EMPLOYMENT ARBITRATION AGREEMENTS

NEW STRATEGIES AFTER THE SUPREME COURT SPEAKS

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I. AN OVERVIEW OF EMPLOYMENT ARBITRATION

Employment arbitration first received the Supreme Court's approval in 2001 in *Circuit City Stores, Inc. v. Adams*.[1] After *Circuit City*, employers' interest in arbitration gradually increased. By 2008, it was estimated that 25% or more of non-unionized workers were covered by arbitration agreements.[2]

As a general matter, employers' interest in arbitration has typically derived from the following potential benefits:

- Lower costs
- Quicker
- Less stringent procedural rules
- No runaway jury awards
- More flexible deadlines
- Confidentiality (?)
- Arbitrators with employment law expertise
- Some control over arbitrator selection
- Easier access to the arbitrator
- Some plaintiffs' lawyers will go away.

At the same time, employers have learned through experience that employment arbitration can present some risks. These include:

- Satellite/pre-arbitration litigation that increases costs
- Arbitrator's fees
- Arbitration entity's fees
- Few summary judgment victories, more hearings
- Rick of compromise awards
- Weak cases/inflated values
- Constant arbitrator contacts as plaintiff's weapon
- Nightmare arbitrator
- Too little procedure
- Too much discovery
- Limited appellate rights
- Risk of class arbitration

More recently, employers have recognized another potential benefit of employment arbitration that may outweigh most or all of these risks. That benefit is the ability to include class and collective action waivers that limit arbitration to individual proceedings.

II. EMPLOYMENT ARBITRATION AT A CROSSROADS

Employment arbitration has received significant new attention in recent months due to two developments. First, the Supreme Court decided *Murphy Oil* and its companion cases to decide whether class and collective action waivers are enforceable. Second, some members of the #MeToo Movement have begun to contend that employment arbitration contributes to sexual harassment and should be banned.

The outcome of these two developments will determine the future of employment arbitration. On one hand, the ability to include class and collective action waivers may lead to a dramatic increase in the use of employment arbitration. On the other hand, if legislation is passed barring the arbitration of any specific types of employment claims, such regulation may be a start down the slippery slope toward a complete ban of all employment arbitration.

A. Class Action Waivers

Three consolidated cases – *Murphy Oil v. NLRB, Lewis v. Epic Systems, and Morris v. Ernst & Young* – were the first to be argued during the Court's current term and are likely the most important employment cases to be decided all year.[3] These cases involve the future of class action waivers in employment arbitration.

Prior to the high court's involvement, a fierce dispute had raged for nearly six years. In 2012, the Obama administration's National Labor Relations Board ("Board" or "NLRB") held in *D.R. Horton, Inc.* employees' right under Section 7 of the National Labor Relations Act ("NLRA") to engage in concerted activity includes a right to pursue collective and class action litigation.[4] The Board concluded the NLRA thus prohibits employers from requiring "employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." The Board ordered that class action waivers in employment arbitration agreements are therefore unenforceable.

The *D.R. Horton* decision set up a showdown between the Board and the courts. D.R. Horton (represented by Ron Chapman and Chris Murray of Ogletree Deakins) appealed the Board's decision to the Fifth Circuit Court of Appeals. The Fifth Circuit decisively rejected the Board's decision and refused to enforce it.[5] Instead, the Court held class action waivers are enforceable under the Federal Arbitration Act ("FAA").

Dozens of other cases around the country raised the same issue.[6] In those cases, employees typically opposed motions to compel arbitration by citing the NLRB's *D.R. Horton* decision and arguing the class action waiver was unenforceable. Almost every court to consider that argument rejected it and refused to adopt the Board's view.

Despite strong judicial opposition, the Board refused to back down. Invoking its "non-acquiescence policy," the Board continued to apply its own view of the law in dozens of cases in which employees filed unfair labor practice charges challenging their arbitration agreements. The Board adhered to its own *D.R. Horton* reasoning in *Murphy Oil* and dozens of subsequent decisions.[7]

At the same time, the vast majority of courts continued to reject the Board's view. The Second, Fifth, and Eighth Circuits all expressly rejected *D.R. Horton*/*Murphy Oil* and found class action waivers enforceable.[8]

However, two exceptions developed in 2016. The Seventh Circuit and the Ninth Circuit became the first U.S. Courts of Appeals to adopt the Board's view, at least in part, in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016) and *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016).

Significantly, even the Seventh and the Ninth Circuits did not follow the Board's reasoning entirely. Moreover, in another decision, the Ninth Circuit found that if an arbitration

agreement included an opt-out provision, it remained enforceable[9] because when an employee is given the chance to opt-out of the arbitration agreement and still keep his or her employment, then the arbitration agreement is truly voluntary and does not run afoul of the NLRA. The Seventh Circuit in *Lewis* left that question open.

Following the emergence of this circuit split on the enforceability of class action waivers, the Supreme Court in 2017 agreed to take up the question. The high court heard argument on October 2, 2017 and issued its decision on May 21, 2018.[10] The Supreme Court held that arbitration agreements providing for individualized proceedings and waiving the right to participate in class or collective actions are lawful and enforceable and are not barred by Section 7 of the NLRA. The Supreme Court rejected the NLRB's position and explained that the Federal Arbitration Act includes a clear mandate that courts must enforce arbitration agreements as written, and nothing in the NLRA overrides that mandate. The Supreme Court further explained that the phase "concerted activity" in the NLRA refers simply to the ability of workers to exercise their right to free association in the workplace.

B. Arbitration and #MeToo

In the latter part of 2017, the topic of employment arbitration suddenly made news in another way. On October 10, 2017, the New York Times published an Op-Ed by Gretchen Carlson titled "How to Encourage More Women to Report Sexual Harassment" in the wake of public allegations about the conduct of Harvey Weinstein.[11] That Op-Ed argued that although workplace sexual harassment is unlawful under Title VII of the Civil Rights Act of 1964, the law is not "on every woman's side." Rather, if a woman has entered into an employment arbitration agreement, the Op-Ed continued, she has "likely to have signed away her right to a jury trial." According to the Op-Ed, many employment contracts now include arbitration clauses because "[t]hey benefit employers." Citing a 2011 Cornell University study, the Op-Ed claimed "employees are less likely to win arbitration cases than cases that go to trial." And it contended "when employees do prevail, they're often prohibited from discussing the case." The Op-Ed declared "[t]his veil of secrecy protects serial harassers by keeping other potential victims in the dark, and minimizing pressure on companies to fire predators."

The New York Times Op-Ed concluded that "[r]eforming arbitration laws is key to stopping sexual harassment." The author vowed to gain bipartisan support for the Arbitration Fairness Act of 2017, "which would keep mandatory arbitration clauses out of employment contracts, giving harassed workers the choice to go to court."

The New York Times piece was followed closely by similar negative coverage on National Public Radio and in the Wall Street Journal, USA Today, Newsweek, the Los Angeles Times, and the National Law Journal.[12]

C. The Ending Forced Arbitration of Sexual Harassment Claims Act

In the midst of the negative media coverage, the federal Ending Forced Arbitration of Sexual Harassment Act of 2017 ("EFASHA") was introduced in December of 2017. EFASHA would exclude all sex discrimination disputes from arbitration.[13] An earlier draft of this proposed Act would also have excluded all employment arbitration from the scope of the Federal Arbitration Act.[14]

D. Proposed State Regulation of Employment Arbitration

A number of states have jumped on the anti-arbitration bandwagon in the wake of the #MeToo criticisms. Several states are considering legislation that would attempt to limit employment arbitration in some way.

For example, in New Jersey, proposed bill S121 would provide:

> A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.[15]

Although this proposed regulation does not use the word "arbitration," it is obviously intended to nullify employment arbitration agreements. Arbitration, after all, involves the waiver of certain procedural rights.

In Massachusetts, House Bill 4058 would prohibit enforcement of mandatory arbitration agreements "relating to a claim of discrimination, non-payment of wages or benefits, retaliation, harassment or violation of public policy in employment." The state Senate Committee is evaluating a similar bill (Senate Bill 4058), which contains similar prohibitions regarding the arbitration of employment related claims. Both bills would impose attorneys' fees as remedies.

State legislation such as these proposals being considered in New Jersey and Massachusetts would likely be preempted by the Federal Arbitration Act, at least as it currently exists. However, in New York, the proposed Enacts the Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act would delegate state enforcement authority to employees. Specifically, it would authorize an aggrieved employee or employees or a representative organization to initiate a public enforcement action on behalf of the commissioner for any provision of the labor law that provides for a civil penalty to be assessed and collected by the commissioner for a violation of the labor law.[16] This essentially would be New York's version of California's Private Attorney General Act ("PAGA"). To date, the Supreme Court has not considered whether this type of statute, which delegates state authority to enforce state labor laws to private parties and prohibits class action waivers in such actions, conflicts with the FAA.

III. CLASS ACTION WAIVERS: NOW WHAT?

Employers should consider taking several actions.

First, those employers without class and collective action waivers should add them to their arbitration agreements. And those employers that have resisted adopting employment arbitration programs to date should consider whether the benefit of avoiding the risk of class or collective actions outweighs the various downsides of employment arbitration. Each employer's situation is different. Small employers that have little risk of expensive class and collective actions might reasonably conclude an arbitration program does not fit their needs. On the other hand, employers with large numbers of employees in litigation "hellholes" such as California, New York, Florida, and others might greatly benefit from individual arbitration programs.[17]

Second, those employers that already adopted class and collective action waivers in their arbitration agreements should consider whether those agreements may be revised and simplified following the Supreme Court's definitive approval of such waivers. Over recent years,

some employers already using class and collective action waivers structured those agreements to best support enforceability under the prior, uncertain state of the law. For example, those employers that inserted opt-out provisions in their agreements might consider whether those opt-outs should be removed.

Third, employers should plan for claims under state statutes such as California's PAGA. Such statutes deputize private parties to enforce state wage laws through quasi-class actions that seek to recover statutory penalties. The Supreme Court has not yet addressed whether the FAA can require such claims be arbitrated only on an individual basis. However, the California Supreme Court held in *Iskanian v. CLS Transportation* that employees may not be required to waive their right to bring a representative action in court under PAGA.[18] Plaintiffs' attorneys are now seeking to circumvent class and collective action waivers in arbitration agreements by adding PAGA claims or even bringing PAGA-only suits.

Employers should plan for cases mixing ordinary employment claims with PAGA-type claims. As an initial matter, the arbitration agreement generally should prohibit class/collective/representative arbitration and require that class/collective/representative actions proceed only in court. Most employers and practitioners agree that arbitration is not well suited to class, collective, and representative actions. In addition, employers may prepare for PAGA-type claims by inserting the following provision in their arbitration agreements:

> The parties agree that if a party brings an action that includes both claims subject to arbitration under this Agreement and claims that by law are not subject to arbitration, ***all claims that by law are not subject to arbitration shall be stayed until the claims subject to arbitration are fully arbitrated***. The parties further agree that in such a situation, ***the arbitrator's decision on the claims subject to arbitration, including any determinations as to disputed factual or legal issues, shall be dispositive and entitled to full force and effect in any separate lawsuit on claims that by law are not subject to arbitration***.

The intent of such a provision is to allow the individual employment claims to proceed to arbitration first while the PAGA representative claim in court is stayed.

IV. PLANNING FOR OTHER CHALLENGES TO EMPLOYMENT ARBITRATION PROGRAMS

Employers also should plan for other types of challenges to their employment arbitration agreements and programs, especially in light of the vigorous criticisms in some popular media accounts attempting to link arbitration with the concerns of the #MeToo movement.[19] In light of common challenges both before and likely after the #MeToo movement's attention on arbitration, employers may wish to consider the following issues.

A. Confidentiality

There is a growing concern that employment arbitration might interfere with employees' ability to publicize unlawful conduct. To meet this objection to arbitration, employers should consider removing or narrowing provisions that would require employees to maintain the confidentiality of arbitration pleadings and awards. Such generalized confidentiality provisions are common in commercial arbitration where businesses seek to protect against the unnecessary disclosure of confidential business information. Although the practice of designating arbitration awards as confidential at times has been carried over from commercial to

employment arbitration, many employers find that such confidentiality is not a primary concern. Of course, confidential business information produced in the proceedings still may be designated as such by the parties in arbitration, just as it is in court, but generalized confidentiality requirements prohibiting the parties from disclosing the award may be eliminated without significant concern.

As a practical matter, many arbitration proceedings, just like court cases, are resolved not through final awards and judgments, but through settlement. Nothing under current law prevents parties from agreeing to confidential settlements in employment disputes.[20] However, that confidentiality can be negotiated on an individual basis and need not be addressed in an arbitration agreement, just as it is negotiated in court.

B. Other Challenges to Arbitration Policies

Other issues that may arise in defending the enforceability of an employment arbitration program include the following:

- **Selection of a neutral arbitrator:** Arbitration programs should provide for the selection of a neutral arbitrator with input from both parties. The pool of potential arbitrators should not be determined unilaterally by the employer.[21]

- **Adequate discovery:** Arbitration is intended to be quicker and more informal than court litigation. To that end, employers may be tempted to place strict limits on the discovery allowed in arbitration. Such limits, however, may lead a court to hold the agreement unenforceable. A better approach is either to incorporate the discovery rules of a well-regarded third part administrator such as the American Arbitration Association or JAMS or to place only *presumptive* limits on discovery while allowing the arbitrator full discretion to allow additional discovery.[22]

- **Written award:** It is prudent to require arbitrators to issue written awards, and some courts may require written findings and awards.[23]

- **All relief available in court, including punitive damages:** Employees should be able to obtain in arbitration all of the same relief they could obtain in court.[24]

- **No additional fees and costs:** Arbitration agreements should not impose costs or fees on employees in excess of what they would pay in court cases.[25]

- **No shortened statutes of limitations:** The terms of an arbitration agreement should not directly or indirectly shorten the statutes of limitations on any claims. This would include not including mandatory notice requirements to employers of potential claims as a prerequisite to obtaining relief on those claims in arbitration where such notice would have to be provided prior to expiration of the statute of limitations.[26]

- **Ability to demonstrate employees received and agreed to arbitration agreements and amendments:** Finally, employers must adopt procedures to ensure they can prove that applicants and employees received and agreed to applicable arbitration agreements. Agreements should be prominently visible and not buried within an employment agreement or employee handbook. In many instances, stand-alone agreements are preferred. Agreements that do not set forth the procedures for selecting arbitrators or the rules of procedure should attach, or clearly

reference, any rules that are incorporated by reference. Employers should adopt clear procedures for obtaining signatures and acknowledgments from employees (and, if applicable, from job applicants) indicating that they have received, reviewed, understand, and agree to the arbitration agreement.

When distributing arbitration agreements electronically, special care must be taken to prove each individual employee received the agreement. This may require the ability to prove each employee accessed the electronic distribution with a unique, private password known only to that employee.

Finally, whether agreements are distributed physically or electronically, employers should develop a procedure for collecting and retaining employee acknowledgements for substantial periods of time. Employees who enter agreements at the outset of their employment may remain employed for years or even decades. An employer should have in place a system for retaining and retrieving employee arbitration agreements/acknowledgements for similar lengths of time.

ENDNOTES

[1] 532 U.S. 105 (2001).

[2] Colvin, A. J. S., & Geogh, M. D., *Individual employment rights arbitration in the United States: Actors and outcomes*, 68 INDUSTRIAL AND LABOR RELATIONS REVIEW 1019, 1020 (2015).

[3] *See Epic Systems Corp. v. Lewis*, No. 16-285 (U.S.); *Ernst & Young v. Morris*, No. 16-300 (U.S.); *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (U.S.).

[4] 357 NLRB No. 184 (2012).

[5] *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

[6] *See, e.g.*, *Murphy Oil*, 361 NLRB No. 72 at 36 n.5 (2014) (Member Johnson, dissenting) (collecting citations to dozens of federal and state courts rejecting the Board's *D.R. Horton* decision).

[7] *See Murphy Oil*, slip op. at 2 n.17.

[8] *Patterson v. Raymours Furniture Company, Inc.*, No. No. 15-2820-CV, 2016 WL 4598542, --- Fed. App'x ---- (2d Cir. Sept. 14, 2016); *RGIS, LLC v. NLRB*, No. 16-60129 (5th Cir. July 7, 2016) (per curiam); *24 Hour Fitness USA, Inc. v. NLRB*, No. 16-60005 (5th Cir. June 27, 2016) (per curiam); *PJ Cheese, Inc. v. NLRB*, No. 15-60610 (5th Cir. June 16, 2016) (per curiam); *On Assignment Staffing Services, Inc. v. NLRB*, Case No. 15-60642 (5th Cir. June 6, 2016) (per curiam); *Chesapeake Energy Corp. v. N.L.R.B.*, 633 Fed. App'x 613, 2016 WL 573705 (5th Cir. Feb. 12, 2016) (per curiam); *Cellular Sales of Missouri, LLC v. N.L.R.B.,* 824 F.3d 772 (8th Cir. 2016); *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015); *D.R. Horton*, 737 F.3d 344; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

[9] The Ninth Circuit holds the lawfulness of an employment arbitration agreement waiving class procedures hinges on whether it contains an opt-out provision. *Morris*, 834 F.3d at 982 n.4; *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1076 (9th Cir. 2014). The Ninth Circuit therefore has partially parted ways with the Board, which holds opt-out provisions do *not* save such agreements. *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189 (Aug. 27, 2015), *enf. denied, On Assignment Staffing Servs., Inc. v. NLRA*, 2016 WL 3685206 (5th Cir. June 6, 2016).

[10] *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018).

[11] Gretchen Carlson, Op-Ed, *How to Encourage More Women to Report Sexual Harassment*, N.Y. TIMES, Oct. 10, 2017, https://www.nytimes.com/2017/10/10/opinion/women-reporting-sexual-harassment.html.

[12] *See* Melina Delkic, *How Forced Arbitration Agreements Cheat Women in the Workplace*, Newsweek, Oct. 25, 2017, http://www.newsweek.com/how-forced-arbitration-agreements-women-work-692702; Yuki Noguchi, *Supreme Court Ruling Could Limit Workplace Harassment Claims, Advocates Say*, NPR All Things Considered, Nov. 16, 2017, https://www.npr.org/2017/11/16/564387907/supreme-court-ruling-could-limit-workplace-harassment-claims-advocates-say; Jessica Guvnn, *'Enough is enough': Gretchen Carlson says bill ending arbitration would break silence in sexual harassment cases*, USA Today, Dec. 6, 2017, https://www.usatoday.com/story/money/2017/12/06/bipartisan-bill-would-eliminate-forced-arbitration-break-silence-sexual-harassment-cases/925226001/; Jacob Gershman, *As More Companies Demand Arbitration Agreements, Sexual Harassment Claims Fizzle*, Wall Street Journal, Jan. 25, 2018, https://www.wsj.com/articles/as-more-employees-sign-arbitration-agreements-sexual-harassment-claims-fizzle-1516876201; Erin Mulvaney, *The #MeToo Implications of the Supreme Court's Workplace Class-Action Case*, The National Law Journal, Jan. 26, 2018, https://www.law.com/nationallawjournal/sites/nationallawjournal/2018/01/24/the-metoo-implications-of-the-supreme-courts-workplace-class-action-case/; Speed Reads, *Samantha Bee optimistically explains the evils of forced arbitration, with help from Gretchen Carlson*, The Week, Feb. 1, 2018,

http://theweek.com/speedreads/752398/samantha-bee-optimistically-explains-evils-forced-arbitration-help-from-gretchen-carlson; Matthew Finkin, *Dealing with harassment? Discrimination? Wage theft? Good luck getting justice with mandatory arbitration*, Los Angeles Times, Feb. 9, 2018, http://www.latimes.com/opinion/op-ed/la-oe-finkin-forced-arbitration-20180209-story.html.

[13] https://www.govtrack.us/congress/bills/115/hr4734/text/ih

[14] *See* https://bustos.house.gov/wp-content/uploads/2017/12/BUSTOS_016_xml_Ending-Forced-Arbitration-of-Sexual-Harrassment-Act.pdf.

[15] https://dlbjbjzgnk95t.cloudfront.net/1024000/1024533/senate%20bill%20s121.pdf

[16] https://www.nysenate.gov/legislation/bills/2017/a7958

[17] *See, e.g.*, American Tort Reform Foundation, *Judicial Hellholes 2017-2018*, available at: http://www.judicialhellholes.org/wp-content/uploads/2017/12/judicial-hellholes-report-2017-2018.pdf

[18] 327 P.3d 129 (2014)

[19] The criticisms of employment arbitration recited in recent popular media coverage are not well founded. Such criticisms suggest arbitration is inherently unfair, deprives claimants of due process, is biased towards employers, and so on. Empirical evidence does not support such criticisms. Although a point-by-point refutation of all such criticisms is beyond the scope of this paper, we also observe as a general matter that the FAA expressly authorizes courts to vacate arbitration awards if an arbitrator is biased, the process is unfair, or the arbitrator exceeded his or her powers. *See* 9 U.S.C. § 10(a). *See also Degidio v. Crazy Horse Saloon & Rest. Inc*, 880 F.3d 135 (4th Cir. 2018) (refusing to enforce arbitration agreement as a result of various procedural and substantive defects).

[20] However, recent changes in federal tax law seek to discourage confidentiality in agreements resolving sexual harassment claims. Specifically, the tax code now provides that "[n]o deduction shall be allowed under this chapter for (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment." 26 U.S.C. § 16s(q).

[21] *See, e.g.*, *McMullen v. Meijer, Inc*., 355 F.3d 485, 494 (6th Cir. 2004) (finding arbitration agreement (unconscionable where company could unilaterally select pool of arbitrators); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999) (finding that the arbitrator-selection process was biased because, among other things, the employer unilaterally controlled the pool of arbitrators).

[22] *Compare Wilks v. Pep Boys*, 241 F. Supp. 2d 860, 864-65 (M.D. Tenn. 2003) (enforcing an arbitration agreement that presumptively limited each party to the deposition of one witness and one expert, but permitted the arbitrator to order additional depositions upon a showing of "substantial need") *with Walker v. Ryan's Family Steak Houses, Inc.*, 289 F. Supp. 2d 916, 925 (M.D. Tenn. 2003) (refusing to enforce an arbitration agreement that limited each party to one deposition and permitted the arbitrator to order additional depositions only "in extraordinary fact situations and for good cause shown"). *See also Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 786 (9th Cir. 2002) (employer limited depositions of employer representatives, but not depositions of plaintiff-employees, to "no more than four designated subjects"); *Williams v. Katten, Muchin & Zavis*, No. 92C5654, 1996 WL 717447, at *4 (N.D. Ill. Dec. 9, 1996) (enforcing arbitration award where arbitrator had considered but rejected the employee's request to depose three additional witnesses); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 684 (2000) (employees are "entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s) and subject to limited judicial review").

[23] *See, e.g.*, *Armendariz,* 6 P.3d at 685 (holding "in order for . . . judicial review to be successfully

accomplished, an arbitrator . . . must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based").

[24] *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 267 (3d Cir. 2003) (striking arbitration agreement that limited employees' relief to reinstatement and "net pecuniary damages"); *Morrison v. Circuit City Stores*, 317 F.3d 646, 655 (6th Cir. 2003) (en banc) (limitations that employer's arbitration agreement placed on the damages a claimant could recover from arbitration were unenforceable).

[25] *Ingle*, 328 F.3d at 1177 (imposing $75 filing fee rendered arbitration agreement unenforceable); *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001), vacated, 294 F.3d 1275 (11th Cir. 2002) (denying enforcement of arbitration agreement that contained clause requiring fee-splitting between the parties because clause limited employee's remedies contrary to the Title VII provision that provides fee-shifting to prevailing plaintiffs); *Williams v. Cigna*, 197 F.3d 752, 765 (5th Cir. 1999) (enforcing arbitral award which, among other things, imposed a $3150 "forum fee" on plaintiff).

[26] *Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 278 (3d Cir. 2004) (shortened statute of limitations in arbitration agreement held unconscionable); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175-77 (9th Cir. 2003) (employer imposed a statute of limitations much shorter than the limitations period imposed by law).