

## **MANDATING FEDERAL STATUTORY ARBITRATION OF AT-WILL EMPLOYMENT DISPUTES AS PART OF NATIONAL LABOR POLICY**

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### **ABSTRACT**

This article examines the implications for mandating federal arbitration of at-will employment disputes. It reviews: (1) at-will employment's modification in the United States and (2) arbitration as a mechanism for resolving at-will employment disputes.

### **INTRODUCTION**

Anyone seeking symmetry and clearly discernable legal patterns will not find them in employment law. Historically, employment law has been a maze of conflicting statutes, common-law doctrines, contract-established rules, and administrative agency findings. Even within a narrow area, employment law may vary considerably on the same issue, depending on whether an administrative agency or a court is involved [1].

Conflict between employee and employer lies at the heart of our economic system and social structure. Employment law is concerned with this conflict and its resolution. Statutes and court decision reflect this shifting conflict balance between employee and employer [1] making employment law one of the most political of legal areas [2]. Today, at-will employment is witnessing this conflict shift between employee and employer [3].

At-will employment allows either the employee or the employer to terminate the employment relationship at any time, for any or no reason, with or without

notice [4]. Despite criticism of the doctrine [5], courts throughout the United States during the past quarter century have made only minor modifications to it. These minor modifications, however, have given hope to employees that fairness in the workplace will eventually be recognized as a right for all employees. Every employee should be free from arbitrary, capricious, and discriminatory adverse employment actions as part of the national labor policy.

Employee attempts to judicially modify the at-will employment doctrine to protect an even broader employee group can be expected to continue. The United States Supreme Court's decision in *Gilmer v. Interstate Johnson Lane Corp.* [6] has sent sufficient signals to employees and employers that arbitration of non-union employment disputes is favored to quickly, efficiently, and economically resolve these disputes.

This article examines the implications for mandating federal arbitration of at-will employment disputes. It reviews: (1) at-will employment's modification in the United States and (2) arbitration as a mechanism of resolving at-will employment disputes.

## AT-WILL EMPLOYMENT

The at-will employment doctrine emerged in the United States not as an outgrowth of English common law, but as a unique development catalyzed by a single legal treatise [7]. H. G. Wood's formulation of the doctrine was unambiguous: "[w]ith us, the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will. . . ." [7, at 277]. Quickly adopted by the courts [8], the new doctrine's application was equally straightforward. An employer could terminate "for good cause, for no cause, or even for cause morally wrong without being thereby guilty of a legal wrong" [9].

From the end of the nineteenth century until the mid 1930s, the United States Supreme Court further entrenched the doctrine within the employment relationship by striking down state legislation protective of employees using doctrines intrinsic to contract law, including "liberty of contract," and "mutuality of obligation" [10]. Courts turned a blind eye to the realities created by the power imbalance between employee and employer [11]. They upheld a doctrine enabling employers to terminate employees for any reason that protected employers from liability even for abusive terminations [12].

Over ensuing decades, inequities resulting from the at-will employment doctrine became more apparent leading both legislatures and courts to modify the doctrine by shielding some employees from the employer's unbridled power [13]. In addition to statutory protections, courts during the last quarter century began fashioning remedies for wrongful termination, including *inter alia*, accepting theories based on an implied-in-fact contract [14], implied covenants of good faith and fair dealing [15], creation of contractual rights in employment handbooks

and policies [16], and public policy exceptions [17]. However, these piecemeal modifications have not resulted in the doctrine's abrogation.

Despite these statutory and judicial modifications, the at-will employment doctrine remains alive and well within the United States after a quarter century of increased litigation. No one statute or court case has completely abrogated the doctrine to require that as a matter of public policy an at-will employee can only be terminated for some form of "cause." Only one state has adopted legislation abrogating the doctrine [18]. As the new millennium dawns, the common law presumption that employment is at-will still predominates, despite piecemeal judicial attempts to modify it. Employees, however, will still assail the doctrine with new theories and fact situations to force courts to further modify it.

Continued litigation will only place more pressure on the judiciary to respond to employee claims of arbitrary, capricious, and discriminatory treatment. At some point, however, courts will realize that they may have overburdened the judicial system with needless litigation to request legislative relief. Unfortunately, the at-will employment doctrine may have been eroded to the point where all employment disputes are before the courts instead of being resolved more expeditiously. This result would be unlike what courts have sanctioned for union represented employees under private and public sector collective bargaining agreements; i.e., final and binding arbitration removes these disputes from the court's initial purview which only provides limited judicial review.

## **MANDATING STATUTORY ARBITRATION OF AT-WILL EMPLOYMENT DISPUTES**

### **Why Protect At-Will Employees Statutorily?**

As the new millennium dawns, it is time to re-examine the need for a national labor policy to statutorily protect at-will employees against not just wrongful terminations but against all types of adverse employment actions. Work is much different today than it was 25, 50, or even 100 years ago. It will change even more rapidly as new technology is introduced into the workplace during the next ten years. The law and the nation's labor policies must evolve to meet these workplace changes and challenges as they have in the past.

The vast majority of us depend upon our employer for wages and benefits to cope with and meet life's basic daily responsibilities of providing food, clothing, and shelter. Historical developments during the past century, confirm that federal and state statutes have recognized that a concept of fundamental fairness is ingrained in today's employment relations to protect certain adverse employer actions. Based on these developments, a persuasive argument can no longer be made why at-will employees should not have the right to contest their employers over any adverse action. Employers must be held more accountable and

responsible to society for their adverse actions where these actions are arbitrary, capricious, or discriminatory.

Over two million at-will employees are terminated each year [19]. It can only be speculated how many at-will employees are subject to other employer adverse employment actions involving reprimands, suspensions without pay, demotions, etc.

Many of these adverse employment actions may not be justified by a non-arbitrary, noncapricious, or nondiscriminatory reason that would meet the “just cause” standard for these actions under collective bargaining agreements that protect union represented employees [20]. The human tragedy in permitting these wrongful adverse employment actions is immeasurable.

Today, more than ever, each of us identifies oneself and finds value in one’s self through employment. We introduce ourselves as teachers, laborers, carpenters, engineers, bricklayers, steelworkers, etc. Being gainfully employed is more than a means of earning a living. It is essential to our very “existence and dignity” [21].

It is not surprising that many employees suffer emotional trauma when they are subjected to employer adverse actions. That distress frequently affects relationships with families and friends.

Employers also suffer. Wrongful adverse employment actions do not make good economic sense. Employee moral is negatively affected by the observation of unjust employer actions. Employees wonder whether their own positions are at risk. Consequently, productivity, loyalty, and employee attitudes may suffer. This may also give rise for the employees to seek security and protection by joining a union.

During the past century, piecemeal federal and state statutes have recognized employees’ rights to challenge adverse employer actions arising out of organizing and forming a union, health and safety matters, and discriminatory conduct [13]. Yet, the most basic aspect of the employment relationship; i.e., to be free altogether from arbitrary, capricious, and discriminatory actions of one’s employer has been left virtually untouched as part of the nation’s labor policy.

Courts are neither equipped to handle the additional caseload nor sufficiently experienced in the area of daily employment relations to deal with adverse employer actions arising out of the at-will employment relationship. The long and procedurally cumbersome judicial process with its motions, discovery requests, and countless hearings cannot provide adequate or swift relief or remedies to the employee and employer [22].

Adequate consideration of the employee’s and employer’s interest in at-will employment relationships demands new, specialized legislation. The judiciary may appropriately respond to the extreme case or to the atypical situation [23]; however, courts have no capacity to construct an administrative mechanism for daily enforcement and the average employee has no access to their more formalized process.

Unless more positive action is taken nationally to define this area, courts will continue to signal employers that their terminations should not be arbitrary,

capricious, or discriminatory by recognizing limited causes of action for possible employee recovery. This will continue to be an unnecessarily expensive and time consuming process for employees, employers, and courts.

During the past quarter century, employers have certainly been exposed to and have had sufficient opportunity to learn good human resource management principles for properly hiring, disciplining, and terminating employees. These human resource management principles have been espoused by national employer organizations, including the Society for Human Resource Management [24].

Undergraduate and graduate programs in human resource management now routinely exist as part of every major college's and university's curriculum [25]. Even law schools teach employment law courses that review good human resource management principles and their application to the at-will employment relationship [26].

These courses and curriculums were not as widespread a quarter century ago. The marketplace for these curriculums and employers willingness to hire individuals with these credentials indicates that employers are more than ever aware of good human resource management principles and the need to incorporate them into the modern workplace.

Employers that have not learned these human resource principles or who care not to follow them should now suffer the consequences. Society can no longer shield or protect these employer errors at the at-will employee's cost. This cost is far better borne by the irresponsible employer who has much more economic power and resources than the at-will employee has to recover from these harms.

Any federal statute should create responsibilities for both employees and employers in terminations and any other adverse employment actions, including discipline, demotions, and layoffs. Employees should be afforded protection for these unwarranted employer adverse actions. Likewise, employers should be protected for improper employee actions that usurp corporate opportunities to work for a competitor, compete against the employer unfairly or illegally, and steal trade secrets or confidential information [27].

With this experience in place, there is no valid reason why the United States Congress should not regulate this area in a more orderly fashion to alleviate the courts' burden in handling these disputes. Montana's groundbreaking Wrongful Discharge from Employment Act reveals that no real burden is placed on employers through the doctrine's statutory abrogation [18]. This statute has operated effectively for over a decade.

### **State Statutes Protecting At-Will Employees**

During the past quarter century, at-will employment's modification has evolved in two distinct phases. First, the courts have taken action to provide limited protection. Second, state legislatures have reviewed proposals to provide a more definite, logical, and orderly means for resolving wrongful termination disputes

through a statutory framework. This modification of at-will employment parallels the emergence of private sector collective bargaining rights prior to the National Labor Relations Act's (NLRA) 1935 enactment [28].

No comprehensive federal wrongful termination legislation exists. Piecemeal state legislation has been adopted in Missouri [29], Puerto Rico [30], South Carolina [31], South Dakota [32], and the Virgin Islands [33]. Other states have enacted statutes protecting whistleblowers; i.e., employees who report to the government or their superiors some wrongdoing, waste, or questionable conduct of their employers [34]. Montana is the only state that has adopted a comprehensive wrongful termination statute [18]. This limited state activity demonstrates a beginning legislative interest in circumscribing and regulating court modification of at-will employment

To statutorily regulate at-will employment, the National Conference of Commissioners of Uniform State Laws prepared the Model Employment Termination Act [35]. The Act is intended as a model for states to use in modifying the at-will employment relationship. It protects employees from arbitrary terminations and provides a procedure to review employment terminations.

The Model Act prohibits the termination of employees employed by the same employer for a total period of one year or more and who have worked for the employer at least 520 hours during the 26 weeks next preceding the termination unless "good cause" is present [35, at §§ 1(1), 1(4), 3]. Disputed terminations may be submitted to arbitration [35, at § 6]. Remedies for an improper termination that the arbitrator has discretion to award include:

1. reinstatement to the employment position that the employee held when employment was terminated or; if that is impractical, to a comparable position;
2. full or partial backpay and reimbursement for lost fringe benefits, with interest, reduced by interim earnings from employment elsewhere, benefits received, and amounts that could have been received with reasonable diligence.
3. if reinstatement is not awarded, a lump-sum severance payment at the employee's rate of pay in effect before the termination, for a period not exceeding 36 months after the date of the arbitrator's award, together with the value of fringe benefits lost during that period, reduced by likely earnings and benefits from employment elsewhere, and taking into account such equitable considerations as the employee's length of service with the employer and the reasons for the termination; and
4. reasonable attorney's fees and costs [35, at § 7].

The arbitrator, however, may not make any award for pain and suffering, emotional distress, defamation, fraud, or other injury under the common law; punitive damages; compensatory damages; or any other monetary award [35, at § 7].

Either the employee or the employer may seek vacation, modification, or enforcement of the arbitrator's award in the court of general jurisdiction where the termination occurred or where the employee resides [35, at § 8(a)]. The court may vacate or modify the award only if it finds that:

1. the award was procured by corruption, fraud, or other improper means;
2. there was evident partiality by the arbitrator or misconduct prejudicing the rights of either the employee or employer;
3. the arbitrator exceeded the powers of an arbitrator;
4. the arbitrator committed a prejudicial error of law; or
5. another ground exists for vacating the award under the state's arbitration act [35, at § 8(c)].

In lieu of an arbitration procedure, the Model Act also allows a state to elect two additional alternatives as the means of enforcement as a substitute for arbitration [35, at Alternatives A-B]. Alternative A envisions enforcement through an existing or a new state administrative agency [35, at Alternative A, §§ 5-6]. Alternative B provides for court enforcement [35, at Alternative B, §§ 5-6].

The Model Act is also required to be posted by the employer at the workplace [35, at § 9]. As yet, no state has adopted it.

Montana became the first state to enact a comprehensive statute protecting at-will employees from wrongful termination [18]. The statute protects employees from wrongful termination in the three main areas where at-will employees lack safeguards; i.e., Montana employers are prohibited from terminating employees:

1. without "good cause" [18, at § 39-2-904(a)];
2. in retaliation for refusing to violate public policy or for reporting a public policy violation [18, at § 39-2-904(1)]; or
3. in violation of the express provisions of an employer's own written personnel policy [18, at § 39-2-904(3)].

Employees who are wrongfully terminated may be awarded lost wages and fringe benefits for up to four years, as well as punitive damages where there is evidence that the employer "engaged in actual fraud or actual malice" in the termination [18, at § 39-2-905].

"Good cause" is defined as "reasonable, job-related grounds for dismissal based on failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason" [18, at § 39-2-903(5)]. "Public policy" includes those policies in effect at the time of the termination governing public health, safety, or welfare and established by constitutional provision, statute, or administrative rule [18, at § 39-2-903(7)].

The statute preempts common law tort and express or implied contract remedies [18, at § 39-2-913]. It also provides that employees must first exhaust any written, internal employer procedures before filing suit and that any suit against an employer must be filed within a year after the termination date [18, at § 39-2-911(2)].

Parties in lieu of court action can agree to final and binding arbitration [18, at § 39-2-914]. If a complaint is filed under the statute, either party can make a written offer to arbitrate within sixty days, and the other party has thirty days to accept the offer in writing [18, at § 39-2-914(3)].

A termination that is subject to other federal or state statutes providing a procedure or remedy, for example, fair employment practice statutes, is exempt from the statute [18, at § 912(1)]. Employees who are covered by collective bargaining agreements or written employment contract for a specific time period are also excluded from coverage [18, at § 912(2)].

The statute's elimination of common law tort actions has not been found to violate the state's constitution provision guaranteeing the right of "full legal redress" [36]. The state's constitution guarantees only an access right to courts in seeking a remedy for wrongs recognized by common law or statute.

The statute's limitation on certain noneconomic damages and of punitive damages does not violate equal protection by unconstitutionally burdening a class of claimants seeking wrongful termination damages [18]. Rejecting a strict scrutiny standard for equal protection, the court found that the statute rationally related to a legitimate state interest of providing greater certainty alleviating problems experienced by employees and employers in termination disputes [37].

Other states have considered legislative proposals for modifying the at-will employment without success. For example, Pennsylvania considered statutory proposals for modifying the doctrine during the 1980s [38]. Each of these legislative proposals would have created a general statutory scheme to protect Pennsylvania's employees from wrongful termination. None of these proposals gained widespread support for adoption; however, legislation protecting employees from wrongful termination arising out of whistleblowing was enacted [39]. The Whistleblower Law, even though limited to the at-will employment's public policy exception, however, indicated the willingness of the Pennsylvania legislature to follow its state court's suggestion in regulating this area through statute instead of piecemeal judicial erosion [40].

## **Model Federal Statutory Proposal**

Based on courts' decisions throughout the United States, even though certain exceptions to the at-will employment doctrine have been recognized, appellate case law during the past quarter century does not overwhelmingly support at-will employees in successfully recovering against their employers. Decisions are replete with remands, recognizing a cause of action but not finding sufficient facts to sustain the claim, etc. In other words, "on the books" exceptions to the doctrine exist, but only isolated employee success has occurred because courts have often found a reason to deny recovery.

Despite these results, employees have continued to bring these claims with the possible implication of overburdening the judiciary. In the future, based on



the prior quarter century of litigation experience, the court case load can be expected to increase to deal with these cases [41]. Piecemeal modification of the doctrine and overburdening of the courts will continue until a case eventually arises that shocks the court's sensibility enough to finally find that public policy contains a "just cause" provision in every employment contract for every adverse employment action. Is this the result that is desirable as part of a national labor policy?

The time has come for the United States Congress to modify at-will employment by finding that the nation's labor policy requires "just cause" for any adverse employment action. Legislation should be adopted to achieve this objective. It is undisputed that courts should not hear these cases unless a separate labor court is created [42].

Should a separate labor court not be a viable alternative, final and binding arbitration under a federal statute would be the ideal alternate to accomplish this [18, 35]. Arbitration of these disputes coincides with a half century's successful experience under private and public sector collective bargaining agreements [43].

Arbitrators trained in employment law matters should handle all employment related matters. These arbitrators' awards should receive the same court deference as arbitrators' awards in other labor matters receive [44]. Arbitration would provide a proven, quick, inexpensive, and final resolution without overburdening the courts.

The statute should articulate a standard for lawful termination, discipline, or other adverse employment actions in terms similar to "just cause." Certain employees should be excluded from the statute's coverage. Among those appropriately excluded are probationary employees, federal and state civil service employees, employees covered by an employment contract, employment handbook providing a final and binding arbitration procedure that is fair, regular, and neutral, and employees covered by a collective bargaining agreement providing a final and binding arbitration procedure that is fair, regular, and neutral.

Since, the United States Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.* [6], more and more courts and employers have supported the resolution of employment disputes through arbitration [45]. The Court's decision in *Gilmer* [6] represents a departure from the position of some federal courts that had interpreted *Alexander v. Gardner-Denver Co.* [46] to mean that federal civil rights actions were not subject to compulsory arbitration [47]. *Gilmer* [6] decided that employees in the securities industry whose registration agreements included a compulsory arbitration provision could be required to arbitrate age discrimination claims.

In recent years, employers have increasingly evaluated the benefits of alternative dispute resolution (ADR) procedures, which contain final and binding arbitration, to resolve employment related claims [48]. ADR offers the advantages of decreased litigation costs, minimized back pay awards due to quicker resolution

of employee termination claims, removal of cases from high-risk jury trials, and a private proceeding not open to the public [49].

One disadvantage to the inclusion of compulsory arbitration clauses in employment agreements or handbooks has been the perception that arbitration would be of little benefit if employees could bypass arbitration or in addition to using the arbitration procedure still independently litigate federal or state statutory discrimination claims or other employment claims in court or before federal or state administrative agencies. Employers fear that an arbitrator's decision on a statutory claim might not receive any deference in later litigation.

Any ADR procedure that uses arbitration should be a "true arbitration procedure." It should at a minimum have:

1. an impartial third-party decision-maker;
2. a mechanism for ensuring neutrality of the third party decision-maker with respect to rendering the decision;
3. a neutral third-party decision-maker chosen by the employee and employer;
4. an opportunity for the employee and employer to be heard; and
5. a final and binding decision as its culmination

Based on decisions [50] supporting *Gilmer* [6] it may be worthwhile for the United States Congress to consider arbitration of all employment disputes. Characteristics of enforceable arbitration procedures indicate that it should:

1. be contained in an employment handbook or other employer writing;
2. be communicated to the employee [51];
3. be supported by consideration [52];
4. be documented that the employee made a knowing and voluntary waiver to file a claim under any federal or state statute [53]; however, the employee should retain the same rights under any federal or state statute waived and the arbitrator should retain the right to award the same remedies under any federal or state statute waived [54];
5. provide for the employee and the employer to select the neutral arbitrator [55];
6. require the cost of the arbitrator to be paid entirely by the employer [56];
7. allow for the employee to be represented by an attorney or other person;
8. permit the presentation of witnesses and documentary evidence [57]; and
9. state that it is the sole and exclusive remedy for any and all employment disputes and the results are final and binding on the employee and the employer [58].

Further support for the use of employment dispute arbitration for at-will employees exists in state legislation recognizing it as a vehicle to resolve these matters [59].

Outlined below is a proposal for a Model Federal Statute that protects at-will employees and employers when employment disputes arise.

## **ARBITRATION OF EMPLOYMENT DISPUTES FOR EMPLOYEES AND EMPLOYERS**

### *Section 1. Short Title.*

This act shall be known and may be cited as the “Act for Arbitration of Employment Disputes for Employees and Employers.”

### *Section 2. Definitions*

The following words and phrases when used in this act shall have, unless clearly indicated otherwise, the meanings given to them in this section:

“Appointing Authority.” The Federal Mediation and Conciliation Service (FMCS).

“Commerce.” Trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or a Territory, or between any foreign country and any State, Territory, or the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

“Designated Representative.” Any person, entity, or association, including but not limited attorneys, who have been empowered by an employee or employer, in writing, to represent the employee or employer.

“District Court.” The United States District Court for the judicial district where the employment dispute arose or occurred.

“Employee.” Any person who performs a service for commerce or who affects commerce and receives wages or other remuneration under a contract of hire that is written, oral, express, or implied. Employee includes applicants for employment and any person employed by an individual, person, partnership, association, corporation, the United States, including any agency, authority, board, or commission created by it, and any State, including any agency, authority, board or commission created by it or one of its political subdivisions. Employee shall not include anyone: (a) covered by a collective bargaining agreement that contains a final and binding arbitration procedure for the review of all employment disputes arising under or out of the agreement; (b) covered by an employment handbook, employment manual, or employment policy that contains a final and binding arbitration procedure for the review of employment disputes arising out of the employment relationship that permits the employee to participate in selecting a neutral arbitrator with the employer and does not require the employee to pay any charges or fees for the arbitrator’s services; (c) protected by a statutory civil service or tenure procedure of either the United States or any State or any agency, authority, board, or commission created by it or one of its

political subdivisions; (d) who has a written employment agreement that contains a final and binding arbitration procedure for the review of employment disputes arising out of or under the agreement that permits the employee to participate in selecting the neutral arbitrator with the employer and does not require the employee to pay any charges or fees for the arbitrator's services; or (e) that is in a probationary status. This term shall also include the employee's representative for the purposes of filing a complaint and appearing at the arbitration hearing.

"Employer." Any individual, person, partnership, association, corporation, that is engaged in commerce and the United States, including any agency, authority, board, or commission created by it or a State, including any agency, authority, board, or commission created by it or one of its political subdivisions. This term shall also include the employer's representative for the purposes of filing a complaint and appearing at the arbitration hearing.

"Employment Dispute." Any adverse employment action that arises out of the employment relationship between an employee and employer, including, but not limited to disputes arising over discipline, termination, resignation, layoff, recall, demotion, promotion, disloyalty, theft of trade secrets, unfair competition, etc., that result from improper action or inaction of an employee or employer. However, disputes relating to the receipt of unemployment compensation and workers' compensation are specifically excluded from this act's coverage and scope.

"FMCS." The Federal Mediation and Conciliation Service.

"Just Cause." As established by arbitrators under the common law developed as part of the federal National Labor Relations Act, 29 U.S.C. §§ 151-169.

"Person." Any individual, sole proprietorship, partnership, association, corporation, the United States, including any agency, authority, board, or commission created by it, and any State, including any of its political subdivisions or any agency, authority, board, or commission created by a political subdivision.

"Probationary Status." A period of time of one hundred and eighty (180) consecutive calendar days or less that occurs immediately after an employee is initially hired by an employer for the first time unless a time period of at least three (3) years has passed since the employee's last employment by the employer. It shall not include situations where an already employed employee is given a new employment position, advancement, promotion, or demotion by his/her employer.

### *Section 3. Employment Dispute.*

An employee or employer shall not adversely effect the interests of the other in any manner that gives rise to an employment dispute unless there is

just cause for the action or inaction that is not arbitrary, capricious, or discriminatory.

*Section 4. Employment Disputes—Complaints.*

An employee or employer who believes that an employment dispute has occurred or arisen in violation of section 3 may file by certified mail return receipt requested a written request for arbitration of the dispute with the FMCS. The written request for arbitration shall be mailed by certified mail return receipt request not later than ninety (90) calendar days after the employment dispute occurred or arose.

*Section 5. Arbitration.*

(a) *Appointment.* Where a written request for arbitration has been filed with the FMCS, the FMCS shall provide the employee and employer with a list of seven (7) arbitrators names within forty-five (45) calendar days after the request is received. Within fifteen (15) calendar days after receipt of the list by the employee and employer, the employee and employer shall meet for the purpose of selecting the arbitrator by alternately striking one name from the list until one name remains who shall be the arbitrator. The employer shall strike the first name from the list. Within five (5) calendar days after the arbitrator's name is selected from the list, the employee and employer shall in writing notify the FMCS of the arbitrator's name. Upon receipt of the arbitrator's name, the FMCS shall notify the arbitrator in writing of his/her appointment.

(b) *Hearing.* Within thirty (30) calendar days after appointment, or within further additional time periods as the employee and employer may in writing agree, the arbitrator shall schedule a hearing.

(c) *Conduct of hearing.* The hearing shall be conducted in the following manner [60]:

(1) *Arbitration Management Conference*—As soon as possible after the arbitrator's appointment but not later than sixty (60) calendar days thereafter, the arbitrator shall conduct an Arbitration Management Conference with the employee and employer and/or their representatives, in person or by telephone, to explore and resolve matters that will expedite the arbitration proceedings. The specific matters to be discussed shall include:

- (i) The issues to be arbitrated;
- (ii) The date, time, place, and estimated duration of the hearing;
- (iii) The resolution of outstanding discovery issued and establishment of discovery parameters;
- (iv) The law, standards, rules of evidence, and burdens of proof that are to apply;
- (v) The exchange of stipulations and declarations regarding facts, exhibits, witnesses, and other issues;

- (vi) The names of witnesses, including expert witnesses, the scope of witness testimony, and witness exclusion;
- (vii) The value of bifurcating the arbitration hearing into a liability phase and a damages phase;
- (viii) The need for a stenographic record;
- (ix) Whether the employee and employer will summarize their arguments orally or in writing;
- (x) The form of the award; and
- (xi) Any other issues relating to the hearing's subject matter or conduct.

The arbitrator shall issue promptly or within a reasonable time period oral and written orders reflecting his/her decisions on the above matters and may conduct additional conferences when the need arises.

(2) *Date, Time, and Place of Hearing*—The employee and employer may mutually agree upon the locale where the arbitration is to be held. If there is a dispute as to the appropriate local, the arbitrator shall determine the local and his/her decision shall be final and binding. The arbitrator shall have the authority to set the date, time, and place of the hearing after discussion with the employee and employer. At least thirty (30) calendar days prior to the hearing, the arbitrator shall mail notice of the date, time, and place of the hearing.

(3) *Vacancies*—If the arbitrator should resign, die, withdraw, refuse, or be unable or disqualified to perform his/her duties, the Bureau shall on proof satisfactory to it, declare a vacancy. Vacancies shall be filled by the FMCS in the same manner as the making of the original appointment and the matter shall be reheard by the new arbitrator.

(4) *Representation*—The employee or the employer may be represented at the hearing by an attorney or any other representative of their choosing who is trained or experienced in employment matters.

(5) *Stenographic Record*—If the employee or the employer desires a stenographic record, the employee or the employer shall make the necessary arrangements with a stenographer and shall notify the other of these arrangements at least five (5) calendar days prior to the scheduled hearing. The requesting party or parties shall pay the cost of the stenographic record. If the transcript is agreed to by the employee and the employer, or determined by the arbitrator to be the official record of the proceeding, it shall be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place to be determined by the arbitrator.

(6) *Interpreters*—If the employee or the employer desires an interpreter, the employee or the employer shall make the necessary arrangements directly with the interpreter and shall assume the service's costs and expenses.

(7) *Attendance at Hearings*—The hearing shall be a private and confidential hearing with no right of the public, the press, communications media, or any other person to attend unless the employee and the employer agree to this attendance. The arbitrator shall have the authority to exclude witnesses, other than a party, from the hearing during the testimony of any witness. The arbitrator also shall have the authority to decide whether any person who is not a witness, outside of those persons excluded by this section, who may attend the hearing; provided that the person has a legitimate interest that is related to the hearing and maintains the hearing's confidentiality.

(8) *Confidentiality*—The arbitrator shall maintain the hearing's confidentiality and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the employee and employer agree otherwise or the law provides to the contrary.

(9) *Postponements*—The arbitrator: (a) may postpone any hearing upon the request of the employee or the employer for good cause shown; (b) must postpone any hearing upon the mutual agreement of the employee and the employer; and (c) may postpone any hearing on his/her own initiative.

(10) *Oaths*—Before proceeding with the testimony, the arbitrator may, in his/her discretion, or if requested by either the employee or the employer require witnesses to testify under oath administered by him/her.

(11) *Arbitration in the Absence of Either the Employee or the Employer*—The arbitration may proceed in the absence of either the employee or the employer who, after due written notice, fails to be present or fails to obtain a postponement. An award shall not be based solely on the employee's or the employer's default. The arbitrator shall require whomever is in attendance to present evidence as the arbitrator may require for the making of an award.

(12) *Evidence*—The employee or the employer may offer any evidence that is relevant and material to the employment dispute and shall produce any evidence as the arbitrator deems necessary to an understanding and determination of the dispute. An arbitrator may subpoena witnesses or documents upon the request of the employee, the employer, or independently by himself/herself. The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary or required. The arbitrator may in his/her discretion direct the order of proof, bifurcate the proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the employee and employer to focus their presentations on issues the decision of which could dispose of all or part of the case. All evidence shall be taken in the presence of the arbitrator, the employee,

and the employer, except where either the employee or the employer is absent without good cause, in default, or has waived the right to be present.

(13) *Evidence by Affidavit or Declaration and Post-Hearing Filing of Documents or Other Evidence*—The arbitrator may receive and consider the evidence of witnesses by affidavit, but shall give it only the weight as the arbitrator deems it entitled to after consideration of any objection made to its admission. If the employee and the employer agree or the arbitrator directs that documents or other evidence may be submitted to the arbitrator after the hearing, the documents or evidence shall be filed with the FMCS for transmission to the arbitrator, unless the employee and the employer agree to a different method of distribution. The employee and the employer shall be afforded an opportunity to examine these documents or other evidence and to lodge appropriate objections, if any.

(14) *Inspection or Investigation*—An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration hearing shall advise the employee and the employer. The arbitrator shall set the date, time, and place of the inspection or investigation and advise the employee and the employer in writing. The employee and the employer may be present during the inspection or investigation. In the event that either the employee, the employer, or both is not present during the inspection or investigation, the arbitrator shall make an oral or written report to the employee and the employer and afford them the opportunity to comment.

(15) *Interim Measures*—At the request of the employee or the employer, the arbitrator may take whatever interim measures he/she deems necessary with respect to the dispute, including measures for the conservation of property. These interim measures may be taken in the form of an interim award and the arbitrator may require security for the costs of these measures.

(16) *Closing of Hearing*—The arbitrator shall specifically inquire of the employee and the employer whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed. If briefs are to be filed, the hearing shall be declared closed as of the final date for the receipt of briefs. If other documents are to be filed as set forth in section 6(c)(13) and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of the hearing's closing. The time limit within which the arbitrator is required to make the award shall commence to run, in the absence of other agreements by the employee and the employer, upon the hearing's closing.



(17) *Reopening of Hearing*—The hearing may be reopened by the arbitrator upon the arbitrator’s initiative, or upon application of the employee or the employer for cause shown, at any time before the award is issued. If reopening the hearing would prevent the making of the award within the specific time for making the award set by this act or within the specific time agreed upon for making the award by the employee and the employer, the hearing may not be reopened unless the employee and the employer agree on an extension of time for making the award.

(18) *Waiver of Oral Hearing*—The employee and the employer may provide, by written agreement, for the waiver of oral hearings in any employment dispute.

(19) *Waiver of Objection/Lack of Compliance with these Procedures*—If the employee or the employer proceeds with the arbitration after any provision or requirement of these procedures has not been complied with, and who fails to state objection thereto in writing, the employee or the employer shall be deemed to have waived the right to object.

(20) *Time Extensions*—The employee and the employer may modify any time period by mutual written agreement.

(21) *Serving of Notice*—The employee and the employer shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of the arbitration; for any court actions in connection therewith; or for the entry of judgment on an award made under this act may be served upon the employee or the employer by mail or personal service addressed to the employee, the employer, or their respective representative at the last known address. The arbitrator may also use facsimile transmission, telex, telegram, e-mail, or other written forms of electronic communication to give the notice required by these procedures.

(22) *Judicial Proceedings*—The arbitrator is not a necessary party in any subsequent judicial proceedings relating to the arbitration unless the court so requires.

(d) *The Award.* After the hearing’s close, the arbitrator, based upon the issues presented, shall render a written opinion outlining the reasons for the award as follows:

(1) The award shall be made promptly by the arbitrator and, unless otherwise agreed to by the employee and the employer, no later than thirty (30) calendar days from the hearing’s closing date.

(2) An award issued under this act shall not be publicly available unless the employee and the employer agree in writing to make it available.

(3) The award shall be in writing and shall be signed by the arbitrator and it shall provide written reasons for the award unless the employee and the employer agree otherwise.

(4) If the employee and the employer settle their employment dispute during the course of the arbitration, the arbitrator may set forth the terms of the settlement in a consent award.

(5) The employee and the employer shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail or by personal service, addressed to the employee, the employer, or their respective representative at the last known address.

(6) Within twenty (20) calendar days after the award's transmittal, the employee or the employer, upon notice to the other, may request the arbitrator to correct any clerical, typographical, technical, or computational errors in the award. The arbitrator shall not be empowered to redetermine the merits of any claim already decided. The other party shall be given ten (10) calendar days to respond to the request. The arbitrator shall dispose of the request within twenty (20) calendar days after the request's receipt.

(7) The arbitrator's award shall be final and binding on the employee and the employer. Judicial review shall be limited as set forth in this act.

(e) *Remedies.* The remedies from which the arbitrator may select include, but are not limited to, the following:

(1) Sustaining the employment dispute against the employee or the employer with or without a monetary award.

(2) Reinstating the employee with no, partial, or full back pay.

(3) A severance payment.

(4) Adding a reasonable rate of interest to any monetary award.

(5) Requiring restitution for any employee or employer property.

(6) Punitive damages in an amount not to exceed three times the amount of monetary damages actually awarded.

(7) Attorney's fees or other fees for a party's representative.

(8) A cease and desist order to restrain any employee or employer action.

(9) Any other remedy permitted under the law, including those under any applicable federal or state law.

(f) *Costs of Arbitration.* The employee and the employer shall bear their own costs for witnesses and the presenting of their respective position unless otherwise decided by the arbitrator. The arbitrator's costs shall be paid by the FMCS.

#### *Section 6. Effect of Arbitrator's Award.*

An arbitrator's decision shall be final and binding upon the employee and the employer and may be enforced in District Court.

#### *Section 7. Judicial Review.*

The District Court shall review the arbitrator's award, upon petition by the employee or employer filed within thirty (30) calendar days after receipt

of the arbitrator's award. The court's review shall be limited to the following:

- (a) There was evident partiality by the arbitrator or corruption, fraud, or misconduct of the arbitrator prejudicing the rights of the employee or the employer or
- (b) The arbitrator exceeded his/her powers under this act.

The pendency of a proceeding for review by the District Court or any further appeal shall not automatically stay enforcement of the arbitrator's award. To receive the benefit of a stay, either the employee or the employer shall demonstrate some likelihood of success on appeal or extreme prejudice.

*Section 8. Enforcement of Award.*

Either the employee or the employer as the prevailing party under an arbitrator's award may seek enforcement of the award against the non-complying party by filing a petition with the District Court.

*Section 9. Contempt.*

An employee or employer who disobeys a lawful order for the enforcement of an arbitrator's award issued by any District Court, may be held in contempt. The punishment for each day that the contempt occurs shall be a fine as set by the District Court, imprisonment, or any other enforcement measure deemed appropriate.

*Section 10. Conflict with Other Acts.*

Initiation of this act's procedures, shall preclude an employee or employer from instituting similar proceedings under any other federal or state statute that provides a remedy for contesting employment disputes. These federal and state statutes include, but are not limited to those that prohibit adverse employer action for filing complaints, charges, and or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, disability, creed, religion, political belief, color, marital status, and other similar grounds. Should proceedings be instituted under any other federal or state statute either prior to initiation of this act's proceedings, during this act's proceedings, or anytime after this act's proceedings have issued a final and binding arbitration award, this act's proceedings and any award issued under it shall be considered null and void. Initiation of proceedings under any similar federal act shall immediately terminate proceedings under this act. Initiation of proceedings under this act shall be considered a waiver of any rights an employee or employer may have under any other federal or state act. The remedies and procedures of this act shall be exclusive and shall not be construed to duplicate any other federal or state statute or be in addition thereto.

*Section 11. Notice of this Act.*

An employer shall post a copy of this act in a prominent place of the work area.

*Section 12. Severability.*

If any provision of this act or its application to any employee or employer is held invalid, the invalidity shall not affect other provisions or applications of this Act, which can be given effect without the invalid provision or application, and to this end this act's provisions are severable.

*Section 13. Repealer.*

This act repeals any and all acts inconsistent with it and specifically repeals [list specific acts repealed].

*Section 14. Effective Date.*

This act shall take effect 120 calendar days after enactment and shall cover any employment dispute that occurs on or after the act's effective date. This act shall not be retroactive; i.e., this act shall not apply to any employment dispute that occurs or arises within 120 calendar days of this act's effective date.

## **Analysis of Model Federal Statute**

In comparison to statutory schemes for at-will employment's modification that have been suggested, this proposal is unique. Its scope is much broader than allowing at-will employees the opportunity to sue only over their terminations. The Model Statute offers an all-encompassing regulatory scheme to set forth procedures for handling all employment disputes between employees and employers.

Efforts to regulate this area must consider and balance both employee and employer rights. Employees must be protected from improper employer adverse actions and employers should be accorded equal recourse against improper employee actions.

The Model Statute is intended to cover all employees and employers in the public and private sectors. Only limited exclusions are provided. An employee does not include anyone: (a) covered by a collective bargaining agreement that contains a final and binding arbitration procedure for the review of all employment disputes arising under or out of the agreement; (b) covered by an employment handbook, employment manual, or employment policy that contains a final and binding arbitration procedure for the review of employment disputes arising out of the employment relationship that permits the employee to participate in selecting a neutral arbitrator with the employer and does not require the employee to pay any charges or fees for the arbitrator's services; (c) protected by a statutory civil

service or tenure procedure of either the United States or a State; (d) who has a written employment agreement that contains a final and binding arbitration procedure for the review of employment disputes arising out of or under the agreement that permits the employee to participate in selecting the neutral arbitrator with the employer and does not require the employee to pay any charges or fees for the arbitrator's services; or (e) that is in a probationary status.

An employment dispute under the Model Statute is defined broadly. It is intended to mean any adverse employment action that arises out of the employment relationship between an employee and employer, including, but not limited to disputes arising over discipline, termination, resignation, layoff, recall, demotion, promotion, disloyalty, theft of trade secrets, unfair competition, etc., that result from improper action or inaction of an employee or employer. However, disputes relating to the receipt of unemployment compensation and workers' compensation are specifically excluded from the act's coverage and scope.

The standard to evaluate an improper adverse action by either an employee or employer is simple. An employee or employer cannot adversely effect the interests of the other in any manner that gives rise to an employment dispute unless there is just cause for the action or inaction that is not arbitrary, capricious, or discriminatory. This standard is similar to that developed under the collective bargaining agreement's grievance arbitration procedure in the private and public sectors [20].

A complaint's initiation requires simply the filing of an arbitration request with the Federal Mediation and Conciliation Service (FMCS). The Model Statute places no additional burden on the FMCS to administer it. The FMCS already has available lists of arbitrators that it considers competent to handle similar disputes. The employee and employer are given the right to select the arbitrator from the list provided by the FMCS.

The arbitration costs would be paid by the federal government to remove the financial burden from the employee to discourage the act's use. At first, this may appear as an onerous economic burden to place on the federal government. However, it may, in fact, result in cost savings. Diminished use of federal administrative agencies under certain federal statutes may result. Once employees and employers realize that the Model Statute's arbitration procedure is quicker and more efficient than a federal agency's procedures that covers similar disputes, the resulting decreased case load before the agency should permit its funding to be reduced. Part of these savings can be used to fund the Model Statute's arbitrations.

Many discrimination disputes arising under federal statutes and currently under the Equal Employment Opportunities Commission's (EEOC's) jurisdiction could be resolved by using the Model Statute [61]. This would reduce the EEOC's budget by eliminating personnel and offices. A portion of these federal budget savings could be used to fund the arbitrations under the Model Statute. In comparison to the EEOC's procedures which commonly take a year or longer, the Model Statute offers a quicker, more efficient, and less costly resolution of

employment discrimination lawsuits for employees and employers. It also preserves employee rights under the federal discrimination statutes that the EEOC administers by requiring arbitrators to award the same remedies for violations that exist under them.

The arbitration would be conducted like any other labor arbitration. An arbitrator's award is final and binding on the employee and employer, and can only be set aside by evidence that there was partiality by the arbitrator or corruption or misconduct of the arbitrator prejudicing the rights of the employee or the employer or that the arbitrator exceeded his/her powers under the act. Failure to conform to an arbitrator's award carries a contempt penalty.

To discourage appeals of other than the most legitimate cases, no automatic stay of enforcement is provided. This lends further to the finality and binding quality of any arbitrator's award. To receive the benefit of a stay, either the employee or the employer must demonstrate some likelihood of success on appeal or extreme prejudice.

The Model Statute is not intended to duplicate any other remedies available for litigating employment disputes. All employees must receive notice of the act. Finally, the act's effective date is postponed for one hundred and twenty calendar days to allow employees and employers to prepare for its implementation.

The Model Statute proposal is an attempt to provide a national labor policy for a quick, efficient, and economical means for resolving at-will employment disputes similar to that found under collective bargaining agreements. It is intended as a point to renew discussions for addressing the needs for both employees and employers in resolving employment disputes better without recourse to an expensive administrative or judicial process that only prolongs these disputes' resolution.

## CONCLUSIONS

The foregoing examination of the at-will employment doctrine and its quarter century modification indicates that the time has again arrived to review this important question as part of nation's labor policy. The Model Statute serves as a step in the right direction to begin discussion.

The law governing the at-will employment relationship in has moved forward considerably during the last quarter century. At the beginning of the last century, employees had no right to bargain collectively. They were guaranteed neither a minimum wage, a humane work schedule, or protection against discrimination of any kind.

The federal government has guaranteed the right to bargain collectively and has taken great strides toward eliminating discrimination. Yet, the United States still attempts to cling to the out-dated at-will employment doctrine.

Millions of employees serve solely at their employers' pleasure, subject to discipline and termination for a good reason, a bad reason, no reason, with or

without notice. The courts and legislatures have made some inroads into protecting these employees.

As the new millennium dawns, the time has again arrived for all interested parties to reexamine this area as part of the national labor policy. No longer can the impact of these disputes be ignored. Courts have sent sufficient warning signals for the initiation of federal legislative action.

Statutory regulation offers the most realistic manner in which to confront the at-will employment doctrine's modification. The need for reexamination of legislative solutions in this area is clear after a quarter century of continued litigation to erode the doctrine. The impact or viability of continuing to litigate this doctrine without a final solution can now be assessed.

Courts have continued to develop a common law that encourages overburdening the judicial system by failing to set forth specific guidelines. This has been costly for employees, employers, and an already overtaxed judicial system. Consequently, at a minimum, the recent court decisions will only cause additional litigation as employees attempt to avail themselves of relief, which only further complicate this unresolved morass.

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## ENDNOTES

1. See I. P. Hardin (ed.), *The Developing Labor Law* 761-850, 1008-84 (3d ed. 1992); Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 Vand. L. Rev. 471 (1986); see also Bakaly, Jr. & Bryan, *Survival of the Bargaining Agreement: The Effect of Burns*, 27 Vand. L. Rev. 1 (1974); Nash, Wilder, Jr. & Banov, *The Development of the Collyer Deferral Doctrine*, 27 Vand. L. Rev. 23 (1974). See, e.g., *NLRB v. Blackstone Co.*, 685 F.2d 102, 106 n.5 (3d Cir. 1982) ("We consider the Board's contrary instructions to its administrative law judges to be completely improper and reflective of a bureaucratic arrogance which will not be tolerated."). Similar nonacquiescence by administrative agencies has occurred under the Occupational Safety and Health Act (OSHA) of 1970 and the Social Security Act (SSA). See, e.g., *Jones & Laughlin Steel Corp. v. Marshall*, 636 F.2d 32, 33 (3d Cir. 1980) (OSHA) ("... the agency is not free to apply its own view of the statute in contradiction of the view of the precedent of this Court."); *Holden v. Heckler*, 584 F. Supp. 463, 474 (N.D. Ohio 1984) (SSA) ("Notwithstanding these [court] rulings, the Secretary [of Health, Education, & Welfare] has not applied *Hayes*

- [v. *Secretary of Health, Education & Welfare*, 656 F.2d (204 (6th Cir. 1981),] to any other disability terminations; rather she has continued to instruct BDD [Ohio Bureau of Disability Determinations] and the ALJ's (administrative law judges) to follow SSA's regulations and internal procedures, mandating current disability standards.").
2. See R. Covington & K. Decker, *Individual Employee Rights in a Nutshell*, chs 1, 6 (1995) ("The volume of labor and employment law has increased so dramatically the past three decades that those who practice it often remark about how little of what they do in 1994 they would have been doing a generation earlier. This can be easily understood if one simply chronicles a few of the major developments, beginning with the end of the Second World War: [listing statutes and court decisions that influenced labor and employment law since 1947]" *Id.* at 12-15).
  3. See generally K. Decker, *A Manager's Guide to Employee Privacy: Laws, Procedures, And Policies* (1989); K. Decker & H. T. Felix, II, *Drafting And Revising Employment Handbooks* (1991); K. Decker, *Drafting And Revising Employment Policies And Handbooks* (1994); K. Decker, *Employee Privacy Forms And Procedures* (1988); K. Decker, *Employee Privacy Law And Practice* (1987); K. Decker, *Hiring Legally: A Guide For Employees And Employers* (2000); K. Decker, *Privacy in The Workplace* (1994); L. Larsen & P. Borowsky, *Unjust Dismissal* (1987); J. Goodman (ed.), *Employee Rights Litigation: Pleading & Practice* (1991); S. Pepe & S. Dunham, *Avoiding And Defending Wrongful Discharge Claims* (1990); H. Perritt, *Employee Dismissal Law* (3d ed. 1992); M. Rothstein, C. Craver, E. Schroeder, & E. Shoban, *Employment Law* (2d ed. 1999).
  4. Restatement (Second) of Agency § 442(1958).
  5. See, e.g., Decker, *At-Will Employment in Pennsylvania after "Banans" and "Darlington." New Concerns for a Legislative Solution*, 32 Vill L. Rev. 101, 131 (1987) ("Perhaps the time has come to begin a thoughtful dialogue which will realistically address this area of employment law through a statutory solution."); Decker, *Federal Regulation of At-Will Employment*, 61 U. Det. J. Urban. L. 351, 360 (1984) ("Today, there is a growing recognition that the at-will employee should be protected similar to the way most public employees and union organized employees . . . are protected."); Decker, *Reinstatement as a Remedy for a Pennsylvania Employer's Breach of a Handbook or an Employment Policy*, 90 Dick. L. Rev. 41, fn 189 (1985) ("Arbitration serves as an alternative to traditional litigation of employee terminations arising under a collective bargaining agreement, and provides a binding resolution more quickly and more inexpensively."); Decker, *At-Will Employment in Pennsylvania—A Proposal for its Abolition and Statutory Regulation*, 87 Dick. L. Rev. 477, 482 (1983) ("Perhaps the most significant recent development affecting employment relations has been the modification of at-will employment in a number of jurisdictions.); Decker, *At-Will Employment: A Proposal for its Statutory Regulation*, 1 Hofstra Lab. L.F. 187, 189 (1983) (" . . . the need to protect the at-will employee who does not possess the bargaining power equal to that of an employer has arrived."); Decker, *Handbooks and Employment Policies as Express or Implied Guarantees of Employment—Employer Beware*, 5 J.L. & Com. 207 (1984) (suggesting "fairness" rationale for employers wishing to terminate at-will employees); Comment, *The Role of Federal Courts in Changing State Law: The Employment At-Will Doctrine in Pennsylvania*, 133 U. Pa. L. Rev. 227, 247 (1984) ("The trend toward liberalization of the strict doctrine of employment at will . . . is unmistakable."); see also Fannon, *The*



- Public Policy Exception to the Employment At-Will Doctrine: Searching for Clear Mandates in the Pennsylvania Constitution*, 27 Rutgers L. J. 927 (1996); Comment, *The Employment-at-Will Rule: The Development of Exceptions and Pennsylvania's Response*, 21 Duq. L. R. 477 (1983). See generally, Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404, 1416 (1967) (“[T]he philosophy [of at-will employment] is incompatible with these days of large, impersonal, corporate employers; it does not comport with the need to preserve individual freedom in today’s job-oriented, industrial society.”); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 Ohio St. L. J. 1, 14 (1979) (“[T]he overwhelming importance of the employment relation to the individual employee, coupled with the arbitrariness and capriciousness of a rule that permits the termination of that relation without cause necessitates that the courts . . . reexamine the suitability of that rule.”); St. Antoine, *The Right Not to be Fired Unjustly*, 10 Human Rights 32, 153 (1982) (“Not a single respected and disinterested voice has been heard to suggest that there is any valid, substantial reason for opposing the requirement of just cause.”); Summers, *Protecting All Employees Against Unjust Dismissal*, 58 Harv. Bus. Rev. 132, 134 (1980) (“The critical fact is that [the courts] have perpetuated legal rules that run counter to accepted principles of personnel practices and social values, . . . all sense of fairness, and all principles of due process.”); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481, 484 (1976) (“[T]he anachronistic legal rule that employees can be discharged for any reason or no reason should be abandoned.”).
6. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
  7. H. G. Wood, *Law of Master & Servant* 277 (1877).
  8. See, e.g., *Martin v. New York Life Insurance Co.*, 148 N.Y. 117, 42 N.E. 416 (1895).
  9. See e.g., *Payne v. Western & A.R.R.*, 81 Tenn. 507, 519-520 (1884), overruled on other grounds, sub. nom.; see also *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915).
  10. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a state law prohibiting bakers from working more than ten hours a day on the basis of the inviolability of “freedom of contract”).
  11. See generally, P. Johnson, *A History of The American People* (1997); III. S.E. Morison, *The Oxford History of The American People: 1869 Through The Death of John F. Kennedy*, 1963 (1994); M. Novak, *The Guns of Lattimer* (1996).
  12. See, e.g., *Adair v. United States*, 208 U.S. 161 (1908) (finding unconstitutional statute prohibiting an employer from terminating an employee because of union membership); see also *Coppage v. Kansas*, 236 U.S. 35 (1915) (same).
  13. See, e.g., 29 U.S.C. §§ 151-169 (1998) (National Labor Relations Act of 1935); 29 U.S.C. §§ 201-209 (1998) (Fair Labor Standards Act of 1976); 29 U.S.C. §§ 621-634 (1998) (Age Discrimination in Employment Act of 1967); 29 U.S.C. §§ 651-678 (1998) (Occupational Safety and Health Act of 1970); 29 U.S.C. §§ 701-796 (1998) (Vocational Rehabilitation Act of 1973); 38 U.S.C. §§ 2021(a)(A)(i), 2021(a)(B), 2021(b)(1), 2024(1998) (Vietnam Era Veterans Readjustment Assistance Act); 42 U.S.C. §§ 12101-12213 (1998) (Americans with Disabilities Act of 1990); 42 U.S.C. §§ 2000e-1 to 2002-17 (1998) (Title VII of the Civil Rights Act of 1964).
  14. See, e.g., *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (the presumption that an employment contract is intended to be terminable at-will is subject, like any presumption, to contrary evidence which may take the form of an

agreement, express or implied, that the relationship will continue for some fixed time period; oral promise enforceable where employer's practice was to terminate only for just cause); see also *Bower v. A.T.&T. Technologies, Inc.*, 852 F.2d 361 (8th Cir. 1988) (laid-off employees could use their employer for compensatory damages over failing to keep promise of re-employment following a corporate restructuring); *Panto v. Moore Business Forms, Inc.*, 547 A.2d 260 (N.H. 1988) (employer's promise to continue salary, pension, and insurance benefits for three months after possible layoffs could constitute an enforceable unilateral contract, if there was an offer that was accepted by an employee continuing to perform his/her regular duties). But see *Miller v. Pepsi-Cola Bottling Co.*, 259 Cal. Rptr. 56 (1989) (summary judgment for employer granted where the only evidence of an implied contract was the employee's longevity of service, regular salary increases, and promotions which should not change an at-will employee's status to one that is terminable only for cause).

15. See, e.g., *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E. 2d 2151 (1977) (in the absence of express individual contractual rights a covenant of good faith and fair dealing is implicit in the employment contract; terminating salesperson to avoid paying earned commissions breached contract); see also *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (employment contract, like all contracts, includes an implied covenant of good faith and fair dealing). But see *Murphy v. American Home Products, Inc.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) (refusal to imply a covenant of good faith and fair dealing when it would be inconsistent with other terms of the contractual relationship).
16. See, e.g., *Wooley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, 491 A.2d 1257, modified, 101 N.J. 10, 499 A.2d 515 (1985) (absent a clear and prominent disclaimer that employment is at-will, an implied promise contained in an employment handbook that an employee will be terminated only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at-will); see also *Hoffmann-LaRoche, Inc. v. Campbell*, 512 So.2d 725 (Ala. 1987) (provisions in an employment handbook plus continued employment following receipt of handbook created unilateral contract that modified at-will relationship); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980) (assurances in handbook that employee would only be terminated for "just cause" enforceable against employer); *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702 (Wyo. 1985) (at-will employee's termination unlawful where employer failed to follow the progressive discipline system it had established in its employment manual). But see *Fiscella v. General Accident Insurance Co.*, 114 L.R.R.M. (BNA) 2611 (W.D. Pa. 1983), aff'd without op., 735 F.2d 1348 (3d Cir. 1984) (progressive discipline system in employment handbook not enforceable upon employer to terminate an at-will employee only for "just cause").
17. See, e.g., *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (terminating an employee for refusing to take a polygraph examination); see also *Tackett v. Delco Remy, Division of General Motors Corp.*, 959 F.2d 630 (7th Cir. 1992) (retaliating against an employee for bringing litigation against the employer); *Savodnik v. Korvettes, Inc.*, 489 F. Supp. 1010 (E.D.N.Y. 1980) (avoiding the payment of an employee's pension); *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (terminating an employee for refusing to participate in an employer's illegal price-fixing scheme); *Petermann v. International Board of*

- Teamsters, Inc.*, 174 Cal. App.2d 184, 344 P.2d 25 (1959) (terminating an employee for refusing to commit perjury at the employer's command); *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1978) (terminating an employee for filing workers' compensation claims); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (terminating an employee for serving on a jury). But see *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979) (no public policy violation for terminating an employee for taking too much sick leave); *Ward v. Frito-Lay, Inc.*, 290 N.W.2d 536 (Wis. 1980) (no public policy violation for terminating employee for cohabitating with one employee while having an affair with a married co-employee).
18. Mont. Code Ann. §§ 39-2-902 to 39-2-914 (1998).
  19. St. Antoine, *The Model Employment Termination Act: A Threat to Management or a Long-Overdue Employee Right?* 1993 Proc. of N.Y.U. 45th Ann. Nat'l Conf. on Lab. 270 (1993).
  20. See *Whirlpool Corp.*, 58 Lab. Arb. (BNA) 421 (1972) (Daugherty, Arb.) (Seven-question checklist to determine "cause" or "just cause". This checklist sets forth the following: 1. Did the employer forewarn the employee orally or in writing of the possible or probable consequences of the employee's adverse action? 2. Was the employer's rule reasonably related to the orderly, efficient, and safe operation of the business and the performance that the employer might reasonably expect of the employee? 3. Did the employer, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey an employer rule or order? 4. Was the employer's investigation conducted fairly and objectively? 5. At the employer's investigation, did the employer's adjudicator obtain substantial and compelling evidence or proof that the employee was responsible or at fault as alleged? 6. Has the employer applied its rule, orders, policies, and penalties fairly and without discrimination to all employees? 7. Was the degree of discipline reasonably related to the seriousness of the offense and the employee's work performance record with the employer? A negative response to any question on this checklist would overturn the employer's disciplinary action.); *Worthington Corp.*, 24 Lab. Arb.(BNA) 1, 6-7 (1955) (McGoldrick, Arb.) (. . . [I]t is common to include the right to suspend and discharge for "just cause," "justifiable cause," "proper cause," "obvious cause," or quite commonly for "cause." There is no significant difference between these various phrases. These exclude discharge for things for which employees have been traditionally fired. They include the traditional causes of discharge in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor and most recently they include the decisions of courts and arbitrators. They represent a growing body of "common law" that may be regarded either as the latest development of the law of "master and servant" or perhaps, more properly as part of the new body of common law of "Management and labor under collective bargaining agreements." They constitute the duties owed by employees to management and, in their correlative aspect, are part of the rights of management. They include such duties as honesty, punctuality, sobriety, or, conversely, the right to discharge for theft, repeated absence or lateness, destruction of company property, brawling and the like. Where they are not expressed in posted rules, they may very well be implied, provided they are applied in a uniform, non-discriminatory manner.); *Cameron Iron Works, Inc.*, 25 Lab. Arb. (BNA) 295, 301 (1955) (Boles, Arb.) (Arbitrator Walter E. Boles held that a "just cause" standard

for consideration of disciplinary action is, absent or clear proviso to the contrary, implied in a collective bargaining agreement); See, also, *Atwater Mfg. Co.*, 13 Lab. Arb. (BNA) 747, 749 (1949) (If the Company can discharge without cause, it can lay off without cause. It can recall, transfer, or promote in violation of the seniority provisions simply in invoking its claimed right to discharge. Thus, to interpret the Agreement in accord with the claim of the Company would reduce to a nullity the fundamental provision of a labor-management agreement—the security of a worker in his job.).

21. Gould, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U.L. Rev. 885, 892 (1986) (One's job provides not only income essential to the acquisition of the necessities of life, but also the opportunity to shape the aspirations of one's family, aspirations which are both moral and educational. Along with marital relations and religion, it is hard to think of what might be viewed as more vital in our society than the opportunity to work and retain one's employment status). See also, Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment At Will*, 17 Am. Bus. L. J. 467, 481 n.64 (1980) ("The question of job security is the most important factor in the life of worker.").
22. St. Antoine, *The Right Not to be Fired Unjustly*, 10 Human Rights 32, 35 (1982).
23. See, e.g., *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (terminating an employee for refusing to take a polygraph examination); see also *Tacket v. Delco Remy, Division of General Motors Corp.*, 959 F.2d 630 (7th Cir. 1992) (retaliating against an employee for bringing litigation against the employer); *Savodnik v. Korvettes, Inc.*, 489 F. Supp. 1010 (E.D.N.Y. 1980) (avoiding the payment of an employee's pension); *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (terminating an employee for refusing to participate in an employer's illegal price-fixing scheme); *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1978) (terminating an employee for filing workers' compensation claims); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (terminating an employee for serving on a jury); *Petermann v. International Board of Teamsters, Inc.*, 174 Cal. App.2d 184, 344 P.2d 25 (1959) (terminating an employee for refusing to commit perjury at the employer's command).
24. See, e.g., the Society for Human Resource Management's web site at "www.shrm.org." (listing information available to human resource managers in promoting good personnel practices).
25. See generally *Barron's, Profiles of American Colleges 25th Edition* (2000).
26. See, e.g., *Temple University School of Law Catalog* (2000); *Vanderbilt University School of Law Catalog* (2000); *Widener University School of Law Catalog* (2000). Since the early 1990s, various casebooks and materials have been offered for teaching employment law courses. See, e.g., M. Finkin, A. Goldman & C. Summers, *Legal Protection for the Individual Employee* (1996); M. Rothstein & L. Liebman, *Employment Law: Cases and Materials* (4th ed. 1998); C. Sullivan, D. Calloway & M. Zimmer, *Cases and Materials on Employment Law* (1993); S. Wilburn, S. Schwab, & J. Burton, Jr., *Employment Law: Cases and Materials* (1993).
27. See generally, K. Decker, *Covenants Not to Compete* (2d ed. 1993); B. Malsberger (ed.), *Covenants Not to Compete: A State-By-State Survey* (2d ed. 1996).
28. 29 U.S.C. §§ 151-169 (1998); see also R. Gorman, *Basic Text on Labor Law 3* (1976) (Prior to the National Labor Relations Act's (NLRA's) enactment, "there developed a gradual sensitivity on the part of some courts to the need for fair procedures in the

- issuance and enforcement of injunctions and, more important, a legislative sensitivity toward the interests of the laborer.”).
29. Mo. Rev. Stat. § 290.140 (1993) (requires a corporation to provide any employee who has voluntarily quit or who has been terminated after at least ninety days of employment, with a letter explaining “the nature and character of service rendered by such employee to such corporation and duration thereof, and truly stating for what cause, if any, such employee was discharged or voluntarily quit such service”).
  30. P.R. Laws Ann. tit. 29, §§ 185a, 185b (1999) (guaranteed severance pay for the termination of at-will employees and limited right to challenge certain terminations).
  31. S.C. Code Ann. § 41-17-10 to 41-17-70 (Law. Co-op. 1986) (Commissioner of Labor mediates disputes in wrongful termination cases and all other industrial disputes, strikes, or lockouts).
  32. S.D. Codified Laws Ann. §§ 60-4-5 (1978) (employment can be terminated at will only if the employee was not hired for a specific term and an employer who wishes to terminate such an employee must show that the termination was justified by “habitual neglect of duty or continued incapacity to perform or any willful breach of duty by the employee in the course of his employment”).
  33. V. I. Code Ann. tit. 24, §§ 76-79 (1999) (protects employees from certain terminations and provides for a review procedure).
  34. See e.g., Mich. Stat. Ann. § 17.428 (West 1989) (prohibiting employer from threatening, terminating, or otherwise discriminating against employee who is about to report a violation of the law by employer); Ohio Rev. Code Ann. § 4113.52 (1991) (prohibiting employers from disciplining or taking retaliatory action against employee who reports violation of state or federal statute, ordinance, or regulation by another employer or his/her employer); Pa. Stat. Ann. tit. 43, §§ 1421-1428 (West 1991) (protects employees who report a violation or suspected violation of federal, state, or local law and provides protection for employees who participate in hearings, investigations, legislative inquiries, or court actions).
  35. National Conference of Commissioners on Uniform State Laws, Model Employment Termination Act (August 8, 1991).
  36. *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 776 P.2d 488 (Mont. 1989) (elimination of common law tort actions in Montana’s Wrongful Discharge from Employment Act does not violate state’s constitution).
  37. *Johnson v. Montana*, 238 Mont. 215, 776 P.2d 1221 (Mont. 1989) (classifications created under Montana Wrongful Discharge from Employment Act do not violate equal protection guarantees under the state’s constitution).
  38. See, e.g., Pennsylvania House of Representatives, H.B. No. 1020 (April 23, 1985); Pennsylvania House of Representatives, H.B. No. 2105 (May 1, 1984); Pennsylvania House of Representatives, H.B. No. 1742 (July 1, 1981).
  39. Pa. Stat. Ann. tit. 43, §§ 1421-1427 (West 1991) (Pennsylvania Whistleblower Law).
  40. *Darlington v. General Electric*, 350 Pa. Super. 183, 191-192, 504 A.2d 306, 310 (1986) (“The citadel of the at-will presumption has been eroded of late, but it has not been toppled. Perhaps the time has come for employees to be given greater protection in this area. This was the opinion of one commentator, who cautioned, however, that “Pennsylvania courts. . . should at this time avoid further modification of the at-will employment relationship. Restraint should be observed to minimize the adverse effects that any complete abrogation might have on employment, productive efficiency,

and overburdening of the judicial process with additional cases. Time and thought should be given now to whether abrogation of the doctrine should occur through 'judicial erosion' or 'legislative mandate.' K. H. Decker, "At-Will Employment in Pennsylvania—A Proposal for Its Abolition and Statutory Regulation," 87 Dickinson Law Review 477, 479 (1983)."). See also *Veno v. Meredith*, 357 Pa. Super. 85, 99-100 n.3, 515 A.2d 571, 579 n.3 (1986) ("[c]ourts are likely to be long on generalization and short on detail when the situation requires outlining procedures and remedies."); *Martin v. Capital Cities Media*, 354 Pa. Super. 199, 221, 51 A.2d 830, 841 (1986) ("The judicial chamber is ill-equipped to determine what effects such a sweeping policy change [of at-will employment] would have on society. Such a change would best be accomplished by the legislative process, with its attendant public hearings and debate.").

41. See, e.g., *Bureau of National Affairs, Individual Employment Rights Reporter* (2000) (This bi-weekly reporter illustrates how this court caseload has increased throughout the United States during the past quarter century. Since its first bound volume's publication in 1987, 15 bound volumes have been published as of this writing. Each bound volume contains approximately 2000 pages. Where prior to 1987, little, if any, need existed for an employment service of this nature, today it is an indispensable tool in understanding and dealing with this developing area. From this, it is difficult for anyone to argue that these cases have not been a strain on our existing federal and state court system. Undoubtedly, many of these disputes could have been resolved more effectively through final and binding arbitration similar to what occurs under private and public sector collective bargaining agreements.)
42. See Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 Mich. L. Rev. 1115, 1122 and n.11 (1964) (A system of specialized labor courts has been successful in Denmark, Germany, and Sweden. These courts could be operated with a simplified procedure like that used in by district justices. In this way, cases could be readily presented by human resource managers, union representatives, or other laypersons without the necessity of being represented by attorneys. In simple cases, the use of attorneys may only obfuscate and complicate what is readily apparent. These courts would also be equipped to hear complex cases to give full scope to representation by attorneys. See also II. B. Aaron & D. Farwell (eds.), *Employment Terminations* (1984); P. Hayes, *Labor Arbitration—A Dissenting View* 116-118 (1966).
43. See generally, T. Bornstein & A. Gosline (eds.), *Labor and Employment Arbitration* (1990); O. Fairweather, *Practice and Procedure in Labor Arbitration* (2d ed. 1983); E. Goggin & M. Volz (eds.), *Elkouri and Elkouri: How Arbitration Works* (5th ed. 1997). See also, N. Brand (ed.), *Discipline and Discharge in Arbitration* (1998); Haagen (ed.), *Arbitration Now: Opportunity for Fairness, Process Renewal and Invigoration* (2000); T. St. Antoine (ed.), *The Common law of the Workplace: The Views of Arbitrators* (1998).
44. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (interpretation of the dispute under the agreement is for the arbitrator and the courts will not review the merits of an arbitration award); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (arbitrability of the employment dispute is for the arbitrator to determine in the first instance and not the courts; i.e., doubts as to coverage of the arbitration clause should be resolved in favor of arbitrability); *United*

- Steelworkers v. American Mfg., Co.*, 363 U.S. 564 (1960) (where a valid arbitration agreement exists, courts will compel arbitration of the dispute where on its face it is covered by the agreement); see also *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (stating that in cases involving collective bargaining agreements, "courts play only a limited role when asked to review the decision of an arbitrator"). See also, Decker, *The Recent Impact of Statutory Law on Contract Interpretation in Public Education Grievance Arbitration*, 4. J. Collective Negotiations in the Public Sector 359 (1975) (discussing the role of arbitration as the favored means of resolving employment disputes).
45. Bureau of National Affairs, No. 74 Daily Labor Reporter, A-9 (April 19, 1999) (A majority of federal and state courts hold that agreements to arbitrate statutory discrimination claims and other workplace employment disputes are valid so long as the employee does not waive any rights or remedies under the statutes and the arbitral process is fair). See, e.g., *In re: Prudential Insurance Co.*, 133 F.3d 225 (3d Cir. 1998) (insurance agents must submit their dispute to arbitration); *Zandford v. Prudential-Bache Securities*, 112 F.3d 723 (4th Cir. 1997) (terminated securities executive required to submit his dispute to arbitration); *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996) (female disc jockey whose employment contract required arbitration of "any other disputes" must submit sexual harassment, retaliation, and constructive discharge claims to arbitration); *Patterson v. Tenet Healthcare*, 113 F.3d 832 (8th Cir. 1997) (employee's discrimination claims are required to be arbitrated under employment handbook's procedure); *Painewebber, Inc., v. Agron*, 49 F.3d 347 (8th Cir. 1995) (arbitration award overturning employee's termination should not be vacated on ground that it violates at-will employment doctrine, where use of arbitration as means of settling employment-related disputes necessarily alters employment relationship from at-will to standard that infers some level of cause so that arbitration panel can determine whether termination was justified); *Continental Airlines v. Mason*, 12 I.E.R. Cas.(BNA) 140 (C.D. Cal. 1995), *aff'd without op.*, 87 F.3d 1318 (9th Cir. 1996) (employee must arbitrate her termination pursuant to employment handbook's arbitration procedure where procedure is neither contrary to parties' reasonable expectations nor unduly oppressive); *Lang v. Burlington Northern R.R. Co.*, 835 F. Supp. 1104 (D. Minn. 1993) (mandatory arbitration provision that was added to employment handbook 26 years after employee was hired bars wrongful termination lawsuit, where written arbitration provision was distributed to employees for insertion in their handbooks, and became binding unilateral contract when employee accepted employer's offer of changed condition by his continued employment; arbitration provision was not contract of adhesion since there was no evidence that it resulted from fraud or was inherently unfair); *McNulty v. Prudential-Bache Securities*, 871 F. Supp. 567 (E.D.N.Y. 1994) (as an employment condition employee was required to arbitrate disputes); *Southtrust Securities v. McClellan*, 730 So. 2d 620 (Ala. Sup. Ct. 1999) (stockbroker must arbitrate claim); *Gold Kist v. Baker*, 730 So.2d 614 (Ala. Sup. Ct. 1999) (employee must arbitrate workers' compensation claim); *Legatree v. Luce, Forward, Hamilton*, 74 Cal. App.4th 1105, 88 Cal. Rptr.2d 664 (1999) (employee who was terminated for refusing to sign predispute arbitration agreement requiring that nonstatutory work-related disputes be resolved through binding arbitration and that losing party pay all costs, including legal fees, has no claim for wrongful termination in violation of public policy); *Brown v. KFC*

- National Management Co.*, 82 Haw. 226, 921 P.2d 146 (1996) (employee compelled to submit to binding arbitration his claims of racial discrimination relating to his resignation or termination); *Rembert v. Ryan's Family Steak House, Inc.*, 235 Mich. App. 118, 596 N.W.2d 208 (1999) (predispute agreements to arbitrate statutory employment discrimination claims are valid so long as the employee does not waive any rights or remedies under the statute and the arbitration is fair); *Fastenberg v. Prudential Insurance*, 309 N. J. Super. 415, 707 A.2d 209 (1998) (insurance company vice president must arbitrate his claims of wrongful termination, defamation, and negligent misrepresentation). But see *Circuit City Stores, Inc., v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (refusal to enforce employer's procedure to arbitrate state law discrimination claims); *Lambdin v. District Court, 18th Judicial District, Arapahoe County*, 903 P.2d 1126 (Colo. 1995) (employee cannot waive statutory rights by entering into an arbitration agreement). See also, Bompey, Delikat, & McClelland, *The Attack on Arbitration and Mediation of Employment Disputes*, 13 Labor Lawyer 21 (1997); Decker, *Gardner-Denver to Gilmer: The Facts and Possibilities for Arbitration*, 2 J. of Individual Employment Rights 305 (1993-94); Delikat & Kathawala, *Arbitration of Employment Discrimination Claims under Pre-Dispute Agreements: Will Gilmer Survive?*, 16 Hofstra Lab. & Emp. L. J. 83 (1998); Siegel, *Changing Public Policy: Private Arbitration to Resolve Statutory Employment Disputes*, 13 Labor Lawyer 87 (1997).
46. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (collective bargaining agreement's grievance arbitration procedure cannot preclude employee from also filing a fair employment practice claim).
  47. See, e.g., *Nordia v. NutriSys, Inc.*, 897 F.2d 339 (8th Cir. 1990) (denying employee's motion to compel arbitration despite mandatory arbitration clause in settlement agreement).
  48. See generally H. Kramer, *Alternative Dispute Resolution in the Workplace* (1999); A. Westin & A. Feliu, *Resolving Employment Disputes without Litigation* (1988).
  49. R. Duston, *Gilmer v. Interstate/Johnson Lane Corp.: A Major Step Forward for Alternative Disputes Resolution, or a Meaningless Decision?* 7 Labor Lawyer 823 (1991).
  50. See, e.g., *Fletcher v. Kidder, Peabody & Co.*, 81 N.Y.2d 623, 601 N.Y.S.2d 686, 619 N.E.2d 998 (1993), cert. denied, 510 U.S. 993 (1993) (compulsory arbitration bars judicial resolution of state fair employment practice claims); *Duello v. Board of Regents of the University of Wisconsin*, 176 Wis.2d 961, 501 N.W.2d 38 (1993) (Title VII attorney's fees denied for internal employee ADR procedure).
  51. See, e.g., *Lang v. Burlington R.R. Co.*, 835 F. Supp. 1104 (D. Minn. 1993) (distribution of employment handbook containing mandatory arbitration provision to employee became binding unilateral contract when employee accepted employer's offer of changed condition by continuing employment).
  52. See, e.g., *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634 (7th Cir. 1999) (arbitration agreement enforceable where mutual consideration to arbitrate present).
  53. See, e.g., *Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), cert. denied, 516 U.S. 812 (1995) (female former employees were not bound by any valid agreement to arbitrate employment disputes, since they did not knowingly contract to forego statutory remedies in favor of arbitration).



54. See, e.g., *Trumbull v. Century Marketing Corp.*, 12 F. Supp.2d 683 (N.D. Ohio 1998) (employer was not entitled to enforcement of arbitration clause contained in employment handbook where arbitrator was not permitted to award the same remedies that were available in the judicial forum); *Rembert v. Ryan's Family Steak House, Inc.*, 235 Mich. App. 118, 596 N.W.2d 208 (1999) (agreements to arbitrate statutory employment discrimination claims are valid so long as the employee does not waive any rights or remedies under the statute and the arbitration process is fair).
55. See, e.g., *Hooters of America v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (arbitration procedure unenforceable where it was crafted by employer to ensure that arbitrator would not be neutral); *Cheng-Canindin v. Renaissance Hotel Associates, et al.*, 50 Cal. App.4th 676, 57 Cal. Rptr.2d 867 (1996) (employment handbook's arbitration provision not enforceable where employee could not participate in neutral arbitrator's selection).
56. See, e.g., *Davis v. LPK Corp.*, 78 F.E.P. Cas.(BNA) 32 (N.D. Cal. 1998) (employer cannot preserve validity of arbitration agreement that provides for employee to pay one-half of the costs, even though employer offered to advance all costs subject to reimbursement by the employee if the employer prevailed or to bear entire arbitration cost); *Shankle v. B-G Maintenance Management*, 74 F.E.P. Cas.(BNA) 94 (D. Colo. 1997), *aff'd remanded*, 163 F.3d 1230 (10th Cir. 1999) (arbitration agreement's provision requiring employee to pay one-half of arbitrator's fees renders agreement unenforceable where provision operates as a disincentive to submitting discrimination claim to arbitration and precludes arbitration from being reasonable substitute for judicial forum); *Maciejewski v. Alpha Systems Lab, Inc.*, 73 Cal. App.4th 1372, 87 Cal. Rptr.2d 390 (1999), *as modified*, 89 Cal. Rptr.2d 834, 986 P.2d 170 (1999) (arbitration agreement splitting costs between employee and employer considered unconscionable and unenforceable).
57. See, e.g., *Cheng-Canindin v. Renaissance Hotel Associates, et al.*, 50 Cal. App.4th 676, 57 Cal. Rptr.2d 867 (1996) (employment handbook's arbitration provision not enforceable where employer controlled what evidence could be presented).
58. M. Weisel, *After the Gilmer Decision: Effectiveness of Arbitration Clauses in Employment Contracts*, 1 J. of Individual Employment Rights, 323 (1992-93).
59. For example, in Pennsylvania, the Act of June 24, 1968, Act 111, 1968 Pa. Laws 237 (Act 111), established the rights of Pennsylvania police and fire employees to organize and bargain collectively through selected representatives; however, no strike right was granted and disputes were to be resolved through final and binding arbitration. Pa. Stat. Ann. tit. 43, §§ 217.1-.10 (West 1992). All other Pennsylvania public employees were given the right to organize and bargain collectively, including a limited strike right for certain public employees, by the Act of July 23, 1970, No. 195, 1970 Pa. Laws 563 (Act 195), with final and binding arbitration for certain public employees who are not permitted to strike, final and binding arbitration for all public employees who enter into a collective bargaining agreement to resolve any and all disputes arising under the agreement, and either advisory or final and binding arbitration for those public employees and employers who agree to use it to resolve negotiations over a new collective bargaining agreement. Pa. Stat. Ann. tit. 43, §§ 1101.101.-.2301 (West 1991).
60. American Arbitration Association, National Rules for the Resolution of Employment Disputes (January 1, 1999).
61. See, e.g., 29 U.S.C. §§ 621-634 (1998) (Age Discrimination in Employment Act of 1967); 29 U.S.C. §§ 701-796 (1998) (Vocational Rehabilitation Act of 1973);

42 U.S.C. §§ 12101-12213 (1998) (Americans with Disabilities Act of 1990); 42 U.S.C. §§ 2000e-1 to 2002-17 (1998) (Title VII of the Civil Rights Act of 1964).

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