

What *14 Penn Plaza LLC v. Pyett* Means for Employers: Balancing Interests in a Landscape of Uncertainty

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Editors' Note: This Article is a further discussion of *14 Penn Plaza LLC v. Pyett*, one of the closely decided employment cases from the 2008–2009 Term of the United States Supreme Court that was analyzed earlier in this issue by Kenneth G. Dau-Schmidt and Todd Dvorak.¹

When the United States Supreme Court issued its opinion in *14 Penn Plaza LLC v. Pyett*,² many commentators immediately hailed the decision as a victory for employers.³ The Court held that a clear and unmistakable collectively bargained agreement to arbitrate statutory discrimination claims is binding on employees.⁴ Following in the footsteps of a host of Supreme Court decisions expanding the universe of claims that may be subject to arbitration pursuant to private agreement, *Pyett* adds some assurance of enforceability for unionized employers that bargain with their unions for mandatory arbitration of statutory claims.⁵

This Article contends, however, that *Pyett* does not radically change the calculus for employers as to the advisability of seeking an agree-

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1. See Kenneth G. Dau-Schmidt & Todd Dvorak, *Review of Labor and Employment Decisions from the United States Supreme Court's 2008–2009 Term*, 25 A.B.A. J. LAB. & EMP. L. 107 (2010).

2. 129 S. Ct. 1456 (2009).

3. See, e.g., Ellie Houston, *Supreme Court Decision Favors Employers' Enforcement of Arbitration Clauses*, DRESSMAN BENZINGER LAVELLE PSC, <http://www.dblaw.com/overview/displaynews.asp?id=160> (last visited Mar. 28, 2010).

4. *Pyett*, 129 S. Ct. at 1463.

5. However, if the Arbitration Fairness Act of 2009 (AFA) is enacted, disputes between employer and employee arising from the employment relationship, but not from collective bargaining agreements, will no longer be subject to arbitration. See Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009). The authors decline to speculate on either the likelihood of such legislation or its impact on existing law.

ment from a union to arbitrate statutory claims. Accordingly, most employers may not be much more likely in the wake of *Pyett* to bargain for mandatory arbitration of their unionized employees' statutory claims than they were before *Pyett*. Part I discusses the state of the law before *Pyett*, looking closely at three of the cases that paved the way for the Supreme Court's decision and what these decisions signal to courts today. Part II analyzes the *Pyett* decision itself and notes some significant questions that the opinion creates for future cases. Turning to the implications of *Pyett*, Part III explores the reasons why some employers might choose to bargain for mandatory arbitration of statutory claims and why some might choose not to, contending that *Pyett* does little to change this analysis. Part IV lists some of the issues to be considered in drafting and bargaining for an enforceable mandatory arbitration provision, should an employer decide it wants such a provision. The Article concludes with a cautionary note for employers about calculating the cost-benefit and risk-reward balances given remaining uncertainties on the landscape of this law.

I. The Law Before *Pyett*

Pyett was hardly the first Supreme Court decision to consider the enforceability of an agreement to arbitrate statutory employment claims, even in the context of a collective bargaining agreement (CBA). For many years, federal courts looked with suspicion on arbitration agreements generally.⁶ Congress passed the Federal Arbitration Act (FAA) in 1925, however, and subsequent Court decisions and congressional amendments have created increasing deference to arbitration agreements.⁷

A. *Gardner-Denver*: Federal Courts, Not Arbitrators, Must Enforce Title VII

The Supreme Court's unanimous decision three decades ago in *Alexander v. Gardner-Denver Co.*⁸ was long considered the Court's controlling word on the enforceability of collectively bargained agreements

6. See, e.g., Thomas E. Carboneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233 (2008). See also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974) ("English courts traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the [Federal] Arbitration Act.").

7. Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-307 (2006)). See also IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 57 (1992) (describing the rise of arbitration as an alternative dispute resolution mechanism and stating, "By 1960 the arbitrator of labor grievances had long since become the king of the collective bargaining relation as it had developed under the National Labor Relations Act.").

8. 415 U.S. 36 (1974).

to arbitrate statutory claims. Writing for a unanimous court, Justice Powell held that “an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.”⁹

The Court found the doctrine of election of remedies inapplicable, holding that Title VII created “parallel or overlapping remedies.”¹⁰ As for the argument that the CBA waived Alexander’s right to bring an action in federal court, the Supreme Court held that “there can be no prospective waiver of an employee’s rights under Title VII” because “waiver of these rights would defeat the paramount congressional purpose behind Title VII.”¹¹ In support of this notion, Justice Powell posited that the arbitrator’s authority is limited to interpretation of the private contract, and does not include authority to invoke and interpret public law.¹² Finding that arbitrators tend to be more concerned with speed than procedure, the Court held that the federal policy favoring arbitration had to be balanced against the federal policy against discriminatory employment practices.¹³ As a result, the Supreme Court held that Alexander could “pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII.”¹⁴

B. Arbitration Makes a Comeback: *Gilmer* and *Wright*

Many years passed after *Gardner-Denver* before the Supreme Court addressed once again the ability of employers to mandate arbitration of statutory discrimination claims. However, the Supreme Court would eventually chip away at the distrust of arbitration reflected in *Gardner-Denver*.

1. *Gilmer v. Interstate/Johnson Lane Corp.*¹⁵ and the Arbitration of Statutory Claims

In *Gilmer*, Justice White framed the question presented as “whether a claim under the Age Discrimination in Employment Act of 1967 (ADEA) can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application.”¹⁶ The majority of seven Justices answered the question in the affirmative and affirmed the decision of the Fourth Circuit.¹⁷ According to the

9. *Id.* at 49.

10. *Id.* at 46–47.

11. *Id.* at 51.

12. *Id.* at 52–53.

13. *Id.* at 56–59.

14. *Id.* at 59–60.

15. 500 U.S. 20 (1991).

16. *Id.* at 23 (citation omitted).

17. *Id.* at 23.

majority, the FAA reflects a “liberal federal policy favoring arbitration agreements.”¹⁸ The Court cited several cases decided under the FAA enforcing arbitration clauses that covered statutory claims, including the Sherman Act, the Racketeer Influenced Corrupt Organizations Act, and the Securities Act of 1933.¹⁹ Foreshadowing *Pyett*, the majority noted that nothing in the text, history, or avowed purposes of the ADEA precluded arbitration.²⁰ The Court also rejected Gilmer’s generalized arguments about the unfairness of arbitration procedures²¹ and the unequal bargaining power between employers and employees.²²

According to the majority, *Gardner-Denver* “stressed that an employee’s contractual rights under a collective-bargaining agreement are distinct from the employee’s statutory Title VII rights.”²³ Because the arbitration in *Gardner-Denver* was limited to contractual claims and the arbitrator’s sole authority was to interpret and apply the contract, *Gardner-Denver* and its progeny decided only the preclusive effect of arbitration of contractual rights on *subsequent* litigation in federal court of statutory rights.²⁴ With these distinctions made, the Court held that individual agreements to arbitrate statutory discrimination claims can be enforceable.

2. *Wright v. Universal Maritime Service Corp.*²⁵: One Step Back, Two Steps Forward

In *Wright*, the CBA governing the plaintiff’s employment provided that “matters under dispute” were to be submitted to a multistep grievance process culminating in arbitration.²⁶ However, Wright claimed that the union advised him to file a claim under the ADA rather than file a grievance.²⁷ As a result, Wright filed charges of disability discrimination with the Equal Employment Opportunity Commission (EEOC) and a South Carolina state agency.²⁸ Wright subsequently filed a complaint against the employer in the U.S. District Court for the District of South Carolina, which eventually found its way to the Supreme Court.²⁹

Writing for a unanimous Court, Justice Scalia framed the question presented as “whether a general arbitration clause in a collective

18. *Id.* at 25 (quoting *Moses H. Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

19. *Id.* at 26.

20. *Id.* at 27–29.

21. *Id.* at 30–32.

22. *Id.* at 32–33.

23. *Id.* at 34.

24. *Id.* at 34–35.

25. 525 U.S. 70 (1998).

26. *Id.* at 73–74.

27. *Id.* at 74.

28. *Id.* at 74–75.

29. *Id.* at 75 (citation omitted).

bargaining agreement (CBA) requires an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act of 1990 (ADA).³⁰ The Court answered the question in the negative, vacating and remanding.³¹ The Court began its analysis by acknowledging the tension between the *Gardner-Denver* and *Gilmer* lines of cases.³² However, the Court refused to speculate as to whether a union-negotiated waiver of a judicial forum for statutory discrimination claims would be enforceable under *Gardner-Denver*.³³ Viewing Wright's claim as arising out of the ADA and not the CBA, the Court held that the arbitration clause was not entitled to a presumption of validity under the FAA as applied to Wright's ADA claim.³⁴

In the final section of its analysis, the *Wright* Court addressed the standard for determining whether an arbitration clause is enforceable.³⁵ The Court held that the concerns reflected in *Gardner-Denver* weighed in favor of a rule that a union's waiver of its members' statutory right to a judicial forum for discrimination claims must be "clear and unmistakable."³⁶ However, the Court held that the arbitration clause at issue in *Wright* was "very general" and was not drawn clearly to include statutory claims,³⁷ and that the clause thus failed to meet such a standard for enforceability.³⁸

II. 14 Penn Plaza LLC v. Pyett: The Supreme Court Revisits Collectively Bargained Agreements to Arbitrate Statutory Claims

In *14 Penn Plaza LLC v. Pyett*,³⁹ the Supreme Court was presented with a CBA that required the arbitration of statutory claims, a fact the parties did not dispute. As a result, the Court had a clear opportunity to reconcile its discordant precedents and rule on the enforceability of mandatory arbitration clauses in union contracts as applied to statutory discrimination claims. While the Supreme Court ruled in favor of enforcing such agreements, the facts and posture of *Pyett*, as well as the realities of the collective bargaining relationship, limit the likely impact of the decision on employers.

30. *Id.* at 72.

31. *Id.* at 82.

32. *Id.* at 75–77.

33. *Id.* at 77.

34. *Id.* at 79.

35. *Id.* at 79–82.

36. *Id.* at 79–80 (applying the Supreme Court's decision in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), which held that a union could waive its officers' statutory protection not to be subject to greater discipline than other employees for participation in a work stoppage).

37. *Id.* at 80.

38. *Id.* at 80–81.

39. 129 S. Ct. 1456 (2009).

A. *Factual Background.*

Steven Pyett, Thomas O'Connell, and Michael Phillips worked as night lobby watchmen at 14 Penn Plaza LLC (14 Penn Plaza), a New York City office building.⁴⁰ They were employed by a building service and cleaning contractor, Temco Service Industries, Inc. (Temco), and were members of a bargaining unit represented by the Service Employees International Union, Local 32BJ (Union).⁴¹ The CBA was a multiemployer agreement negotiated between the Union and the Realty Advisory Board on Labor Relations, Inc. (RAB), a multiemployer bargaining association that engaged with the Union in industry-wide collective bargaining.⁴² The CBA provided, among other things, that union members must submit all employment discrimination claims—including all applicable state and federal statutory claims—through a specified grievance and arbitration procedure.⁴³

In August 2003, 14 Penn Plaza engaged Spartan Security, a non-unionized affiliate of Temco, to provide security services for the building with the Union's consent.⁴⁴ As a result, the plaintiffs were no longer able to continue their work as night watchmen, and Temco shifted the plaintiffs into jobs as night porters and light duty cleaners.⁴⁵

B. *Grievances and Arbitration*

At the three employees' request, the Union filed grievances challenging their reassignments, alleging age discrimination, violation of seniority rules, and failure to rotate overtime equitably.⁴⁶ When the grievances were unsuccessful, the Union submitted the claims to arbitration.⁴⁷ However, the Union withdrew the plaintiffs' ADEA claims because it believed its prior consent to the arrangement precluded it from legitimately objecting.⁴⁸ The Union informed the employees that they could pursue their ADEA claims in arbitration by engaging separate counsel and paying their portion of costs, but the plaintiffs ultimately chose not to do so.⁴⁹ The remaining seniority and overtime grievance claims were denied on August 10, 2005, after eight arbitration hearings that took place between February 2, 2004, and March 7, 2005.⁵⁰

40. *Pyett v. Penn. Bldg. Co.*, No. 04 Civ. 7536(NRB), 2006 WL 1520517, at *1 (S.D.N.Y. June 1, 2006).

41. *Pyett*, 129 S. Ct. at 1461.

42. *Id.*

43. *Id.*

44. *Id.* at 1461–62.

45. *Id.*

46. *Id.* at 1462.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Pyett v. Penn. Bldg. Co.*, 498 F.3d 88, 90 (2d Cir. 2007).

C. *The District Court and Court of Appeals*

While arbitration was ongoing, but after withdrawal of the age discrimination claims, the plaintiffs filed charges with the EEOC.⁵¹ On September 23, 2004, after receiving notice of their right to sue, the three employees filed suit in the United States District Court for the Southern District of New York against Pennsylvania Building Co., 14 Penn Plaza, and Temco, asserting the ADEA claims that the union declined to pursue in arbitration.⁵² The building and employer filed motions to dismiss and, alternatively, to compel arbitration.⁵³ The district court denied both motions, reasoning that “even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable.”⁵⁴ The United States Court of Appeals for the Second Circuit affirmed the decision, summarily defending the district court’s reasoning on the basis of the Second Circuit’s interpretation of Supreme Court precedent.⁵⁵ The defendants then petitioned for a writ of certiorari from the Supreme Court.⁵⁶

D. *The Supreme Court Speaks*

The majority opinion, written by Justice Thomas, and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, settled the question of whether a collectively bargained agreement to arbitrate statutory claims can be enforceable. The Court held that “a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.”⁵⁷ However, the assumptions behind the majority’s reasoning make it difficult to predict the outcome of future litigation where the issues are not so narrowly presented.

1. The Textual Argument: The Statutes Don’t Forbid It

Starting with the National Labor Relations Act (NLRA), the majority found that the statutory regime gives broad authority to unions

51. *Pyett*, 129 S. Ct. at 1462.

52. *Pyett*, 498 F.3d at 91. The plaintiffs also initially filed a “hybrid” lawsuit under section 301 of the Labor Management Relations Act against the Union, Pennsylvania Building Co., 14 Penn Plaza, and Temco. *Pyett*, 129 S. Ct. at 1463 n.2. In order to prevail in this type of “hybrid” lawsuit under section 301, an employee must allege both a breach of the CBA by the employer and a breach of the duty of fair representation on the part of the Union. See generally Jonathan S. Willett, *Evolving Standards for Duty of Fair Representation Cases Under Section 301*, 62 DENV. U. L. REV. 627 (1985). According to the plaintiffs, the Union breached its duty of fair representation by refusing to pursue their ADEA claims in arbitration, and Pennsylvania Building Co., 14 Penn Plaza, and Temco breached the CBA by reassigning them. *Pyett*, 129 S. Ct. at 1463 n.2. However, the plaintiffs later voluntarily dismissed their section 301 action. *Id.*

53. *Pyett*, 498 F.3d at 91.

54. *Pyett v. Penn. Bldg. Co.*, No. 04 Civ. 7536 (NRB), 2006 WL 1520517, at *3 (S.D.N.Y. June 1, 2006).

55. *Pyett*, 498 F.3d at 92–94.

56. 14 Penn Plaza LLC v. Pyett, 128 S. Ct. 1223 (2008).

57. *Pyett*, 129 S. Ct. at 1474.

and employers to collectively bargain “in respect to rates of pay, wages, hours of employment, or other conditions of employment.”⁵⁸ Though the NLRA does not address whether parties can bargain for mandatory arbitration of statutory claims, the majority held that courts should enforce the agreement of the parties in the absence of a statutory prohibition.⁵⁹ Looking to *Gilmer*, the majority held that the Age Discrimination in Employment Act (ADEA) does not prohibit arbitration of discrimination claims under the Act.⁶⁰ As the majority neatly summarized its analysis, “[t]he NLRA provided the Union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA.”⁶¹

2. Distinguishing *Gardner-Denver*: Times Have Changed

Having reached the conclusion that the ADEA did not prohibit mandatory arbitration, the Court still had to address *Gardner-Denver*. The majority distinguished *Gardner-Denver* from *Pyett* on its facts and procedural posture. First, the Court noted that the CBA at issue in *Gardner-Denver* did not expressly cover statutory claims.⁶² Second, *Gardner-Denver* and subsequent Supreme Court cases that favorably cited the precedent had been dealing with a different issue: whether the employee waived the right to a judicial forum for the statutory claims by arbitrating contractual claims arising out of the same nucleus of facts.⁶³

More importantly, the majority identified as “broad dicta” the language in the *Gardner-Denver* decision that “was highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights.”⁶⁴ According to the majority, the distrust of arbitration reflected in *Gardner-Denver* has been effectively set aside by subsequent cases.⁶⁵ The Court explained that subsequent cases have established that arbitration is just as good a forum as federal courts for the enforcement of statutory discrimination statutes because arbitrators are recognized as capable of handling complex cases, and there is no reason to believe that they will not follow the law.⁶⁶ Although the majority agreed that unions might have a potential conflict in subordinating individual interests to collective interests, it noted that balancing individual in-

58. *Id.* at 1463 (quoting 29 U.S.C. § 159(a) (2006)).

59. *Id.* at 1464.

60. *Id.* at 1465.

61. *Id.* at 1466.

62. *Id.* at 1467.

63. *Id.* at 1467–69.

64. *Id.* at 1469.

65. *Id.* at 1469–70.

66. *Id.* at 1471.

terests against those of the collective is a core principle underlying the NLRA and could be modified by statutory amendment.⁶⁷ But the majority argued that Congress already provided protections for individuals in the form of the duty of fair representation that binds unions, potential shared liability for unions under discrimination statutes, and the rights of individuals to file EEOC and NLRB charges seeking judicial intervention against unions.⁶⁸

3. What Constitutes a Clear and Unmistakable Agreement to Arbitrate?

Many of the early commentators identified *Pyett* as a landmark case that would substantially change the way labor law disputes are handled.⁶⁹ However, the devil is in the details—in particular, the details about whether a waiver is sufficiently clear and unmistakable to require arbitration of statutory claims. In *Metropolitan Edison*, the Supreme Court imported the NLRB’s “clear and unmistakable” standard to hold that a union had not waived the statutory protection against imposition of more severe penalties on union officials than other employees.⁷⁰ The Court directly derived its use of the clear and unmistakable standard from the “explicitly stated” standard introduced in *Mastro Plastics Corp.*, which held that a general no-strike provision was insufficient to constitute a waiver of the right to strike over an unfair labor practice.⁷¹

The Supreme Court in *Wright* later applied the “clear and unmistakable” standard to the arbitration clause in the plaintiff’s CBA, finding that the general nondiscrimination language was insufficient to satisfy the standard for waiver.⁷² However, *Pyett* provides no additional guidance, since the Supreme Court refused to consider the arguments raised by the individual employees that the CBA did not clearly and unmistakably require arbitration of their statutory discrimination claims because the employees did not raise these arguments in the district court or court of appeals.⁷³ Because of the procedural posture of

67. *Id.* at 1472.

68. *Id.* at 1473.

69. See, e.g., Michael T. Garone, *Supreme Court Decision Has Important Consequences for Both Employers and Employees*, SCHWABE, WILLIAMSON & WYATT, Apr. 8, 2009, <http://www.schwabe.com/showarticle.aspx?Show=11593>.

70. See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705–10 (1983). See also Philip J. Graves, Note, *Sympathy Strikes, Coterminal Interpretation, and the Clear and Unmistakable Waiver Standard: Unweaving the Tangled Web*, 1988 COLUM. BUS. L. REV. 793, 796 (1988) (“It is well-established that a waiver of a right guaranteed under the NLRA must be clear and unmistakable.”).

71. *Metro. Edison Co.*, 460 U.S. at 707–08 (citing *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 283 (1956)).

72. See *Wright v. Univ. Mar. Serv. Corp.*, 525 U.S. 70, 79–80 (1998).

73. *Pyett*, 129 S. Ct. at 1473–74.

Pyett, future courts have little direction from the Supreme Court as to whether an agreement to arbitrate statutory claims found in a CBA is a clear and unmistakable waiver of the right to a judicial forum.

III. Do Employers Even Want to Arbitrate?

Pyett makes it easier for unionized employers to enforce arbitration provisions and compel arbitration of statutory discrimination claims. Whether this ground will hold politically or whether Congress and federal agencies will undermine the effect of the decision is a matter of some doubt.⁷⁴ In any event, *Pyett* is not a clear-cut victory for employers, given the continuing uncertainty about what will constitute a clear waiver, among other things. In addition, there are significant practical questions about the probable costs to employers in bargaining for obtaining a union's agreement to require arbitration of statutory claims. And many employers may question whether arbitration is the optimal forum for resolving statutory discrimination claims.⁷⁵ Whether an employer will ultimately find it worthwhile to bargain for the arbitration of statutory claims will depend upon the employer's analyses of the cost-benefit balance in bargaining as well as of the potential risks and rewards of arbitration.

A. *The Costs and Benefits of Bargaining for Arbitration*

An employer's choice of whether to bargain for arbitration of statutory claims will be affected considerably by an assessment of what it might take to obtain the union's consent to such a provision. The realities of the particular collective bargaining relationship and the opportunities and challenges anticipated in the particular process will be important factors in this assessment. And an employer will want to weigh the value it places on the arbitration provision against whatever bargaining trade-offs it might have to make to get the provision in the contract.⁷⁶ It also may be important to consider the potential toll on

74. See, e.g., Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); Department of Defense Appropriations Act, 2010, H.R. 3326, 111th Cong. (2009) (forbidding contractors with contracts worth more than \$1,000,000 awarded more than 60 days after the Act's effective date from requiring their employees to arbitrate certain types of statutory claims).

75. See generally Charles D. Coleman, *Is Mandatory Employment Arbitration Living Up to Its Expectations? A View from the Employer's Perspective*, 25 A.B.A. J. LAB & EMP. L. 227 (2010).

76. See *Garden Ridge Mgmt., Inc.*, 347 N.L.R.B. 131, 132–33 (2006) (analyzing compliance with the NLRA duty to bargain in good faith in the context of the give-and-take of the entire negotiation and stating, "From the context of an employer's total conduct, it must be decided whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibilities of reaching agreement." (quoting *In re Pub. Serv. Co. of Okla. (PSO)*, 334 N.L.R.B. 487, 487 (2001), *enfd.*, *Pub. Serv. Co. of Okla. (PSO) v. NLRB*, 318 F.3d 1173 (10th Cir. 2003)) (internal quotations omitted).

the bargaining process that may be taken by the difficult challenge of drafting and bargaining for language that will be sufficient for its intended purpose under *Pyett*. An employer will want to consider, too, the overall effect on labor relations of insisting on this type of clause, particularly if union resistance to it is based on factors such as the union's position that it would bear an untenable burden.⁷⁷

B. The Rewards of Arbitration: Efficiency and Finality

Supreme Court cases from *Gilmer* to *Pyett* have sung the praises of arbitration as an alternative to a judicial forum. According to the Supreme Court, “[p]arties trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”⁷⁸ In reevaluating the arbitration possibilities under *Pyett*, employers will want to consider whether these characteristics of arbitration make sense in the context of their businesses and the types of claims they are likely to face.

1. Increased Efficiency: Speed and Costs

Both employers and employees alike stand to benefit from the speed of the arbitration process.⁷⁹ An arbitration case can often be resolved in a matter of months, which in most cases is considerably less time than it would take the parties to get a court to resolve their dispute.⁸⁰ The conventional wisdom is that the speed of arbitration is a product of its informality, limited discovery and motion practice, and appeals.⁸¹ In addition, private arbitration is not subject to the backlogs and delays of the judicial system.⁸² The speed and informality of arbi-

77. The statement, in dicta, of the *Pyett* majority that a “freely negotiated term” between a union and an employer to submit statutory discrimination claims to arbitration under a collective bargaining agreement “easily qualifies” as a condition of employment subject to mandatory bargaining, 129 S. Ct. at 1464, is consistent with NLRB precedent that an arbitration provision governing contract terms, generally, is a mandatory subject of bargaining. *McClatchy Newspapers, Inc.*, 321 N.L.R.B. 1386, 1390 (1996). Although classification as a mandatory subject ordinarily permits an employer unilaterally to implement its proposal regarding the subject following impasse, *NLRB v. Katz*, 369 U.S. 736 (1962), the equivalence between mandatory subject classification and a right to unilateral implementation may not be present here. The NLRB has recognized exceptions to the equivalence doctrine in circumstances in which unilateral implementation would be destructive of the collective bargaining process. *See, e.g.*, *Roosevelt Mem’l Med. Ctr.*, 348 N.L.R.B. 1016, 1016 (2006) (unlawful for employer unilaterally to implement arbitration provision following impasse); *see also McClatchy Newspapers, Inc.*, 321 N.L.R.B. at 1390.

78. *Pyett*, 129 S. Ct. at 1471 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) (internal quotations omitted).

79. *See Coleman, supra note 75*, at 229.

80. Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer’s Quinceañera*, 81 TUL. L. REV. 331, 342–43 (2006).

81. *See Pyett*, 129 S. Ct. at 1471.

82. *Id.*

tration, it has been asserted, tend to lower expenses in comparison to what can be encountered in typical litigation in a judicial forum.⁸³

Some commentators have questioned the empirical basis for these beliefs, however.⁸⁴ In any event, legal representation in arbitration certainly still requires substantial time for hearing preparation and attendance, as well as discovery and brief writing—all matters of significant expense. Nevertheless, in many cases, employers can expect to realize at least some savings in litigation costs when they compare arbitration proceedings with court actions. As the analysis below will discuss, however, it is possible that the decreased costs of arbitration may encourage more litigants and thus increase the total volume of claims employers are forced to defend.

2. Finality of the Decisions of Arbitrators

Unlike decisions in federal or state courts, arbitration awards generally are final and subject to appeal only on limited grounds. The Supreme Court, however, has articulated two different bodies of case law derived from two different statutes to define the scope of judicial review for arbitration awards—one governing arbitration under collective bargaining agreements and one governing arbitration arising from other kinds of agreements, including non-collective employment agreements.

Long before the rise of employment arbitration, a federal common law developed independently of the FAA based on section 301 of the Labor Management Relations Act⁸⁵ for judicial review of labor arbitration awards arising under collective bargaining agreements. The Supreme Court held in *Enterprise Wheel* that a labor arbitrator's award could only be overturned if it failed to “draw[] its essence from the collective bargaining agreement.”⁸⁶ On the other hand, employment arbitration awards are subject to judicial review under section 10 of the FAA, which permits vacation of an award if arbitrators have “exceeded their powers.”⁸⁷ The Supreme Court recently held that the bases of judicial review explicitly listed in the FAA are the exclusive grounds for vacating arbitration awards under the FAA.⁸⁸

83. See, e.g., Bales, *supra* note 80, at 344–46; but see Coleman, *supra* note 75, at 233–34.

84. See, e.g., Coleman, *supra* note 75, at 233–34.

85. 29 U.S.C. § 185 (2006).

86. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1959).

87. 9 U.S.C. § 10(a)(4) (2006). The FAA also permits overturning awards that are “procured by corruption, fraud or undue means”; that result from “evident partiality or corruption of the arbitrator”; or that result from “prejudicial arbitral procedural misconduct.” *Id.* § 10(a).

88. *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 583 (2008).

Although the Supreme Court said broadly in *Circuit City* that the FAA applies to all contracts of employment except those of workers directly engaged in interstate transportation,⁸⁹ when the Court decided a labor arbitration case less than two months after its *Circuit City* decision, the Court applied traditional labor arbitration precedents under section 301 and did not refer either to the FAA or *Circuit City*.⁹⁰ The Supreme Court has never attempted to reconcile these two strands of judicial review, leaving uncertain the extent to which the two standards may differ and which of them would be applicable to those parts of a labor arbitrator's award adjudicating statutory claims.⁹¹ Scholars have assessed differently which aspects of section 301 and FAA judicial review are more deferential, but they agree that the two lines of authority are not uniform.⁹²

It might be argued that the Court resolved the issue in *Pyett* when the majority opinion said that "an arbitrator's decision as to whether a unionized employee has been discriminated against on the basis of age in violation of the [Age Discrimination in Employment Act] remains subject to judicial review under the FAA."⁹³ The Court's statement there, however, was unaccompanied by any suggestion that the Justices intended to reverse decades of Supreme Court decisions that have applied precedents under section 301 rather than the FAA to review decisions of labor arbitrators arising under collective bargaining agreements. There are no reported lower court decisions subsequent to *Pyett* directly addressing how courts will review decisions of arbitrators arising under collective bargaining agreements but addressing statutory employment claims.⁹⁴ In the absence of further clarification from the courts of appeals or the Supreme Court defining the standard of review for arbitral awards regarding statutory employment claims under collective agreements, employers that enter now into collective bargain-

89. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2000).

90. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2000).

91. Moreover, if section 301 is the applicable standard of judicial review, it is further unclear how such a standard, designed for assessing a contractual determination, would be applied to review an arbitrator's statutory decision.

92. William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 647 (2006); David E. Feller, *Putting Gilmer Where It Belongs: The FAA's Labor Exemption*, 18 HOFSTRA LAB. & EMP. L.J. 253, 282-83 (2000); Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781, 889-93 (2000).

93. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1471 n.10 (2008).

94. Before *Pyett*, courts of appeals that had addressed the issue had rejected the notion that the FAA governed judicial review of claims arising under collective bargaining agreements, although none of the awards being reviewed had determined an employee's statutory employment rights. See *Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp.*, 380 F.3d 1084, 1097 (8th Cir. 2004); *Int'l Chem. Workers Union v. Columbian Chems. Co.*, 331 F.3d 491, 494 (5th Cir. 2003); *Smart v. Int'l Bhd. of Elec. Workers, Local 702*, 315 F.3d 721, 724 (7th Cir. 2002).

ing agreements permitting arbitration of statutory claims cannot know with certainty or precision what standard of review courts will apply. Nevertheless, both the FAA and section 301 provide extremely narrow grounds for review, making the awards of arbitrators effectively final in all but the most exceptional circumstances.

3. Cohesiveness of Labor Relations

The relative informality of the arbitration process is useful for more than just speedy adjudication. Where the parties may need to continue to work together, as do employers and unions, the informality of arbitration can help the parties preserve their relationship.⁹⁵ This advantage might be considered especially important in the context of a collective bargaining relationship.

4. Confidentiality

Because arbitration hearings are generally private, unlike court trials, arbitration can allow greater confidentiality for the parties. For disputes involving particularly sensitive or confidential information, private arbitration protects the parties from unwanted public disclosure.⁹⁶ In addition, privacy may facilitate reasonable settlements, since the parties are less apt to feel pressure publicly to vindicate their position.⁹⁷

5. One Bite at the Apple

Where a collective bargaining agreement mandating contractual arbitration is already in place, adding statutory discrimination claims to the arbitration provision could protect employers from the cost and hassle of defending themselves in multiple venues. For instance, in one particularly messy example, an employee who won her job back in labor arbitration continued to pursue her gender and marital status discrimination claims against her employer.⁹⁸ Although not all claims are subject to arbitration, adding statutory claims into the CBA's mandatory arbitration provisions will at least help employers narrow the range of circumstances where employers might have to defend suits in multiple venues.

6. Choice of Arbitrator and Procedures

Arbitration offers both parties some control over the dispute resolution process. The parties can select the decision maker, who is typi-

95. Christopher Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?* 37 HOFSTRA L. REV. 71, 78 (2009).

96. *See id.*

97. *See, e.g.,* Edward Brunet & Jennifer J. Johnson, *Substantive Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 459, 472-73 (2008).

98. David Shaffer, *DNR Supervisor Who Won Job Back Alleges Gender Bias*, STAR TRIB., Oct. 28, 2009, at B5.

cally an expert in the subject matter of the dispute. Further, because the parties can choose procedural rules to apply, arbitration allows for more creative and flexible procedures and solutions. In *Pyett*, the Supreme Court declined to evaluate the fairness of the particular arbitration procedures because the employees had failed to raise such arguments in the lower courts.⁹⁹ Indeed, a speedy system where the decision maker understands the applicable law and possesses the power to fashion a solution may well have the potential to revolutionize the resolution of employment disputes.¹⁰⁰

7. Reasonable Damages

In the commercial context, many businesses prefer arbitration because it protects them from “aberrational jury verdicts or punitive damages awards.”¹⁰¹ With employment and labor law disputes, the analysis of this potential benefit is somewhat more complicated. Some courts take the position that arbitration clauses covering statutory claims will not be enforced if the arbitration agreement limits an arbitrator’s authority to less than the full range of statutory remedies available to plaintiffs in the courts.¹⁰²

8. No Class Actions (Probably)

Finally, some businesses prefer arbitration because of their ability to adopt procedures that curtail the ability of claimants to pursue classwide relief. The Supreme Court held in *Green Tree Financial Corp. v. Bazzle*¹⁰³ that it was for the arbitrator to decide whether the arbitration agreement provided for class relief, thus impliedly authorizing arbitration agreements to preclude such relief.¹⁰⁴ However, the Supreme Court will decide in its 2010 Term the question “[w]hether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act.”¹⁰⁵ In any event,

99. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1473–74 (2008).

100. STEPHEN F. BEFORT & JOHN W. BUDD, INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW & PUBLIC POLICY INTO FOCUS 145–48 (2009) (discussing the potential of European-style specialized employment and labor law tribunals to streamline efficiency in the resolution of employment disputes).

101. See Drahozal & Wittrock, *supra* note 95, at 77.

102. See, e.g., *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1286 (11th Cir. 2001) (“[F]ederal statutory claims are arbitrable only when arbitration can serve the same remedial and deterrent functions as litigation, and an agreement that limits the remedies available cannot adequately serve those functions.”). But see *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539–40 (8th Cir. 2002) (enforcing an agreement to arbitrate that contained a provision limiting statutory remedies); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004) (applying *Arkcom* to an agreement to arbitrate in employment contracts).

103. 539 U.S. 444 (2003).

104. *Id.* at 447.

105. *Petition for Writ of Certiorari, Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 129 S. Ct. 2793 (2009) (No.08-1198), 2009 WL 797583.

it seems certain that future litigation arising from labor arbitration of discrimination claims will no doubt continue to raise these and other challenges to the fairness of the procedures and sufficiency of the remedies available in arbitration.

C. *Risks of Arbitration: Efficiency and Finality*

Some of arbitration's greatest strengths can also be among its greatest weaknesses. In particular, the speed and finality of arbitration can have unintended consequences for unwary employers. Employers will want to consider these possibilities in analyzing the risks and rewards of mandatory arbitration in their own context.

1. Efficiency and the Law of Unintended Consequences

In examining whether arbitration is likely to result in cost savings, an employer must look at the big picture. While a single arbitration case will often be less expensive than a lawsuit, it is a distinct question whether adopting a company-wide mandatory arbitration system will achieve overall cost savings for the employer.¹⁰⁶ In fact, there would seem to be a significant risk that the existence of an expedited, low-cost process to resolve disputes might encourage employees and their unions to pursue *more* claims, particularly including statutory claims, all the way through arbitration than they would if forced to litigate in federal or state court.¹⁰⁷ Without the more daunting prospect of waiting months to get into court and the extensive rules-based preparation required for motion practice and discovery in the court setting, unions might pursue a greater number of claims. Furthermore, it is plausible that unions might interpret their duty of fair representation as requiring them to arbitrate statutory claims where they previously would not have pursued arbitration.¹⁰⁸ Thus, employers must carefully consider the likely effect on overall cost that the anticipated arbitration agreement will actually have.

2. Finality

Finality, or the limited review of arbitration awards, certainly entails its own risks for an employer. For example, if an arbitrator liberally construes or misconstrues a discrimination law and issues a large damage award, the employer is effectively without recourse.¹⁰⁹ This will

106. See Coleman, *supra* note 75, at 233–34.

107. In the oral argument for *Pyett*, Chief Justice Roberts noted that, without the benefit of union-negotiated arbitration clauses, employers might decide “I’ve got a good record. I’m not going to agree to arbitrate claims. I’m going to make people go to court because there will be fewer claims brought.” Transcript of Oral Argument, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2008) (No. 07-581), 2008 WL 5054056.

108. See Brendan D. Cummins & Nicole M. Blissenbach, *The Law of the Land in Labor Arbitration: The Impact of Penn Plaza*, 25 A.B.A. J. LAB. & EMP. L. 159 (2010).

109. See *supra* Part III.B.2; 9 U.S.C. § 10 (2009) (providing the limited grounds for vacating an arbitration award under the FAA).

be particularly troubling with respect to employment disputes tending toward the higher end of the scales of complexity and damages exposure.¹¹⁰ Though the ability to choose arbitrators offers parties some protection against outrageous awards, an arbitrator may nevertheless apply the law in ways that one or the other party does not accept, and even a clearly erroneous application of the law is unreviewable.¹¹¹ This creates a significant risk that employers must factor into their arbitration analysis.

3. Additional Uncertainties

Just as risky to unionized employers are the significant legal uncertainties that continue after *Pyett*. Even though employers now know that agreements to arbitrate statutory claims in union contracts can be enforceable, there is precious little case law defining what kinds of agreements will be construed as clear and unmistakable enough to be enforced.¹¹² In addition, courts will still be asked to discern at what point certain procedural differences from judicial trials are sufficient to render an arbitration decision invalid as to its effect on statutory claims.¹¹³ Although the Supreme Court's decision essentially lifted arbitration to equal footing with judicial conflict resolution, one probable result of the remaining uncertainties in the law is that employers, unions, and employees will continue to challenge the courts to resolve these uncertainties. Employers may thus incur not only the cost of defending the underlying claims by the employee, but also the cost of litigating the arbitration agreement itself, which was intended to keep the parties out of court in the first place.

4. The Impossibility of Comprehensive Arbitration

Even after *Pyett*, there are a variety of statutory claims that, by their own provisions and/or Court interpretation, are simply not as a matter of law subject to resolution by arbitration. Such claims include: claims under the Fair Labor Standards Act;¹¹⁴ enforcement actions

110. Drahozal & Wittrock, *supra* note 95, at 79–80.

111. *See, e.g.*, *Howard Univ. v. Metro. Campus Police Officers' Union*, 512 F.3d 716, 720 (D.C. Cir. 2008) (“That the arbitrator may have made a ‘mistake of law’ does not affect the standard of review: The parties have agreed to be bound by the arbitrator’s interpretation without regard to whether a judge would reach the same result”) (quotation omitted).

112. For a discussion of post-*Pyett* cases examining the issue of clear and unmistakable agreements to arbitrate statutory claims, see Cummins & Blissenbach, *supra* note 108, at 168.

113. *See 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1473–74 (2009) (considering and rejecting on narrow procedural grounds an employee’s challenge to the fairness of arbitration procedures).

114. *See Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740–45 (1981) (holding that FLSA claims are not arbitrable); *Tran v. Tran*, 54 F.3d 115, 117 (2d Cir. 1995) (same). *But see Carter v. Countrywide Credit Indus.*, 362 F.3d 294 (5th Cir. 2004) (finding that plaintiff’s FLSA claims are arbitrable).

brought by the EEOC,¹¹⁵ and various state law claims.¹¹⁶ Because an arbitration clause cannot be applied to such claims, arbitration on factually related claims will not necessarily preclude an employee from later suing in court.¹¹⁷ Employers considering the likelihood that in certain situations they may eventually face litigation in federal or state court for nonarbitrable claims may conclude that a statutory arbitration clause might actually increase their costs by forcing them to defend essentially the same dispute in multiple venues.

5. The Potential Lack of Important Procedural Protections

The informal procedures that often are touted as making arbitration faster and cheaper than judicial dispute resolution may also present significant risk to employers. Arbitrators are not typically as receptive as courts to technical, procedural arguments,¹¹⁸ though an arbitration provision can, and should, spell out the rules that will apply. An employer that might succeed in court by arguing that a claim is untimely or should be summarily dismissed may find that such arguments are not as likely to succeed in arbitration. In this way, some employers may find that arbitration presents an untenable risk in comparison with a judicial forum.

Moreover, arbitration procedures do not typically provide the robust injunctive relief available in federal and state courts.¹¹⁹ Although the speed and informality of arbitration counteract this weakness, employers wishing to put a stop to disclosure of trade secrets or enforce a noncompete agreement may find arbitration unsatisfactory. The procedural protections of judicial dispute resolution, though they can be cumbersome and time intensive, also can be very valuable to employers that need them.

6. Flexibility in Damage Awards—It Cuts Both Ways

As discussed above, many corporations appreciate arbitration because it reduces their exposure to outlier jury verdicts and extensive punitive damages, and in some jurisdictions and circumstances even attorneys' fees.¹²⁰ However, lower individual awards may not necessarily result in cost savings for employers. In addition to the potential exposure to a higher volume of claims under an arbitration system, many

115. See *EEOC v. Waffle House*, 534 U.S. 279, 287 (2002) (holding that the EEOC "has the authority to pursue victim-specific relief regardless of the forum that the employer and employee have chosen to resolve their disputes").

116. See, e.g., *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

117. See *Pyett*, 129 S. Ct. at 1467–69 (discussing various questions presented when an employee attempts to commence suit after arbitration has already taken place).

118. Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21 (1997).

119. Drahozal & Wittrock, *supra* note 95, at 78–79.

120. *Faber v. Menard, Inc.*, 367 F.3d 1048, 1054–55 (8th Cir. 2004).

practitioners feel that arbitrators are prone to “splitting the baby,” or making compromise awards.¹²¹ If this observation is true, employers may face increased exposure to liability through arbitration of statutory claims. Although empirical studies have not clearly borne out this observation,¹²² private arbitration is notoriously difficult to track.

IV. Considerations for Drafting an Enforceable Agreement to Arbitrate

Should an employer elect to bargain for a CBA arbitration provision covering statutory claims, drafting an enforceable agreement will be an important challenge. *Pyett* does not make all such agreements automatically enforceable. Aside from the *Gardner-Denver*-based concerns now largely swept aside by *Pyett*, a CBA provision requiring arbitration of statutory claims, like all arbitration agreements, may be subject to challenge on a number of grounds. Employers and unions agreeing in their CBAs to the arbitration of statutory claims must prepare for such challenges by drafting language that appropriately addresses the nature and scope of the arbitration requirement, the claims that will and will not be subject to arbitration, and the remedies and procedures that will apply and be available in arbitration.

A. *The Waiver of a Judicial Forum Must Be Clear and Unmistakable*

In a nonunion employment setting, contract formation principles play an important role in determining whether a mandatory arbitration clause in an employment agreement is enforceable. For instance, courts have refused to enforce agreements to arbitrate that lack consideration.¹²³ The FAA provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹²⁴ Precisely because the agreement to arbitrate is contractual, the party seeking enforcement generally need only show the objective manifestation of mutual assent to enter into a contract; no heightened standard generally applies where an employee waives a statutory or even constitutional right in an agreement to arbitrate.¹²⁵

121. See Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105, 114–18 (2004); Laura J. Cooper et al., *How and Why Labor Arbitrators Decide Discipline and Discharge Cases: An Empirical Examination*, PROCEEDINGS OF THE SIXTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS (Stephen F. Befort & Patrick Halter, eds., 2008).

122. Drahozal, *supra* note 121, at 114–18.

123. See *Floss v. Ryan's Family Steak Houses*, 211 F.3d 306, 316 (6th Cir. 2000).

124. 9 U.S.C. § 2 (2006).

125. *Id.*; see, e.g., Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167 (2004).

Such contract formation analyses, however, are less readily applicable to CBAs, where agreement to an arbitration clause would be the result of the collective bargaining process. The alternative analytical framework, as applied in *Pyett*, determines whether an individual union member is bound by the CBA's requirement to arbitrate by asking the question whether the waiver of a judicial forum for the enforcement of statutory rights is clear and unmistakable.¹²⁶ This standard is derived from earlier Supreme Court decisions including *Wright*, which was based on a finding that the agreement to arbitrate claims was vague and general, rather than clear and unmistakable as to statutory claims.¹²⁷ This use of the clear and unmistakable standard derives, in turn, from *Metropolitan Edison Co. v. NLRB*,¹²⁸ where the Supreme Court applied the clear and unmistakable standard to hold that a union through collective bargaining could waive individual statutory rights of its officers not to be subject to greater discipline than other employees for participation in a work stoppage.¹²⁹

Courts may have some difficulty pinning down exactly what language in a CBA will be construed as a clear and unmistakable waiver of the right to a judicial forum for the vindication of statutory rights. In *Wright*, the Supreme Court dismissed a broad clause that provided for arbitration of "matters under dispute" as relating to contractual matters and thus insufficient to satisfy the clear and unmistakable standard.¹³⁰ In contrast, *Pyett* dealt with an unchallenged arbitration clause that explicitly required union members to submit discrimination claims to arbitration and provided a nonexhaustive list of applicable discrimination statutes.¹³¹

Metropolitan Edison equated "clear and unmistakable" with "explicitly stated."¹³² The NLRA, the Court noted, "contemplates that individual rights may be waived by the union so long as the union does not breach its duty of good-faith representation."¹³³ In contrast, according to the Court, *Alexander v. Gardner-Denver* reasoned that waiver of individual Title VII rights would be inconsistent with the purposes of Title VII.¹³⁴ The Court in *Pyett* upholds this distinction only insofar as it

126. 14 Penn Plaza v. Pyett, 129 S. Ct. 1456, 1474 (2009).

127. *Wright v. Univ. Mar. Serv. Corp.*, 525 U.S. 70, 79–80 (1998).

128. 460 U.S. 693 (1983).

129. *Id.* at 707–08. The "clear and unmistakable waiver" standard has also been applied to other aspects of labor law. See *Am. Ben. Corp.*, 354 N.L.R.B. No. 129 (Jan. 8, 2010) (finding a clear and unmistakable waiver of a right to bargain about a mandatory subject of bargaining).

130. *Wright*, 525 U.S. at 72, 80–82.

131. *Pyett*, 129 S. Ct. at 1461.

132. *Metro. Edison Co.*, 460 U.S. at 708.

133. *Id.* at 707 n.11.

134. *Id.*

makes part of its analysis the question whether the ADEA specifically prohibits an agreement to arbitrate ADEA claims. More significantly, *Pyett* explicitly rejects the notion that an agreement to arbitrate might constitute a waiver of individual statutory protection, reasoning that the only thing at issue with respect to enforcement of the arbitration agreement was a waiver of the right to a judicial forum as the place to vindicate statutory rights.

Following *Wright* (which relied on *Metropolitan Edison*) in decisions before *Pyett*, the Fourth Circuit developed two approaches to test whether a waiver of statutory claims in a collective bargaining agreement was clear and unmistakable.¹³⁵ The first approach involves an explicit arbitration clause that is “a clear and unmistakable provision under which the employees agree to submit to arbitration all federal causes of action arising out of their employment.”¹³⁶ The second approach applies “when the arbitration clause is not so clear, and requires that such general arbitration clauses be supported by additional provisions mandating explicit incorporation of statutory anti-discrimination requirements which make it unmistakably clear that the discrimination statutes at issue are part of the agreement.”¹³⁷ Other courts relying on *Wright* have suggested that the parties to the CBA must expressly list and agree to comply with the substance of each respective statute intended to be covered by the agreement.¹³⁸

Notably, under its second approach the Fourth Circuit has not required explicit reference to each statute in order to find clear and unmistakable waiver. In *Singletary*, for example, the court found a waiver to be clear and unmistakable when the contract said “[a]ny and all claims regarding equal employment opportunity or provided for under this Article of the Agreement or under any federal or state employment law shall be exclusively addressed by an individual employee or the Union under the grievance and arbitration provisions of this Agreement.”¹³⁹

The *Singletary* court was satisfied that even without explicit reference to specific statutes, the clause above “includes the entire set of such claims, leaving no room for courts and litigants to speculate on the margins about which claims are covered and which are not.”¹⁴⁰ On the other hand, some courts after *Wright* not only have required an explicit reference to each statute, but also have insisted that explicit reference to each intended statute be included in the CBA’s arbitration provision

135. See *Singletary v. Enersys, Inc.*, 57 Fed. App’x 161, 163 (6th Cir. 2003).

136. *Id.* (quoting *Carson v. Giant Food, Inc.*, 175 F.3d 325, 331 (4th Cir. 1999)).

137. *Id.* (quoting *Carson*, 175 F.3d at 332 (internal quotations omitted)).

138. See, e.g., *Bratten v. SSI Serv., Inc.*, 185 F.3d 625, 631 (6th Cir. 1999).

139. *Singletary*, 57 Fed. App’x at 163.

140. *Id.* at 164.

as well.¹⁴¹ Since *Pyett* does not speak to the content of the clear and unmistakable standard, these approaches to the standard remain good law in the circuits where they have been adopted. These decisions provide guidance for drafters.

Notwithstanding the guidance that might be derived from the long heritage of the clear and unmistakable standard, few courts after *Pyett* have yet attempted to fashion content for the clear and unmistakable standard. Among the lessons these few cases share, however, is that, to be enforceable, an agreement to arbitrate statutory claims must be explicit with respect to its application beyond merely contractual matters.¹⁴²

These cases suggest that parties wishing to ensure the mandatory arbitration of statutory claims should list the statutory claims that are subject to arbitration, be explicit about the statutory authority that creates those rights, and include reference to these statutes in the arbitration provision as well. And it would probably be wise to specify that an individual employee has the right to bring a grievance, to prevent enforcement issues that might arise where a union declines to pursue arbitration of an employee's statutory claim. In the absence of such a provision, even a clear and unmistakable waiver may not be enough to keep the employee's claim out of federal court.¹⁴³

B. *Be Specific About the Claims That Will Not Be Arbitrated*

Even where an agreement to arbitrate statutory claims is clear and unmistakable, certain claims are not subject to arbitration.¹⁴⁴ Some of the more common statutory claims that are generally considered nonarbitrable include those under the FLSA and equivalent state wage and hour laws, and state workers' compensation claims.¹⁴⁵ A common rationale behind these exceptions to arbitrability is that the statute is designed to act as the exclusive remedy for violations. Similarly, agency enforcement actions pursuant to statutory author-

141. *Bratten*, 185 F.3d at 631–32 (citing *Wright v. Univ. Mar. Serv. Corp.*, 525 U.S. 70, 79–80).

142. *See, e.g.*, *Catrino v. Town of Ocean City*, No. WMN-09-505, 2009 WL 2151205, at *4 (D. Md. July 14, 2009) (citing *Wright* for the proposition that the agreement to arbitrate statutory claims must be “explicitly stated”); *Aubin v. Unilever HPC NA*, No. 09-C-184, 2009 WL 1871679, at *4 (N.D. Ill. June 26, 2009); *Markell v. Kaiser Found. Health Plan of the Nw.*, No. CV 08-752-PK, 2009 U.S. Dist. LEXIS 95891, at *20 (D. Or. Oct. 15, 2009).

143. *See Cummins & Blissenbach, supra* note 108, at 168–69 (discussing the early post-*Pyett* decisions that have dealt with the employee's ability to seek a judicial forum where the union controls the grievance process, including the decision whether to arbitrate a claim).

144. GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 243–95 (2d ed. 2001).

145. *See supra* notes 114–16 and accompanying text.

ity are not subject to arbitration, even where individualized relief is sought.¹⁴⁶

In addition, non-statutory personal claims, especially those only tangentially related to employment, may also be nonarbitrable under a union contract arbitration requirement. Employers should consider drafting explicit exceptions to arbitration that may be in their interest, such as trade secret claims and those seeking injunctive relief, and those involving tort or workers' compensation claims.¹⁴⁷ Given the scope of the types of claims that may be nonarbitrable, employers will find it difficult to explicitly carve out every nonarbitrable claim. Thus, to avoid the possibility of ending up with an entirely unenforceable arbitration agreement, employers should include a severability clause to preserve the rest of the arbitration agreement.¹⁴⁸

C. *Modify Federal Statutory Procedures and Remedies at Your Peril*

The procedures used in arbitration need not be the same as those available in state and federal courts. The *Pyett* decision, like the line of pro-arbitration decisions that preceded it, explains that these procedural differences are part of what makes arbitration attractive as an alternative to judicial dispute resolution. However, the more employers tinker with the procedures and remedies available in arbitration, the more likely it is that the employer will face litigation challenging the arbitration provision and proceedings with respect to statutory claims. Some of the most frequently challenged provisions in agreements to arbitrate include discovery limits, arbitrator selection mechanisms, class arbitration waivers, location of the arbitration proceeding, cost allocation, time limits, remedy limitations, carve-outs from arbitration, and confidentiality.¹⁴⁹

Because private arbitration proceedings are subject to infinite variations, there are relatively few established safe harbors for employers seeking to modify procedures. At a minimum, however, employ-

146. See *EEOC v. Waffle House*, 534 U.S. at 295 (2002); *U-Haul Co. of Cal.*, 347 N.L.R.B. 375, 389 (2006) (finding that U-Haul committed an unfair labor practice by requiring employees to arbitrate claims where employees could reasonably believe that requirement to arbitrate included matters within the statutory jurisdiction of the NLRB).

147. The Fifth Circuit recently held that a wrongful death action was not subject to arbitration, even where the underlying facts involved a workplace accident. *Graves v. BP Am., Inc.*, 568 F.3d 221 (5th Cir. 2009). Similarly, the Fifth Circuit recently refused to compel arbitration where a Halliburton employee asserted tort claims for a sexual assault that occurred in barracks-style housing provided by the company for its employees in Iraq. *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009).

148. *But see Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1262 (9th Cir. 2005) (invalidating an arbitration agreement that included a severability clause, due to the agreement's overwhelmingly unconscionable terms, including the employer's unilateral right to modify the agreement).

149. *Drahozal & Wittrock*, *supra* note 95, at 83–84.

ers should draft to provide for an independent and impartial decision maker and a binding, final written decision to ensure the arbitration agreement will be enforced. Furthermore, few courts would view published and widely available rules from organizations like the American Arbitration Association as evincing an unconscionability such that they would refuse to compel arbitration or enforce an arbitrator's award.¹⁵⁰

In contrast to procedural specifications, modification of statutory remedies are somewhat more problematic. Some courts hold that agreements to arbitrate statutory claims and subsequent awards are invalid when the proceedings provide less than the full panoply of remedies that Congress or the legislature have made available in courts.¹⁵¹ In those jurisdictions, the arbitration agreement should include language specifying that the arbitrator has the authority to award the full range of remedies that could be awarded by a court sitting in the jurisdiction under the relevant law. In jurisdictions such as the Eighth Circuit, however, reasonable limits on damages, including punitive damages and attorneys' fees, do not render an individual employment agreement to arbitrate invalid.¹⁵² Thus, as this example illustrates, any significant change to procedures or remedies will require a jurisdiction-by-jurisdiction analysis, and often an analysis of the law related to the particular type of remedy. But where the law is unsettled or unclear, employers may face the prospect of defending litigation challenging any abridgement of remedies.

D. Provide Clear Authority to the Arbitrator and Include a Choice of Law Provision

The arbitration agreement should also clearly and explicitly provide the scope of the arbitrator's authority. This will, of course, include the authority to render a decision under the statutes the parties have agreed to cover, as well as under the contract itself. One item that may be especially worthwhile to consider is specifying that the arbitrator, not a court, has the authority to decide whether any given dispute is arbitrable, including authority to decide both substantive and procedural aspects of arbitrability.¹⁵³ Under section 301 of the Labor Man-

150. See, e.g., AMERICAN ARBITRATION ASSOCIATION EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES (2009), available at <http://www.adr.org/sp.asp?id=32904>.

151. See, e.g., *Perez v. Globe Airport Sec. Serv., Inc.*, 253 F.3d 1280, 1286 (11th Cir. 2001) (“[F]ederal statutory claims are arbitrable only when arbitration can serve the same remedial and deterrent functions as litigation, and an agreement that limits the remedies available cannot adequately serve those functions.”).

152. See *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539–40 (8th Cir. 2002) (enforcing an agreement to arbitrate that contained a provision limiting statutory remedies); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004) (applying *Arkcom* to an agreement to arbitrate in employment contracts).

153. See generally *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944–47 (1995) (holding that the arbitrator may determine the scope of the agreement to arbitrate where

agement Relations Act, the Supreme Court has recognized that the parties may agree to give the arbitrator authority to determine questions of arbitrability.¹⁵⁴ In the absence of an unambiguous statement in the agreement to arbitrate, courts have been divided on whether it is the province of the judiciary or the arbitrator to decide arbitrability.¹⁵⁵ However, the Supreme Court likely will provide some clarification in its 2009–2010 Term, as it recently granted certiorari to decide whether an arbitrator has jurisdiction to determine if an arbitration agreement is unconscionable where the agreement so authorizes the arbitrator to do so, in clear and unmistakable terms.¹⁵⁶

Similarly, employers may wish to include a choice of law provision in the arbitration provision. This provision should be used to eliminate ambiguity as to what law applies when the arbitrator ultimately resolves the substantive dispute. The absence of such clarification in the agreement could invite yet another argument for employees seeking review of an arbitrator's decision.

V. Conclusion

There is no question that *Pyett* signals a continued trend towards enforcing agreements to arbitrate employment-related claims. While unions and employers were among the early users of arbitration procedures, the *Pyett* decision provides further incentive for employers to seek the union's agreement to mandatory arbitration of statutory claims. There is now greater certainty that, under such a bargained-for arbitration clause, employees and their unions will be obligated to resolve all related contractual and statutory claims in the same proceeding. From an employer's perspective, this consolidation creates a potential cost savings that cannot be ignored.

However, *Pyett* leaves significant legal uncertainty in the landscape of arbitration agreements covering statutory employment claims. Although the FAA, section 301, and the NLRB all provide for great deference to arbitration agreements and awards, there continue to be significant areas of the law after *Pyett* that are subject to challenge and

the agreement is "clear and unmistakable," as to who has authority to decide arbitrability questions, but finding no such clear agreement under the facts presented); *IBEW Local Union No. 545 v. Hope Elec. Corp.*, 380 F.3d 1084, 1098 (8th Cir. 2004) (explaining the distinction between substantive and procedural arbitrability and the general rules of jurisdiction to decide these aspects of arbitrability).

154. See *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583 n.7 (1960) ("Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose.").

155. *First Options of Chi., Inc.*, 514 U.S. at 944–47.

156. *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 1133 (2010).

development. And these open questions will affect the employer's cost-benefit analysis in collective bargaining. A reasonable employer may or may not decide that it is worth the costs in collective bargaining to obtain an arbitration provision covering statutory claims. Employers that do choose to bargain for such a provision should do so only with eyes wide open to the challenges inherent in those open questions, as well as to the risks and rewards of arbitration itself.