sup> One California court of appeal framed the test as follows: "An unwaivable

<sup>154</sup> *Id.* at 826; see also Gorman, *supra* note 61, at 642 (arguing that "the distinction between public and private claims is fragile" and positing that contract enforcement rules "serve a larger social objective beyond mere private redress or compensation"); Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 351-52 (1990) (arguing that "virtually every statute and all actions recognized by the common law seek not only to do justice between the parties but also to govern and mold conduct" and, in that sense, even average commercial contract dispute contains element of " 'social' or 'public' interest").

<sup>155</sup> *Foley v. Interactive Data Corp.*, 765 P.2d 373, 379 (Cal. 1988) (refusing to recognize claim for wrongful discharge in violation of public policy deriving from "statute [that] simply regulate[s] conduct between private individuals, or impose[s] requirements whose fulfillment does not implicate fundamental public policy concerns").

<sup>156</sup> See *Fittante v. Palm Springs Motors, Inc.*, 129 Cal. Rptr. 2d 659, 686 (Ct. App. 2003) (extending *Armendariz* to arbitration of claims arising under California Labor Code section 970 because "[r]ules against fraud and abuse by unscrupulous employers inure to the benefit of the public generally, not merely to a particular employer or employee"); cf. *Little v. Auto Stiegler*, 63 P.3d 979, 999 (Cal. 2003) (Brown, J., concurring and dissenting) (criticizing majority's focus on whether claim is waivable or unwaivable in determining applicability of heightened standards for employment arbitration in light of fact that any intentional tort claim is unwaivable under California Civil Code section 1668).

statutory right is one enacted for a public purpose, and may be recognized by the test question, would it contravene public policy to allow the parties to exact a waiver of its protection?"<sup>157</sup> Claims implicating principally a public purpose include those asserted under Title VII, the ADEA, the ADA, the FLSA, and the claim of wrongful discharge in violation of public policy. Indeed, with respect to the public policy wrongful discharge claim, the employee generally must demonstrate that his termination implicates a specific and definite interest beyond those of himself and the employer.<sup>158</sup> Claims implicating principally a private purpose include breach of express or implied contract, breach of the covenant of good faith and fair dealing, negligent or intentional infliction of emotional distress, negligent or intentional misrepresentation, negligent or intentional interference with contract or prospective economic advantage, and defamation.

#### B. *Harmonizing Regulation of Employment Arbitration Agreements with the Goals of Arbitration*

The principal rationale for specially regulating the arbitration of federal statutory employment claims — protecting the public interest, as opposed to protecting the private interests of employees — also extends to the arbitration of public policy wrongful discharge claims.<sup>159</sup> Thus, an arbitration prohibition that includes federal

<sup>157</sup> *Fittante*, 129 Cal.Rptr. 2d at 667.

<sup>158</sup> See *Foley*, 765 P.2d at 380 (“When the duty of an employee to disclose information to his employer serves only the private interest of the employer, the rationale underlying the [wrongful discharge in violation of public policy] cause of action is not implicated.”); RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 402 reporter’s notes, cmt. f (Discussion Draft, 2008) (“In the absence of a whistleblower statute, courts tend to limit whistleblowing protection to situations that implicate an established public policy affecting third parties, as opposed to mere internal misconduct affecting principally the company’s shareholders and managers.”).

<sup>159</sup> One might argue that Congress could sensibly invalidate predispute employment arbitration agreements with respect to federal statutory claims but exclude state public policy wrongful discharge claims from the invalidation because protection of the public interests grounding the state tort should be left to the states. The FAA, however, as it currently exists, forbids states from specially regulating arbitration contracts whenever the FAA applies to the contract. See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (“By enacting § 2 [of the FAA], we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed ‘upon the same footing as other contracts.’” (citation omitted)). States, therefore, are powerless to prohibit enforcement of predispute employment arbitration agreements as they relate to public policy tort claims if the arbitration contract is subject to the FAA. See Haagen, *supra* note 13, at 1046 (concluding that Supreme Court has interpreted FAA in way that has “effectively stripped from the states the ability to regulate the fairness

statutory claims and state common law public policy employment claims, but does not include other contract or common law employment claims, is theoretically defensible. Arguably, when one weighs the virtues of employment arbitration against the need to protect the public interest, the scale tips in favor of invalidating predispute employment arbitration agreements. Conversely, when one separately weighs these same virtues of employment arbitration against the need to protect the private interests of employees, arguably the scale tips in favor of honoring such predispute employment arbitration agreements. The problem with this approach is that such a partial invalidation makes little sense in light of the fact that one of the central goals of employment arbitration is to resolve employment disputes in a timely and economical manner.<sup>160</sup>

Indeed, a principal goal of arbitration generally is to adjudicate disputes in a more timely and cost-efficient manner than typically occurs in civil litigation in court.<sup>161</sup> This is certainly a principal goal of employment arbitration.<sup>162</sup> As noted earlier, the expeditious arbitration of an employment dispute not only can reduce the financial and personal costs of adjudicating the dispute, but can also increase the chances of preserving the relationship between employer and employee.<sup>163</sup>

A statute that renders unenforceable a contract calling for arbitration of federal statutory and state common law public policy

of" predispute agreements to arbitrate); Sternlight, *supra* note 14, at 643, 668 (concluding that after *Casarotto*, "state legislatures will be permitted to protect consumers and others from unfair binding arbitration clauses only to the extent they regulate purely local transactions, or draft legislation that addresses arbitration jointly with other concerns").

<sup>160</sup> Cf. *Allied Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 275 (1995) (interpreting FAA's "involving commerce" language broadly and arguing that "a narrower interpretation is not consistent with the [FAA]'s purpose, for . . . such an interpretation would create a new, unfamiliar test . . . thereby unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it").

<sup>161</sup> Cole, *supra* note 14, at 450 ("The many proponents of arbitration suggest that its value lies primarily in permitting faster, cheaper, and more efficient resolution of disputes."); see also *Allied Bruce Terminix Co.*, 513 U.S. at 277-78 (interpreting FAA's "evidencing a transaction involving commerce" language to mean "commerce in fact" and rejecting "contemplation of the parties" test, as latter test would "risk[] the very kind of costs and delay through litigation (about the circumstances of contract formation) that Congress wrote the [FAA] to help the parties avoid").

<sup>162</sup> See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (commenting that "[a]rbitration agreements allow parties to avoid the costs 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").

<sup>163</sup> See *supra* notes 59-60 and accompanying text.

employment claims, but allows enforcement of a contract calling for arbitration of all other employment law claims, is structurally inconsistent with arbitration's central goal of providing a more timely and less expensive claim adjudication.<sup>164</sup> Such a structure would invite dual adjudications of an employee's claims. The employee's federal statutory and state common law public policy claims could be adjudicated only in court, while all of the employee's other claims could be adjudicated in a separate arbitration. Having such dual adjudications negates any time and cost savings that arbitration of employment law claims might otherwise provide. As a result, the use of employment arbitration would likely be sharply curtailed.<sup>165</sup> An employer that might otherwise wish to arbitrate its employees' arbitrable claims will choose to abandon arbitration to avoid the expense and delays attendant to dual adjudications of an employee's claims. Employers, therefore, should be equally indifferent to a statute invalidating predispute employment arbitration agreements that covers only federal statutory employment claims and one that covers any type of employment claim.

For these reasons, if Congress were to enact a statute prohibiting enforcement of predispute employment arbitration agreements, that prohibition should be universal as to the types of covered employee claims. The question of whether Congress should carve out exceptions from such a statute based on the status of the employee or the size of the employer still remains. The next two parts of this Article discuss the merits of exempting high-level employees and small employers from any legislation invalidating predispute employment arbitration agreements and the mechanics of how best to do so.

<sup>164</sup> See *Adams*, 523 U.S. at 123 (rejecting interpretation of FAA that would have given rise to "the necessity of bifurcation of proceedings in those cases where state law precludes arbitration of certain types of employment claims but not others" and noting that such bifurcation would increase litigation costs to parties).

<sup>165</sup> See Estreicher, *Saturns for Rickshaws*, *supra* note 59, at 562 (arguing that employers would have responded to certain legal uncertainty that would have arisen under narrow construction of § 1 of FAA and "inability to obtain under state law a complete resolution of all of the claims arising in a particular employment dispute, by abandoning employment arbitration entirely").

### III. DISTINGUISHING BETWEEN HIGH-LEVEL EMPLOYEES AND LOW-LEVEL EMPLOYEES FOR THE PURPOSES OF LEGISLATION INVALIDATING PREDISPUTE EMPLOYMENT ARBITRATION AGREEMENTS

#### A. *The Merits of Distinguishing Between High-Level Employees and Low-Level Employees*

A number of the common concerns regarding arbitration arising from predispute employment arbitration agreements do not have equal force across the spectrum of employees. First, compared to low-level employees, high-level employees are more likely to possess greater bargaining leverage, sophistication, and informational advantages in negotiating the terms of any employment agreement with their employer or potential employer.<sup>166</sup> For example, a recent study of CEO employment contracts found that CEOs of S&P 1500 companies “overwhelmingly contract around the at-will default standard of termination.”<sup>167</sup> Consequently, high-level employees are less likely to enter into an arbitration agreement with their employer or potential employer that is grossly unfair to the employee.<sup>168</sup> There is not as

<sup>166</sup> See Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 232, 266 (2006) (reviewing contracts of 375 CEOs of S&P 1500 companies and concluding that these contracts provide “evidence that CEOs have significant bargaining power in their negotiations over the terms of their employment contracts and change in control agreements” and concluding that “the differences between these CEO contracts and those of other corporate workers seem quite stark”); cf. Fitzgibbon, *supra* note 59, at 1424 (proposing that courts take “hands-off” approach to enforcement of arbitration agreements between employer and its high level employee “on the theory that a higher ranking employee has some bargaining power and some choice and likely traded off the right to go to court for other terms” while also proposing that courts “carefully assess the terms of the arbitration agreement in the case of a lower-level employee with no real bargaining power and limited choices even as to other job opportunities”); Michele M. Buse, Comment, *Contracting Employment Disputes out of the Jury System: An Analysis of the Implementation of Binding Arbitration in the Non-Union Workplace and Proposals to Reduce the Harsh Effects of a Non Appealable Award*, 22 PEPP. L. REV. 1485, 1516 (1995) (hypothesizing that predispute employment arbitration agreement between employer and high level employee is less likely to be successfully challenged as contract of adhesion than is similar agreement entered into by low level employee because of high level employee’s greater relative bargaining power); Robert J. Lewton, Comment, *Are Mandatory, Binding Arbitration Requirements a Viable Solution for Employers Seeking to Avoid Litigating Statutory Employment Discrimination Claims?*, 59 ALB. L. REV. 991, 1020-21 (1996) (same).

<sup>167</sup> Schwab & Thomas, *supra* note 166, at 233; see also *id.* at 246.

<sup>168</sup> There is some evidence that high-level employees do better in employment arbitration than do low level employees. See Bingham, *The Repeat Player Effect*, *supra*

much of a concern, therefore, that these high-level employees will bargain away the means to effectively vindicate their statutory and public policy claims against their employers.<sup>169</sup>

Moreover, high-level employees are more likely than low-level employees to be able to afford up front any costs that are unique to arbitration.<sup>170</sup> Critics of predispute employment arbitration agreements worry that such costs, including filing fees and the arbitrator's fees, will deter employees subject to an arbitration agreement from pursuing their claims against their employer.<sup>171</sup> High-level employees, however, who tend to be highly compensated and to have more financially at stake in employment litigation, are less likely to be deterred by such costs from pursuing their employment claims in arbitration.<sup>172</sup>

High-level employees also are less likely than low-level employees to be disadvantaged by the repeat player effect.<sup>173</sup> They are likely to have

note 12, at 211-12 (reporting on her empirical study which found that white collar employees win in arbitration more frequently and recover more of what they demand in arbitration than do blue or pink collar employees). This may reflect greater bargaining power in setting the procedures for arbitration, or it may reflect any number of factors such as the greater likelihood that the white collar employee will have a for cause employment contract. See Bingham, *Adhesive Contracts*, *supra* note 12, at 235 (hypothesizing that highly compensated white collar employees may do better in employment arbitration than blue collar workers because they are more likely to be able to negotiate fixed term of employment or other employment protections).

<sup>169</sup> Cf. Gorman, *supra* note 61, at 650 (suggesting that employee's lower level status should be relevant to enforceability of predispute employment arbitration agreement entered into by employee).

<sup>170</sup> See Schwab & Thomas, *supra* note 166, at 244, 267 (noting that average CEO in their empirical study of employment contracts for CEOs of S&P 1500 companies "earns a base salary of \$643,212" and that "[m]ean total compensation is \$1.65 million").

<sup>171</sup> See *supra* notes 68-70 and accompanying text.

<sup>172</sup> *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 665 (6th Cir. 2003) (discussing how cost splitting provision in employment arbitration agreement may be enforceable against high level managerial employee but not against other employees given that "in many cases, . . . high level managerial employees and others with substantial means can afford the costs of arbitration"); see also *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 699 (Cal. 2000) (Brown, J., concurring) (criticizing majority for ignoring fact that "[n]ot all arbitrations are costly, and not all employees are unable to afford the unique costs of arbitration [and thus] the imposition of some arbitral costs does not deter or discourage employees from pursuing their statutory claims in every case").

<sup>173</sup> For a discussion of the repeat player effect, see *supra* notes 75-81 and accompanying text.



higher-value claims.<sup>174</sup> Consequently, they are more likely to be able to obtain competent counsel to represent them in pursuing those claims.<sup>175</sup> The participation of an experienced plaintiff's employment lawyer will militate against a repeat-player advantage in arbitration, which the employer might otherwise enjoy.<sup>176</sup> Experienced plaintiff's counsel will tend to be familiar with a roster of potential employment arbitrators, or at least will tend to realize the value of becoming so familiar. Consequently, plaintiff's counsel will be able to strategically select arbitrators. Moreover, for that reason, arbitrators will tend to view plaintiff's counsel as a potential source of future employment just as they might view a repeat player employer as a potential source of future employment.

Finally, a statute that prohibits enforcement of predispute employment arbitration agreements containing an exception based on

<sup>174</sup> Estreicher, *Saturns for Rickshaws*, *supra* note 59, at 563 ("The people who benefit under a litigation-based system are those whose salaries are high enough to warrant the costs and risks of a law suit undertaken by competent counsel.").

<sup>175</sup> *See id.*; *cf.* Fitzgibbon, *supra* note 59, at 1412 (asserting that "[l]ower wage earners also are likely to have difficulty finding an attorney to represent them because attorneys simply cannot afford to take to court cases with only a small potential for recovery" but speculating that "[a]ttorneys may be more willing to represent employees in arbitration" because it is less expensive to bring arbitrated case to hearing); Maltby, *supra* note 63, at 57 (noting that "[e]ven if the [employee] has clearly been wronged and is virtually certain to prevail in court, the attorney will be forced to turn down the case unless there are substantial damages"); St. Antoine, *supra* note 1, at 791-92 (positing that some workers with meritorious but low value employment claim will be unable to obtain first rate lawyer to represent them because potential dollar recovery would not justify that lawyer's investment of time and money in case).

<sup>176</sup> *See* Colvin, *supra* note 12, at 431, 433-34 (speculating that "[a] factor that should reduce the likelihood of a repeat employer arbitrator effect emerging is the potential role of plaintiff's counsel as a repeat player in the system," and concluding from his own empirical study that "win rate for unrepresented employees whose cases are decided by arbitrators who are involved in multiple arbitration cases with that same employer is strikingly low and raises particular concerns about the danger of repeat player bias for the more vulnerable employee who does not have representation by counsel"); Estreicher, *Saturns for Rickshaws*, *supra* note 59, at 566 (arguing with respect to repeat player effect that "the emergence of an organized plaintiff's bar, in the form of the National Employment Lawyers Association, should drive down considerably any claimed systematic advantage for employers"); Galanter, *supra* note 75, at 118 (concluding that "[t]he existence of a specialized bar on the [one-shot player] side should overcome the gap in expertise" between repeat players and one-shot players, but also concluding that existence of such specialized bar would not overcome other "fundamental strategic advantages of [repeat players] — their capacity to structure the transaction, play the odds, and influence rule development and enforcement policy"); St. Antoine, *supra* note 1, at 789 (asserting that "the repeat-player effect will diminish with the increasing growth of a plaintiff's claimants bar").

the status of the employee will safeguard the public interest function of employment litigation — principally, promoting the elimination of invidious employment discrimination. Under such a prohibition, the vast majority of all employment discrimination claims that are adjudicated will be litigated in court. Such litigation will greatly serve the general deterrence, law development, and norm development and reinforcement functions that concern critics of employment arbitration.<sup>177</sup>

Thus, several of the purported drawbacks of arbitration arising from a predispute employment arbitration agreement are minimized in the context of a dispute between an employer and a high-level employee. Further, several of the benefits of employment arbitration are most pronounced in this context. A high-level employee is relatively more likely to be the type of employee with whom the employer would especially wish to salvage a beneficial employment relationship. Further, litigation with a high-level employee has a relatively greater likelihood of seriously disrupting the workplace and exacting an emotional toll on fellow employees.<sup>178</sup> This type of litigation also is relatively more likely to involve sensitive or confidential information that the employer, the employee, and coworkers would like to keep private.<sup>179</sup> Thus, employers, employee disputants, and coworkers should especially prize the speedy and private resolution of this type of dispute.<sup>180</sup>

In sum, high-level employees are less likely, compared to low-level employees, to be disadvantaged by arbitration arising from predispute employment arbitration agreements, and employers should most

<sup>177</sup> See *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 32 (1991); Gorman, *supra* note 61, at 668-69 (dismissing concerns that employment arbitration will retard development of employment discrimination law given that court decisions will comprise majority of adversary dispositions of employment discrimination claims); St. Antoine, *supra* note 1, at 789 (commenting that “[t]he notion that the use of arbitration will inhibit the development of a body of judicial doctrine on workplace discrimination seems highly suspect in light of the very large caseload of the federal courts in this area”).

<sup>178</sup> See Yarkon, *supra* note 60, at 171 n.30 (noting that “the cost of such interruptions [to the workplace caused by depositions attendant to employment litigation] is particularly high in the case of managers”).

<sup>179</sup> See Schwab & Thomas, *supra* note 166, at 238 (noting that employers would view arbitration clause in CEO employment contract as desirable “to keep matters private, and thereby avoid adverse publicity over a messy termination and possible public litigation”).

<sup>180</sup> See *id.* at 258 (concluding from review of 375 CEO contracts that “[e]ven CEOs, who are generally employees with considerable bargaining power, seem willing to bind themselves to arbitrate contractual disputes”).

highly value arbitration when the disputant is a high-level employee. Therefore, even if Congress proscribes enforcement of predispute arbitration agreements as they relate to all types of employment law claims, Congress should carve out an exception from the prohibition for certain high-level employees.<sup>181</sup>

*B. How Best to Distinguish Between High-Level Employees and Low-Level Employees*

In considering how best to structure an exception for high-level employees to a prohibition on enforcement of predispute employment arbitration agreements, several considerations are paramount. Of primary importance, the exception should be crafted to minimize litigation over who qualifies for the exception. An arbitration gatekeeping standard that breeds litigation would conflict with the central goal of arbitration — expeditious adjudication of the dispute that will save the disputants both time and money.<sup>182</sup>

Thus, in a way that minimizes litigation, the exception first should separate out the employees who are most likely to have sufficient bargaining leverage and sophistication as well as sufficient financial resources that they will be able to effectively bargain with their employer for a procedurally fair arbitration and afford any costs unique to arbitration. Second, the exception should separate out the employees with whom employers would most desire to have an arbitration agreement. These should be the employees who are most critical to the success of their employer's business such that the employer would want to maximize the possibility of maintaining a beneficial employment relationship with the employee and to minimize the possibility of disruption to the business that would be caused by protracted and public litigation with the employee. Finally, the size of the class of employees falling within the exception should be such as to have no more than a de minimus effect on the public goals that animate employment discrimination litigation. These goals include deterrence of invidious discrimination, development of the law of employment discrimination, and norm development and reinforcement with respect to the discrimination ban.

Congress has distinguished between high-level and low-level employees in several federal employment statutes. This Article's

<sup>181</sup> Cf. Speidel, *supra* note 1, at 1093 (proposing reforms to govern arbitration agreement in adhesion contract between employer and employee and defining employee to exclude "an executive officer of a corporation").

<sup>182</sup> See *supra* notes 54-61 and accompanying text.

proposed exemption borrows concepts from three of these statutes: the ADEA's exemptions for "bona fide executives" and "high policymaking employees"; the FMLA's exemption concerning "highly compensated" employees; and the NLRA's exclusion of "supervisors." One virtue of borrowing concepts from existing statutes is that there is an accompanying existing body of case law that elaborates on the meaning and application of the borrowed concepts. This should reduce uncertainty and litigation arising from a new standard. This Article discusses each of these existing standards below, before turning to the details of the proposed exclusion.

### 1. The ADEA's Exemption for "Bona Fide Executives" and "High Policymaking Employees"

The ADEA prohibits employment discrimination on the basis of age against persons who are at least forty years old.<sup>183</sup> This legislation provides a narrow exception to the discrimination prohibition for certain "bona fide executives" and "high policymaking employees." Section 12(c) of the ADEA provides:

Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee which equals, in the aggregate, at least \$44,000.<sup>184</sup>

Section 12(c)'s legislative history suggests that Congress added the bona fide executive and high policymaking employee exemptions because of "concerns . . . regarding the impact that the elimination of

<sup>183</sup> 29 U.S.C. §§ 623(a), 631(a) (2000).

<sup>184</sup> 29 U.S.C. § 631(c)(1). The employer that would be free to force such an employee to retire at or after the age of 65 may instead retain the employee in a lesser or part-time status. 29 C.F.R. § 1625.12(c) (1988); see *Koprowski v. Wistar Inst. of Anatomy and Biology*, 819 F. Supp. 410, 414 (E.D. Pa. 1992). The employer, however, may not otherwise treat the employee less favorably than a younger employee on account of his age. 29 C.F.R. § 1625.12(c). If the employee holds more than one position with the employer in the two years immediately prior to retirement, each position must be a bona fide executive or high policymaking position for the exemption to apply. 29 C.F.R. § 1625.12(f).

mandatory retirement would have on the ability of employers to assure promotional opportunities for younger workers.”<sup>185</sup>

The Equal Employment Opportunity Commission’s (“EEOC”) interpretive regulations elaborate on both the bona fide executive and high policymaking employee exceptions.<sup>186</sup> With respect to the bona fide executive exemption, the regulations provide that in order for the employer to show that its employee qualifies as a “bona fide executive,” the employer must first show that the employee meets the definition of a bona fide executive set out in the regulations for the FLSA.<sup>187</sup> The employer further must show that the employee is not a

<sup>185</sup> S. REP. NO. 95-493, at 7 (1977), as reprinted in 1978 U.S.C.C.A.N 504, 510; cf. *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1325 (S.D.N.Y. 1983), *aff’d*, 742 F.2d 724 (2d Cir. 1984) (suggesting that rationale for high policymaking employee exemption was “the importance of avoiding staleness in the formulation of policy”).

<sup>186</sup> See generally 29 C.F.R. § 1625.12 (2009).

<sup>187</sup> *Id.* § 1625.12(d)(1). The EEOC’s regulations on the section 12(c) exemption expressly refer to and incorporate “the definition of a bona fide executive set forth in § 541.1 of [29 C.F.R.]” *Id.* 29 C.F.R. § 541.1 used to contain the FLSA’s definition of a bona fide executive and used to provide that a bona fide executive is an employee:

- (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and
- (b) Who customarily and regularly directs the work of two or more other employees therein; and
- (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
- (d) Who customarily and regularly exercises discretionary powers; and
- (e) Who does not devote more than 20 percent, or in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: Provided, that this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20 percent interest in the enterprise in which he is employed. . . .

29 C.F.R. § 541.1 (1973) (repealed 2004). Section 541 was revised, however, effective August 23, 2004, so that section 541.1 no longer contains a definition of “bona fide executive.” See 69 Fed. Reg. 22122-01 (Apr. 23, 2004). The definition of “bona fide executive” contained in the revised FLSA regulations differs significantly from the definition contained in the former regulations, but essentially retains the elements

mere “middle-management employee[]” but rather is a “top level employee[] who exercise[s] substantial executive authority over a significant number of employees and a large volume of business.”<sup>188</sup> Thus, the regulations suggest that the head of a major legal department, for example, may qualify as a bona fide executive.<sup>189</sup> One court, however, held that an employer’s chief labor counsel was not a bona fide executive after finding that he “had little executive responsibility,” but rather “was primarily an attorney doing legal work, giving legal advice, giving attention to the effect of statutes, regulations and administrative action upon company practices, and attending to litigation.”<sup>190</sup>

With respect to the high policymaking position exemption, the exemption is limited to certain top level employees “who have little or no line authority but whose position and responsibility are such that

contained in former section 541.1(a)-(c). See 29 C.F.R. § 541.100 (2009).

<sup>188</sup> 29 C.F.R. § 1625.12(d)(2). The regulations adopt and quote from the legislative history of the exception:

“Typically, the head of a significant and substantial local or regional operation of a corporation [or other business organization], such as a major production facility or retail establishment, but not the head of a minor branch, warehouse or retail store, would be covered by the term ‘bona fide executive.’ Individuals at higher levels in the corporate organizational structure who possess comparable or greater levels of responsibility and authority as measured by established and recognized criteria would also be covered.

. . . With respect to employees whose duties are associated with corporate headquarters operations, such as finance, marketing, legal, production and manufacturing (or in a corporation organized on a product line basis, the management of product lines), the definition would cover employees who head those divisions.”

*Id.* (quoting H.R. REP. NO. 95-950, at 9 (1978) (Conf. Rep.)).

The Conference Report and regulations also make clear that the immediate subordinates of division heads fall within the exemption provided that they “possess responsibility which is comparable to or greater than that possessed by the head of a significant and substantial local operation who meets the definition.” *Id.*

<sup>189</sup> 29 C.F.R. § 1625.12(d)(2); see also *Breckenridge v. Bristol-Myers Co.*, 43 Fair Empl. Prac. Cas. (BNA) 1011, 1013 (S.D. Ind. 1987) (concluding that “in light of [employee’s] position as head of the Mead Johnson Legal Department, plaintiff falls within the ADEA exemption for holders of bona fide executive positions”).

<sup>190</sup> *Whittlesey*, 567 F. Supp. at 1322, 1323. Nor was the in house lawyer a high policymaker where the court found that although his work “extended beyond mere interpretation of legal requirements and did touch on questions of policy, he was not looked to for significant contributions to the formulation of policy” at the company, nor did he have “access to the high policy making levels of management.” *Id.* at 1322, 1324.

they play a significant role in the development of corporate policy and effectively recommend the implementation thereof.”<sup>191</sup> Thus, an employee who does not meet the definition of a bona fide executive under the FLSA regulations may still qualify for the section 12(c) exemption if he plays a significant role as a policymaker.<sup>192</sup> The regulations cite as an example an employer’s chief economist or chief scientist charged with the responsibility of developing and recommending “policy direction” to the employer’s top management and who “would have a significant impact on the ultimate decision on such policies by virtue of his expertise and direct access to the decisionmakers.”<sup>193</sup> Accordingly, where the employee was an executive vice president for corporate affairs who “had direct access to the [employer’s] top decisionmakers, . . . was responsible for evaluating significant legislative and regulatory trends and issues and working with legislators on these issues, and . . . recommended policy on acquisitions and mergers, capitalization, and other areas of importance” to the employer, one court found that the employee qualified as a high policymaker.<sup>194</sup>

It is notable that courts generally consider an employee’s salary relative to the salaries of the employer’s other employees a relevant and often important factor in deciding whether the employee is a bona fide executive or holds a high policymaking position under section 12(c).<sup>195</sup> Courts view the employee’s relative salary as an important

<sup>191</sup> 29 C.F.R. § 1625.12(e) (quoting H.R. REP. NO. 95-950, at 10 (1978) (Conf. Rep.)).

<sup>192</sup> *Breckenridge*, 43 Fair Empl. Prac. Cas. (BNA) at 1017.

<sup>193</sup> 29 C.F.R. § 1625.12(e). The regulations make clear that the high policymaking employee’s support staff would not qualify for the exemption regardless of whether the support staff member drafted policy recommendations or supervised the development of such recommendations. *Id.*

<sup>194</sup> *Morrissey v. Boston Five Cents Sav. Bank*, 54 F.3d 27, 33 (1st Cir. 1995) (quoting district court).

<sup>195</sup> *See id.* at 29 (noting that ADEA plaintiff and asserted high policymaker was employer’s fifth highest paid employee); *Passer v. Am. Chemical Soc’y*, 935 F.2d 322, 328 (D.C. Cir. 1991) (noting that ADEA plaintiff’s “salary ranked him as [the employer]’s tenth highest paid employee out of a total work force of 1,900” and concluding based in part on this fact that employee was bona fide executive for purposes of section 12(c) exemption); *Colby v. Graniteville Co.*, 635 F. Supp. 381, 385 (S.D.N.Y. 1986) (“[T]he level of compensation . . . is one of a number of factors to consider [in determining whether the employee is a bona fide executive] especially where . . . high pay is accompanied by perquisites of office limited to a few individuals.”); *Whittlesey*, 567 F. Supp. at 1322, 1326 (“[H]igh or low pay can be relevant, and often compelling evidence, as to an employee’s executive or policymaking importance.”); *Breckenridge*, 43 Fair Empl. Prac. Cas. (BNA) at 1015 (citing as factor in support of its finding that plaintiff was bona fide executive under section 12(c) that “[h]e was highly compensated, especially in comparison to others at

factor because it often speaks to the importance that the employer places on the employee's job.<sup>196</sup> Salary, however, is less important in the calculus than other factors that speak more directly to the employee's job functions and responsibilities.<sup>197</sup> According to one court: "High pay is not determinative as to whether a position comes within the bona fide executive or high policymaker exemption. The test is one of function, not of pay."<sup>198</sup>

The ADEA's bona fide executive and high policymaking employee are precisely the types of employee that should be exempt from any legislation prohibiting enforcement of predispute employment arbitration agreements. They are, by definition, critical employees who play a key role in the planning or operation of the employer's business. Further, they very likely possess both bargaining leverage and sophistication sufficient to protect themselves from being bullied by their employer into a fundamentally unfair employment arbitration process.

Unfortunately, the guidelines in the EEOC's regulations for determining who qualifies as a bona fide executive or high policymaking employee are too uncertain to serve as a gatekeeping standard for arbitration. As set forth below, this Article seeks to implement the concept of a bona fide executive or high policymaking employee by means of a gross but more certain approximation. Borrowing from the case law interpreting the ADEA's section 12(c) exemption, the proposed exemption relies heavily on the employee's compensation as a proxy for the employee's importance to his employer as well as his sophistication and bargaining leverage. The FMLA's exemption for "certain highly compensated employees"<sup>199</sup> from its reinstatement requirement is informative.

[the employer] and in comparison to his subordinates in [his d]epartment, and had perquisites available only to a few persons").

<sup>196</sup> *Whittlesey*, 567 F. Supp. at 1322, 1326-27 ("The salary accorded to [plaintiff's] position no doubt measures the importance of that function to [the employer].")

<sup>197</sup> *See Colby*, 635 F. Supp. at 385 (finding that for purposes of court's determining whether plaintiff was bona fide executive within purview of section 12(c), nature of employee's job responsibilities were "[o]f even more compelling force" than level of employee's compensation); *Whittlesey*, 567 F. Supp. at 1322, 1326 27 (employee's salary, while "relevant, and often compelling" piece of evidence for court to consider "does not measure whether the attributes and responsibilities of the position involve executive or high policymaking functions").

<sup>198</sup> *Whittlesey*, 567 F. Supp. at 1322, 1326.

<sup>199</sup> *See* 29 U.S.C. § 2614(b) (2006).



## 2. The FMLA's Exemption Concerning Certain Highly Compensated Employees

The FMLA provides that “an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period” to care for the employee’s newborn child or adjust after the placement with the employee of a newly adopted child. Additionally, employees are entitled to this leave to care for the employee’s spouse, child, or parent if this relative “has a serious health condition,” or because of the employee’s own “serious health condition that makes the employee unable to perform the functions of the [employee’s] position.”<sup>200</sup> The FMLA protects an employee who exercises his right to take FMLA leave by providing that when the employee returns from leave, he is entitled to be restored to his former or an equivalent position with equivalent pay and benefits.<sup>201</sup> The employer may deny “certain highly compensated employees” such restoration, however, if “such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer.”<sup>202</sup>

The FMLA defines a “highly compensated employee” for the purposes of the restoration exemption as “a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.”<sup>203</sup> Thus, the FMLA’s definition of a highly compensated employee enables a court to determine that an employee falls outside the bounds of the reinstatement exemption with near mathematical precision. For this reason, this Article’s proposed exemption from a statute prohibiting enforcement of predispute employment arbitration agreements borrows and modifies the FMLA’s “highly compensated

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<sup>200</sup> *Id.* § 2612(a)(1)(C), (D) (2006).

<sup>201</sup> *Id.* § 2614(a)(1)(A), (B).

<sup>202</sup> *Id.* § 2614(b)(1)(A); *see also* 29 C.F.R. § 825.216(c) (2009). The employer must notify the employee of its intent to deny restoration as soon as the employer determines that restoration would cause such injury. 29 U.S.C. § 2614(b)(1)(B). The Department of Labor’s regulations implementing this section of the FMLA emphasize that the restoration of the employee to employment, rather than the absence of the employee from her employment, must be the cause of the substantial and grievous economic injury. 29 C.F.R. § 825.218(a) (2009).

<sup>203</sup> 29 U.S.C. § 2614(b)(2); *see also* 29 C.F.R. § 825.217(a) (2009). The Department of Labor’s regulations implementing this provision of the FMLA provide that the determination of whether or not an employee is among the highest paid 10 percent of the employees employed within 75 miles of the employee’s worksite “shall be made at the time the employee gives notice of the need for leave.” 29 C.F.R. § 825.217(c)(2).

employee” test as a means to help approximate the concept of a bona fide executive or high policymaking employee.

The second part of the FMLA’s reinstatement exemption, the “grievous economic injury” test, is less exact. The Department of Labor’s regulations implementing this section of the FMLA elaborate on the meaning of “substantial and grievous economic injury.” The regulations provide:

If the reinstatement of a “key employee” threatens the economic viability of the firm, that would constitute “substantial and grievous economic injury.” A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute “substantial and grievous economic injury.”<sup>204</sup>

The FMLA regulations and case law suggest that an employer can demonstrate that it would suffer substantial and grievous economic injury if it were required to reinstate a highly compensated employee even if the employee does not play any role in the development of corporate policy. Rather, the critical factor appears to be whether the employee played a key role in the successful operation of the employer’s business and, thus, whether permanent replacement of the employee during his or her absence is unavoidable.<sup>205</sup> Thus, one district court found that a hotel’s executive housekeeper, who was responsible for supervising the hotel’s other housekeepers, qualified

<sup>204</sup> 29 C.F.R. § 825.218(c).

<sup>205</sup> See *Kephart v. Cherokee County*, 52 F. Supp. 2d 607, 610 11 (W.D.N.C. 1999), *rev’d on other grounds*, 229 F.3d 1142 (4th Cir. 2000) (focusing on county employer’s need to get tax bills out on time, plaintiff employee’s critical role in this process, and difficulties that would be caused if county employer hired temporary assessor to fill in for plaintiff while he was on FMLA leave); 29 C.F.R. § 825.218(b) (“If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration.”). The regulations and cases make clear that the critical issue is whether *restoration* itself would cause substantial and grievous economic injury, rather than whether the employee’s *absence* would do so. See *O’Grady v. Catholic Health Partners Serv.*, No. 00 C 7144, 2002 WL 221583, at \*7 (N.D. Ill. Feb. 13, 2002); 29 C.F.R. § 825.218(a). The extent of injury caused by the employee’s absence is surely relevant, however, to whether permanent replacement is unavoidable. See *Kephart*, 52 F. Supp. 2d at 611 (noting in finding that employer had demonstrated that reinstatement would cause it substantial and grievous economic injury that “the Plaintiff could not have chosen, had he done so, a more inconvenient time for medical leave”).

for the FMLA's reinstatement exclusion.<sup>206</sup> The court based this conclusion principally on the finding that "it is important for [the viability of the defendant employer's] hotel[] to have rooms properly cleaned and available on a timely basis for [its] guests."<sup>207</sup> The court further found that the employer had "made an educated business decision" when it decided to permanently replace the plaintiff while she was on leave, and could not afford to retain both the plaintiff and her permanent replacement as executive housekeepers at their full salaries.<sup>208</sup>

To the extent that the "grievous economic injury" test focuses on the employee's key role in the operation of the employer's business, the concept might be helpful in identifying the type of employee who should be exempted from the protections of a statute invalidating predispute employment arbitration agreements. The test is too ambiguous, however, to serve a gatekeeping function in arbitration. Indeed, the regulations implementing the FMLA evidence the uncertainty arising from the substantial and grievous economic injury test, conceding that "[a] precise test cannot be set for the level of hardship or injury to the employer which must be sustained."<sup>209</sup> A more precise test is exactly what is needed, however, to screen out employees from the prohibition on enforcement of predispute employment arbitration agreements. For that greater precision, this Article's proposal borrows from the FMLA's highly compensated employee test, discussed above, and the NLRA's more objective exclusion of "supervisors" from its collective bargaining protections, discussed next.

### 3. The NLRA's Exclusion of "Supervisors"

The NLRA provides employees with the right to self-organization and the right to engage in collective bargaining free from interference by an employer.<sup>210</sup> It further provides that for the purposes of these rights, the term "employee" shall not include "any individual

<sup>206</sup> See *Oby v. Baton Rouge Marriott*, 329 F. Supp. 2d 772, 782-83 (M.D. La. 2004).

<sup>207</sup> *Id.* at 776 n.10; see also *id.* at 783 (citing as evidence that employer would suffer substantial and grievous economic harm from reinstating employee "undisputed evidence . . . that plaintiff was relied upon as the Executive Housekeeper . . . to keep the facilities clean and [the] customers happy"); *id.* at 787 (stating defendant employer had to replace plaintiff employee "or the continued successful operation and viability of the [defendant employer's hotel] would be questionable").

<sup>208</sup> *Id.* at 783, 787.

<sup>209</sup> 29 C.F.R. § 825.218(c).

<sup>210</sup> 29 U.S.C. §§ 157, 158(a) (2006).

employed as a supervisor.”<sup>211</sup> Section 152 of the NLRA presents a twelve-factor definition identifying a “supervisor” as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.<sup>212</sup>

Congress intended for this definition of “supervisor” to distinguish between employees with minor supervisory duties and those supervisors traditionally regarded as part of management.<sup>213</sup> The latter are those “vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action” and, therefore, owe management their undivided loyalty.<sup>214</sup> Indeed:

Congress wanted to ensure that employers would not be deprived of the undivided loyalty of their supervisory foremen. Congress was concerned that if supervisors were allowed to affiliate with labor organizations that represented the rank and file, they might become accountable to the workers, thus, interfering with the supervisors’ ability to discipline and control the employees in the interest of the employer.<sup>215</sup>

<sup>211</sup> *Id.* § 152(3) (2006).

<sup>212</sup> *Id.* § 152(11).

<sup>213</sup> *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 589 (1994) (Ginsburg, J., dissenting); S. REP. NO. 105, at 4 5 (1947).

<sup>214</sup> *Health Care & Retirement Corp.*, 511 U.S. at 589.

<sup>215</sup> *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 695 (1980) (Brennan, J., dissenting); H.R. REP. NO. 245, at 14 (1947). Congress also “sought to protect the rank and file employees from being unduly influenced in their selection of leaders by the presence of management representatives in their union.” *Yeshiva Univ.*, 444 U.S. at 695.

By judicial decision, “managerial employees” also are excluded from the NLRA’s self organization and collective bargaining protections. *Health Care & Retirement Corp.*, 511 U.S. at 576-77; *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, 289 (1974). The Supreme Court has defined “managerial employees” as “those who ‘formulate and effectuate management policies by expressing and making operative the decisions of their employer.’” *Bell Aerospace Co.*, 416 U.S. at 288. A managerial employee must be aligned with management. *Yeshiva Univ.*, 444 U.S. at 683. The Court has elaborated that “[o]nly if an employee’s activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with

The NLRA's "supervisor" test is broader than the employee exclusion appropriate for a statute invalidating predispute employment arbitration agreements. Too many employees who would meet the NLRA supervisor test would nevertheless lack the bargaining leverage and sophistication needed to effectively bargain with their employer over the terms of an arbitration agreement. In addition, too many NLRA supervisors with modest financial resources might be deterred from asserting their claims in arbitration by the costs unique to arbitration. Finally, the class of NLRA supervisors seems too large and too removed from upper management to exempt the class from a prohibition on enforcement of predispute employment arbitration agreements if a purpose of the prohibition is to safeguard the public goals of employment discrimination litigation.<sup>216</sup> If the criticisms of employment arbitration relating to the public goals of employment discrimination litigation have any force, then a statute invalidating predispute employment arbitration agreements but nevertheless permitting removal of any supervisor's discrimination claims from the public courts is too narrow.

These objections to using the NLRA supervisor test to exempt employees from a statute invalidating predispute employment arbitration agreements lose their force, however, when the supervisor test is combined with a stringent compensation standard, such as the FMLA's highly compensated employee test. The NLRA supervisor test then becomes useful for the proposed exemption, so long as the test is modified to remove several ambiguous criteria. Specifically, the last two of the twelve factors set out in the NLRA definition of supervisor

management." *Id.* at 690. Moreover, "normally, an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *Id.* at 683. Thus, for example, the Supreme Court has held that the faculty of a university were managerial employees where the faculty exercised absolute authority in academic matters including determining course offerings, teaching methods, grading policies, and matriculation standards. *Id.* at 686. "To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served." *Id.*

The managerial employee exception grows out of the same concern as the supervisory employee exception: Both exceptions are grounded in the belief that the "employer is entitled to the undivided loyalty of its representatives." *Id.* at 682; see also *id.* at 695 (Brennan, J., dissenting) (stating that "[i]dentical considerations underlie the exclusion of managerial employees" and supervisory employees). The managerial exception, however, like the ADEA's bona fide executive and high policymaking employee exceptions, seems insufficiently objective to serve as a gatekeeping standard for arbitration.

<sup>216</sup> See *infra* notes 88-103 and accompanying text.

— “responsibly to direct them, or to adjust their grievances” — seem too amorphous to be appropriate for an arbitration gatekeeping standard.<sup>217</sup> Accordingly, these two factors should be excluded from any proposed arbitration gatekeeping standard.

In addition, the use of the term “independent judgment” in the NLRA’s supervisor test gives rise to ambiguity.<sup>218</sup> In particular, it is unclear how much discretion or independent judgment will suffice to support a finding that the employee acted as a supervisor.<sup>219</sup> Thus, any exemption should not include this prong of the NLRA supervisor test. The deletion, however, could potentially render the exemption too broad. As the Supreme Court has noted, “Many nominally supervisory functions may be performed without the exercise of such a degree of . . . judgment or discretion . . . as would warrant a finding of supervisory status under the [NLRA].”<sup>220</sup> Thus, when the employer has issued detailed orders to the employee with respect to the exercise of a nominally supervisory function, the employee is less likely to be exercising sufficient “independent judgment” to qualify for the NLRA supervisory exemption.<sup>221</sup> Combining the NLRA supervisor test with a high compensation standard, however, alleviates this concern. In effect, this Article’s proposed exemption utilizes the employee’s high compensation as a proxy for independent judgment. This Article turns now to a discussion of the details of the proposed exemption for

<sup>217</sup> See *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 726 (2001) (Stevens, J., dissenting) (commenting that term “responsibly to direct” is ambiguous); *Health Care & Retirement Corp.*, 511 U.S. at 579 (agreeing with National Labor Relations Board’s assertion that “phrases in [29 U.S.C.] § [15]2(11) such as ‘independent judgment’ and ‘responsibly to direct’ are ambiguous”); *id.* at 585 (Ginsburg, J., dissenting) (noting that “[i]f the term ‘supervisor’ is construed broadly, to reach everyone with any authority to use ‘independent judgment’ to assign and ‘responsibly . . . direct’ the work of other employees, then most professionals would be supervisors, for most have some authority to assign and direct others’ work,” but such broad exclusion would be inconsistent with Congress’s inclusion of professionals within NLRA’s protections). *But see Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 690-92 (2006) (attempting to clarify National Labor Relations Board’s interpretation of definition of “responsibly to direct” as that term is set forth in section 2(11) of NLRA).

<sup>218</sup> *Ky. River Cmty. Care, Inc.*, 532 U.S. at 713; *id.* at 725 (Stevens, J., dissenting) (commenting that “[t]he term ‘independent judgment’ is indisputably ambiguous”). *But see Oakwood Healthcare*, 348 N.L.R.B. at 692-94 (attempting to clarify National Labor Relations Board’s interpretation of definition of “independent judgment” as that term is set forth in section 2(11) of NLRA).

<sup>219</sup> *Ky. River Cmty. Care, Inc.*, 532 U.S. at 713 (“[I]t is certainly true that the statutory term ‘independent judgment’ is ambiguous with respect to the degree of discretion required for supervisory status.”).

<sup>220</sup> *Id.* (internal quotations omitted).

<sup>221</sup> *Id.* at 713-14.

distinguishing sufficiently high-level employees for the purposes of exempting these employees from legislation invalidating predispute employment arbitration agreements.

4. A Proposal to Distinguish High-Level Employees for the Purpose of Exempting Such Employees from Any Legislation Invalidating Predispute Employment Arbitration Agreements

This Article's proposed exemption for key employees from a statute prohibiting enforcement of predispute employment arbitration agreements has five elements. First, an employer would be able to *designate* certain employees as exempt from such a prohibition. As detailed below, under the proposed exemption, the employer would be able to irrefutably designate certain employees from a small class as exempt, and rebuttably designate certain other employees from a larger but still limited class as exempt. In total, the employer would be able to designate up to ten percent of its employees as exempt. This element exempts from the prohibition those employees who are most critical to the employer, similar to the ADEA's exemptions for bona fide executives and high policymaking employees.<sup>222</sup> Presumably, the employer knows best which of its employees are most important. The proposed exemption, therefore, would allow the employer to decide for itself who its most key employees are among those in a limited group.

Second, an employer would be able to designate a certain employee as exempt only if that employee is among the highest paid twenty percent of the employees employed by the employer within seventy-five miles of the facility at which the employee is employed. The proposed exemption uses the employee's high compensation as a proxy for his importance to the employer, to help ensure that the employer designates only those employees who are its key employees, as opposed to those employees against whom the employer might most like to discriminate. The proposed exemption also uses the employee's high compensation as a proxy for sufficient employee bargaining power and sophistication, to help ensure that the exemption does not undermine the concerns that ground the prohibition on enforcement of predispute employment arbitration agreements in the first place. Finally, relating salary to the universe of employees within seventy-five miles of the employee's worksite controls for cost-of-living distortions in compensation. This element recognizes that an employer may pay an employee employed in New York City more than it pays its more critical employee employed in

<sup>222</sup> See *supra* Part III.B.1.

Atlanta merely because New York City has a higher cost of living than Atlanta.

Third, if an employee is among the highest paid five percent of the employer's employees within seventy-five miles of the employee's facility, the employee would not be able to rebut his employer's designation of him as exempt. The employer's designation in such cases would be final. This element of the exemption maximizes deference to the employer when the employee is most likely to be one of the employer's key employees. Additionally, it minimizes litigation over the exempt status of the employee in a large number of cases of greatest importance to the employer.

Fourth, if an employee is among the highest paid twenty percent but not among the highest paid five percent of the employer's employees within seventy-five miles of the employee's facility, the employee would be able to rebut his employer's designation of him as exempt. To do so, the employee would have to demonstrate that at the relevant time, the employee was not an individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or effectively to recommend such action. This standard is a modified version of the NLRA supervisor test.<sup>223</sup> It deletes the less objective elements of "responsibly to direct" and "to adjust their grievances,"<sup>224</sup> and the ambiguous term "independent judgment." This element allows the employee to demonstrate that despite his relatively high compensation, he did not exercise the responsibilities that we would expect a key employee to exercise.

The proposal allows the employee to demonstrate that he did not meet the requirements of the test at the time he and the employer contracted to arbitrate future disputes. The time of contracting is relevant because that is when the relative bargaining power of the parties matters most. The proposal also allows the employee to demonstrate that he did not meet the requirements of the test at the earlier of the time his employment with the employer terminated or the time the employer sought to compel arbitration. The time of enforcement is relevant because the purpose of the exemption is to allow the employer to force only key employees to arbitrate. Where

<sup>223</sup> See *supra* Part III.B.3.

<sup>224</sup> See *Ky. River Cmty. Care, Inc.*, 532 U.S. at 728 (Stevens, J., dissenting) ("[O]f [the 12 NLRA supervisory employee functions], it is only 'responsibly to direct' that is ambiguous and thus capable of swallowing the whole if not narrowly construed. The authority to 'promote' or 'discharge,' to use only two examples, is specific and readily identifiable. In contrast, the authority 'responsibly to direct' is far more vague.").



the employer seeks to compel a former employee to arbitrate, the employee's circumstances at the time of his termination should be considered because the test cannot sensibly be applied to the current circumstances of a former employee, given that the former employee is no longer employed at a facility of the employer or being compensated by the employer.

Finally, an employer would be able to designate an employee as irrebuttably or rebuttably exempt only at the time the employer and the employee enter into a predispute arbitration agreement. This element of the proposal prevents the employer from manipulating the system by designating an employee as exempt once the employer knows or suspects that litigation with the employee is likely.<sup>225</sup> However, an employer would be able to revoke a designation of an employee as exempt at any time after contracting with the employee to arbitrate, in order to make room in the limited group of designated employees for another employee whom the employer views as more critical. The employer's revocation of the exempt designation would void the employer's right to enforce any existing predispute employment arbitration agreement between the employer and the employee.

#### IV. EXEMPTING SMALL EMPLOYERS FROM LEGISLATION INVALIDATING PREDISPUTE EMPLOYMENT ARBITRATION AGREEMENTS

##### A. *The Merits of Distinguishing Between Employers on the Basis of Firm Size*

Congress has repeatedly evidenced its concern regarding the impact of the compliance costs of employment statutes on small businesses. Indeed, Title VII,<sup>226</sup> the ADEA,<sup>227</sup> the ADA,<sup>228</sup> and the FMLA<sup>229</sup> all

<sup>225</sup> Cf. H.R. REP. NO. 95-950, at 9 (1978) (Conf. Rep.) ("To prevent an employer from circumventing the law by appointing an employee to a bona fide executive or high policymaking position shortly before retirement in order to permit compulsory retirement of that employee, the conference agreement provides that the exemption applies only to those employees who for the 2 years prior to retirement serve in such capacity."). It would be highly unusual (outside of the class action context) for at least 10 percent of an employer's employees to sue the employer. Thus, the employer would have no incentive not to "waste" an exemption designation on a less key employee if it could make the designation at the time litigation with the employee was imminent.

<sup>226</sup> 42 U.S.C. § 2000e(b) (2006) (defining "employer" for purposes of Title VII in part as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year").

exempt certain employers from their coverage based on the employer's number of employees. These small-employer exemptions are intended to ease "entry into the market and preserv[e] the competitive position of smaller firms."<sup>230</sup> More specifically, these exemptions for small employers evidence congressional intent "to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail."<sup>231</sup> Similarly, 42 U.S.C. § 1981a provides for compensatory and punitive damages for intentional violations of Title VII, the ADA and section 501 of the Rehabilitation Act of 1973, subject to caps graduated according to the size of the employer.<sup>232</sup> The FLSA, by contrast, utilizes a different approach to avoid burdening certain small employers. It contains an exemption for employing "enterprises" which have an annual gross sales volume less than \$500,000.<sup>233</sup>

For several reasons, any prohibition on enforcement of predispute arbitration agreements as they relate to employment law claims should exempt relatively smaller employers.<sup>234</sup> First, small employers are less likely than larger employers to enjoy a gross advantage in bargaining

<sup>227</sup> 29 U.S.C. § 630(b) (2006) (defining "employer" for purposes of ADEA in part as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year").

<sup>228</sup> 42 U.S.C. § 12111(5) (2006) (defining "employer" for the purposes of ADA in part as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year").

<sup>229</sup> 29 U.S.C. § 2611(4)(A)(i) (2006) (defining "employer" for purposes of FMLA in part as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day in each of 20 or more calendar workweeks in the current or preceding calendar year").

<sup>230</sup> See *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 447 (2003).

<sup>231</sup> *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999).

<sup>232</sup> 42 U.S.C. § 1981a(b)(3)(A)-(D) (2006).

<sup>233</sup> 29 U.S.C. § 203(s)(1)(A)(ii) (2006) (defining enterprise for purposes of FLSA's coverage as "an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated)").

<sup>234</sup> Professor Michael Green has hinted at this approach. See Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 467 n.261 (2000) (commenting that "[a]lthough it is beyond the scope of this Article, a more practical alternative for handling the unique issues for small employers would be a congressional amendment allowing the special handling of mandatory arbitration for smaller employers").

power vis-à-vis their employees.<sup>235</sup> Small employers, therefore, are less likely to be able to bully their employees into unfair arbitration agreements that might jeopardize the employees' ability to vindicate their rights in arbitration.

Second, small employers are less well-positioned, compared to larger employers, to absorb the costs of litigating employment law disputes in the public court system.<sup>236</sup> These costs include direct monetary costs such as attorney's fees and expenses incurred relating to discovery as well as financial and emotional costs arising from the disruption to the employer's workplace attendant to protracted employment litigation.<sup>237</sup> With fewer employees, the small employer is less able to afford to have its employees distracted by or tied up in litigation. Thus, the consequences of foreclosing the more economical and speedy arbitration option for small employers are of greater concern.

Third, small employers are less likely than are larger employers to enjoy a "repeat player" advantage over their employees in arbitration. As discussed above, some hypothesize that an employer enjoys an advantage in arbitration because the employer participates in arbitration or is thought by arbitrators likely to participate in arbitration on a more regular basis than the employee.<sup>238</sup> The principal concern is that because the repeat-player employer is likely to engage an arbitrator again while the employee is not, an arbitrator may favor the employer in order to gain future business. A small employer, however, is far more likely to be a one-shot player than is a larger employer.<sup>239</sup> For example, an employer with fifty employees is much

<sup>235</sup> *Id.* at 465 (asserting that "small employers tend to operate on fairly equal bargaining terms with their employees").

<sup>236</sup> *Id.* ("The risk-averse small employer does not have the huge coffers to wait out a long, drawn out piece of litigation or the flexibility to drum up a large fund to pay defense attorneys while the matter is ongoing."); *cf.* Yarkon, *supra* note 60, at 189 n.119 (hypothesizing with respect to settlement that "smaller companies are likely to be more risk averse than larger companies that have relatively less at stake in an individual [employment discrimination] case").

<sup>237</sup> *See* Green, *supra* note 234, at 464 (postulating that speed of arbitration might have special appeal to small employers because of "the peace of mind, certainty, and lack of an ongoing mental drain on its supervisors and human resource personnel" that quick resolution to employment dispute might bring).

<sup>238</sup> *See supra* notes 75-79 and accompanying text.

<sup>239</sup> Bingham, *Adhesive Contracts*, *supra* note 12, at 255 56 ("A small employer with relatively few employees is less likely to have repeat business than a large Fortune 500 Company with numerous employees. Large companies are more likely to be the source of future business for the arbitrators [than are small employers,] because they have more employment disputes to arbitrate.").

less likely to engage in employment arbitration again in the near future than is an employer with five thousand employees. The small employer, therefore, is less likely to enjoy a repeat-player advantage vis-à-vis its employee.

Finally, a statute invalidating predispute employment arbitration agreements with an exception based on the small size of the employer will still fully safeguard the public interest function of employment litigation. Under such legislation, the vast majority of employee discrimination claims will continue to be litigated in a judicial forum. Accordingly, a small employer exception will pose no threat to the general deterrence, law development, and norm development functions of employment discrimination litigation.<sup>240</sup>

#### B. *How Best to Distinguish Between Employers on the Basis of Firm Size*

The availability of the exemption for small employers from a prohibition on enforcement of predispute employment arbitration agreements might be based on the employer's annual gross volume of sales. As noted above,<sup>241</sup> the FLSA has such a dollar value limitation. Alternatively, the availability of the exemption might be based on the number of employees the employer employs. Title VII, the ADA, the ADEA, and the FMLA all employ this approach to exempting small employers from the coverage of these statutes.<sup>242</sup> A critical consideration in structuring a means for separating out exempt small employers is the extent to which the means will minimize litigation over the exempt status of the employer.

This Article's proposed small-employer exemption is based on the number of employees the employer employs, along the lines of Title VII's coverage requirement.<sup>243</sup> Additionally, it has a two-tiered exemption, graduated according to the size of the employer, along the lines of 42 U.S.C. § 1981a's graduated cap on compensatory and punitive damages for Title VII, ADA, and Rehabilitation Act causes of

<sup>240</sup> See *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 32 (1991); Gorman, *supra* note 61, at 668-69 (dismissing concerns that employment arbitration will retard development of employment discrimination law given that court decisions will comprise majority of adversary dispositions of employment discrimination claims).

<sup>241</sup> See *supra* note 233 and accompanying text.

<sup>242</sup> See *supra* notes 226-229 and accompanying text.

<sup>243</sup> See 42 U.S.C. § 2000e(b) (2006) (defining "employer" for purposes of Title VII in part as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year").

action.<sup>244</sup> Thus, the smallest employers will be completely exempt from the statute invalidating predispute employment arbitration agreements. Slightly larger employers will be subject to the statute but will not have to litigate the issue of whether any employee whom they have designated as exempt is a supervisor, according to the test set out in Part III.B.4 above, so long as the employee is among the highest paid twenty percent of the employer's employees within seventy-five miles of the employee's facility.

More specifically, this exemption completely exempts any employer engaged in an industry affecting commerce who has one hundred or fewer employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.<sup>245</sup> It partially exempts any employer engaged in an industry affecting commerce who has more than one hundred but fewer than five hundred and one employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. Finally, it provides that small employers who are partially exempt could irrebuttably designate up to ten percent of their employees as exempt from the prohibition provided that any such employee is among the highest paid twenty percent of the employer's employees within seventy-five miles of the employee's facility.

This proposal borrows the limiting language Title VII utilizes to define an employer but raises the requisite number of employees from fifteen or more employees under Title VII to one hundred or fewer or five hundred or fewer employees, respectively, for my proposed total and partial exemptions from a prohibition on enforcement of predispute employment arbitration agreements. A virtue of borrowing this language from Title VII is that there is a considerable body of interpretative case law. Courts have already grappled with issues relating to this definition, such as "Who may be counted as an employee?" and "How is the counting done?"<sup>246</sup> This should minimize the amount of litigation that the proposed exemption for small employers might otherwise generate.

Finally, to qualify for either the total or partial exemption for a small employer, an employer must meet the size requirements at both the

<sup>244</sup> See 42 U.S.C. § 1981a(b)(3)(A)-(D) (2006).

<sup>245</sup> This language is similar to the language defining "employer" in Title VII. See *id.* § 2000e(b) (2006).

<sup>246</sup> For a collection of and discussion of cases addressing these and other questions relating to the larger issue of "Who is an employer?" under Title VII, see BARBARA T. LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1470-85 (4th ed. 2007).

time the employer contracts with its employee to arbitrate and at the time the employer seeks to enforce the arbitration agreement. The time of contracting for arbitration is relevant because that is when the balance of bargaining power between employer and employee matters most. The time of enforcement is relevant because of the concern with the purported repeat player advantage that large employers may enjoy in arbitration.<sup>247</sup>

#### CONCLUSION

Critics of predispute employment arbitration agreements argue that employment arbitration jeopardizes the ability of employees to vindicate their substantive employment rights. A principal concern is that employers' typical bargaining advantage enables them to demand as a condition of employment that employees contract for an arbitration process that is designed to favor the employer. Critics also charge that the characteristics of even a "neutral" employment arbitration tend to favor the employer. Costs unique to arbitration, such as the arbitrators' fees, might discourage some employees from asserting a claim against their employer in arbitration if there is a possibility that the employee might end up being responsible for such costs. In addition, the limited discovery typical in arbitration tends to favor the employer who generally has greater relative access than does the employee to the information, records, documents, and witnesses essential to proving or defending an employment law claim. Also, employers who are repeat-players in arbitration might enjoy certain advantages in arbitration over one-shot employees.

Critics of employment arbitration also assert that it undermines the public goals of employment discrimination laws and litigation. Employment arbitration is less effective than judicial adjudication of employment claims at deterring employers from engaging in invidious employment discrimination, given that employment arbitration is private and does not result in a published reasoned opinion. Further, because arbitration is private and does not result in binding precedent, it does not contribute significantly to the development of employment discrimination law necessary to guide future employer conduct. Finally, these same features also make employment arbitration a less effective means to develop and reinforce the public values that animate our employment discrimination laws.

Even if these criticisms have merit, a total prohibition on enforcement of predispute employment arbitration agreements is

<sup>247</sup> See Bingham, *The Repeat Player Effect*, *supra* note 12, at 190.

unwarranted. A weighing of the rationales for and against regulation of the employment relationship generally, and regulation of employment arbitration agreements specifically, leads to the conclusion that any such prohibition should exempt claims by or against certain high-level employees and claims by or against certain small employers.

A partial prohibition on enforcement of predispute employment arbitration agreements, with exceptions for high-level employees and small employers, allows for the public adjudication of most employment discrimination claims. Therefore, the partial prohibition safeguards the general deterrence, law development, and norm development and reinforcement functions of employment litigation. Moreover, high-level employees are likely to have sufficient bargaining power, sophistication and financial resources to negotiate for a fair arbitration process and to exercise their rights effectively in such an arbitration. At the same time, employers should value employment arbitration the most when the disputant is a high-level employee, given the increased potential for disruption to the workplace and disclosure of sensitive information that protracted litigation with such a key employee might bring. Relatively small employers are especially in need of the advantages that employment arbitration offers, given that they are less well-positioned to absorb the costs of protracted employment litigation in the public court system. Moreover, small employers are less likely to enjoy a gross bargaining advantage vis-à-vis their employees so as to be able to coerce employees into an unfair employment arbitration agreement, and they are less likely to benefit from any repeat player effect in arbitration.

This Article sets forth a proposal to structure exemptions for certain high-level employees and small employers from any legislation invalidating predispute employment arbitration agreements in a manner that maximizes the likelihood of identifying the entities most meriting an exemption while minimizing the likelihood of litigation over who qualifies for an exception. With respect to the exemption for high-level employees, this Article proposes to allow an employer to designate as exempt from a prohibition on enforcement of predispute employment arbitration agreements up to ten percent of its employees, provided that any designated employee is among the highest paid twenty percent of the employees employed by the employer within seventy-five miles of the facility at which the employee is employed. The proposal presumes that an employer knows best which of its employees are its key employees but also presumes that only certain highly compensated employees are likely to have the bargaining power and sophistication necessary to protect themselves from being coerced

into an unfair arbitration agreement. The proposal, however, allows some employees who are designated as exempt to avoid the designation by demonstrating that they do not meet certain objective criteria set out in the proposal meant to ensure that the exempt employee exercised the types of responsibilities that we would expect a key employee to exercise. With respect to the exemption for small employers from the prohibition on enforcement of predispute employment arbitration agreements, the proposal bases complete and partial exemptions on the number of employees the employer employs, along the lines of Title VII's coverage requirement. Finally, although the proposal distinguishes between types of employees and types of employers, it does not distinguish between types of claims. Any prohibition on enforcement of predispute employment arbitration agreements should be complete as to subject matter — it should cover both statutory discrimination claims and common law claims, as well as contract claims. A partial prohibition on enforcement of predispute employment arbitration agreements would be inconsistent with a central goal of employment arbitration as it would invite dual litigation of an employee's employment law claims.

The proposed Arbitration Fairness Act of 2009 is too broad. It fails to recognize that many of the criticisms of predispute employment arbitration agreements have less force with respect to high-level employees and with respect to small employers. It also fails to appreciate that many of the benefits of employment arbitration are especially pronounced when high-level employees or small employers are involved. This Article offers a proposal as an alternative that more thoughtfully balances the interests of employees and employers with respect to employment arbitration.



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