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FOREWORD

Forced Arbitration in the Workplace

Andrew J. Gordon† and Kimberley C. Weber‡‡

Forced Arbitration in the Workplace: A Symposium was a joint effort by The Employee Rights Advocacy Institute For Law & Policy (“The Institute”) and the Berkeley Journal of Employment and Labor Law (“BJELL”) to bring together academics, practitioners, law students, and community members for a thoughtful dialogue about employer-promulgated, mandatory arbitration or forced arbitration.¹ Over the past two decades, an increasing number of companies have required arbitration agreements from their employees as a condition of employment,² yet the scholarly explications of the phenomenon were fragmentary. Held at the University of California, Berkeley School of Law (“Berkeley Law”) on February 27, 2014, the Symposium considered how mandatory arbitration affects workers’ access to the civil justice system.

The Symposium sparked a vigorous discussion about mandatory arbitration in the workplace. Distinguished panelists explored not only the


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3. Panelists included Sarah E. Belton (Public Justice, PC), F. Paul Bland, Jr. (Public Justice, PC), Stephen McG. Bundy (University of California, Berkeley School of Law), Alexander J.S. Colvin (Cornell University, School of Industrial & Labor Relations), Christopher R. Drahozal (University of Kansas, School of Law), Catherine L. Fisk, (University of California, Irvine School of Law), Joseph D. Garrison, (Garrison, Levin-Epstein, Richardson, Fitzgerald & Pirrotti, PC and American Association of
current state of mandatory employment arbitration, but also its historical roots; proposed ethical standards for arbitrators in mandatory employment arbitration; emerging empirical research about arbitration outcomes; the preemptive expanse of the Federal Arbitration Act; and innovative legal theories to challenge mandatory arbitration provisions. Robert B. Reich, former U.S. Secretary of Labor and current Chancellor’s Professor of Public Policy at the University of California, Berkeley Goldman School of Public Policy, keynoted the Symposium by situating mandatory employment arbitration within broader trends of the American economy toward income inequality and decreased employee power.

The Articles that follow represent a renewed effort among the legal community to strengthen the scholarship in this area and ensure fairness in the workplace for all employees. Each Article contributes to our understanding of mandatory employment arbitration and its impact on workers’ ability to enforce their statutory rights in the contemporary workplace.

The first set of Articles examines the history of mandatory arbitration. Carmen Comsti, The Institute’s Paul H. Tobias Attorney Fellow, provides critical context to the current debate over mandatory arbitration of employment disputes. She traces the Federal Arbitration Act (“FAA”) from its nascence to its reconstitution as a “super statute,” and discusses how legislative and legal developments since the 1990s led to the rise of mandatory arbitration. Next, Professor Imre Szalai explores the changing standard for judicial review of arbitration awards and its impact on the fairness of the arbitral system.

Thereafter, Professor and Arbitrator Barry Winograd presents a proposed set of guidelines from the National Academy of Arbitrators that would impose demanding standards on arbitrators who oversee disputes involving mandatory arbitration. He questions how arbitration providers can ethically resolve cases that stem from mandatory arbitration provisions.

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Next, several authors discuss ground-breaking empirical research on employment arbitration outcomes. Professor Alexander J.S. Colvin draws upon several surveys to examine how mandatory arbitration alters the mechanism for enforcing workplace rights and exacerbates inequality. Based on a new national survey of plaintiffs’ employment lawyers, Ph.D. Candidate Mark Gough evaluates mandatory arbitration’s effect on employees’ access to justice and on lawyers’ handling of cases. Professors J. Ryan Lamare and David B. Lipsky analyze a comprehensive study of employment arbitrations in the financial securities industry to assess commonly held beliefs about employment arbitration.

Two subsequent Articles evaluate the growing body of jurisprudence on FAA preemption over state law, discussing the interstitial nature of state contract doctrine and federal arbitration law. Consumer advocates Sarah Belton and F. Paul Bland, Jr. analyze how the Supreme Court’s dramatic expansion of the FAA displaces and undermines legal principles in several areas, including state law, constitutional rights, contract law, and the procedural/substantive distinction. Dean Christopher Drahozal next addresses important misconceptions about AT&T Mobility, LCC v. Concepcion. He argues that Concepcion, properly construed, supports a narrow reading of the FAA—despite the contrary reading adopted by most employee and consumer advocates.

The final set of Articles suggests new litigation strategies for challenging mandatory arbitration of employment disputes. Professor Catherine L. Fisk discusses recent litigation on mandatory arbitration, including class action waivers and collective action rights under the National Labor Relations Act. Professor Michael Z. Green advances a new way of thinking about mandatory arbitration. He urges advocates and employers to consider potential retaliation claims for employers imposing mandatory arbitration on an employee after that employee files a charge.

with the Equal Employment Opportunity Commission or the National Labor Relations Board.

In addition to the scholarship of the panelists, BJELL presents a Comment on the topic of mandatory arbitration in this issue. Law student John Thompson examines the public policy supporting mandatory employment arbitration as announced in the Supreme Court's Gilmer v. Interstate/Johnson Lane Corporation decision14 and explores where one particular group of vulnerable workers, day laborers, fit within that schema.15

The Articles published in this volume of BJELL include diverse perspectives on the impact of mandatory arbitration in the workplace. The Institute and BJELL would like to thank everyone involved in the Symposium for participating in such a thoughtful dialogue, and particularly the tremendous staff and faculty of Berkeley Law and the Symposium Planning Committee, without whose support and enthusiasm this event would not have been possible.