Grappling with Gilmer: Pre-Hire Arbitration Agreements in the Day Labor Industry

John Thompson

Follow this and additional works at: http://scholarship.law.berkeley.edu/bjell

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/bjell/vol35/iss1/12

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38D63P

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Employment & Labor Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcerawlaw.berkeley.edu.
Grappling with *Gilmer*: Pre-Hire Arbitration Agreements in the Day Labor Industry

John Thompson†

Since the Supreme Court’s decision in *Gilmer v. Interstate/Johnson Lane Corp.*, pre-hire arbitration provisions have proliferated in the workplace. In the booming market for temporary low-skill labor—often called “day labor”—firms such as Labor Ready, Inc., are able to use these provisions to immunize themselves from many types of lawsuits. Labor Ready’s workers generally earn minimum wage on an hourly basis, with an employment relationship that lasts a single day. As a result, any wage and hour lawsuit they bring is likely to seek a small sum; in such suits the workers’ primary goal is not recovery but to effect change in workplace practices.

In many jurisdictions, however, Labor Ready and similar firms are able to deter such suits by requiring all applicants to waive their rights to bring a class action, to agree to split arbitrators’ fees, which often exceed $400 an hour, and to agree to private arbitration, which diminishes the deterrent effect of adjudication. By comparing the day labor industry’s use of these contractual mechanisms with the policy considerations voiced in the *Gilmer* case, this Comment argues that this type of employment arbitration is beyond what the Supreme Court authorized in *Gilmer*. As a result, reform is needed to end claim suppression and other inequitable effects of forced arbitration.

† J.D. Candidate, Georgetown University Law Center (2014); B.A., cum laude, Vanderbilt University, 2008. My gratitude goes to Professor James Oldham for his guidance and encouragement in the publication of this Comment; to Sally J. Adams, for her input, her patience, and her support throughout this process; and to my parents.
INTRODUCTION

Over the last two decades the role of temporary staffing agencies has grown dramatically, accompanied by a commensurate expansion in the contingent workforce. In the market for low-income workers, private "day labor" firms allow businesses to employ temporary, low-skill workers on short notice. Day labor agencies offer their customers specific advantages over traditional long-term or union employees.

Some day labor agencies have begun to require applicants to agree to binding, pre-hire arbitration provisions. This practice was unheard of in most workplaces until the 1991 Supreme Court ruling *Gilmer v. Interstate/Johnson Lane Corp.*. *Gilmer* and subsequent decisions spawned a movement towards forced arbitration provisions in employment contracts. Though *Gilmer* only provided a qualified authorization for arbitration of employment disputes, courts have since opened the door much wider—overruling lower courts’ decisions to sever such clauses as unconscionable and repeatedly expressing support for arbitration.

The day labor industry offers a telling example of the potentially harsh consequences of pre-hire arbitration agreements. Labor Ready, Inc., the national leader in day labor services, has used these relatively new contractual devices with particular success. In many jurisdictions, Labor Ready has managed to effectively immunize itself from class action suits,
foreclosing its workers’ opportunity to vindicate legal rights when small sums are at issue.

But for these workers the modest sums belie a greater pursuit: to expose and reform the company’s curtailment of workers’ rights, which a traditional lawsuit might normally effectuate through publicity and deterrence. Because the day labor industry is already fraught with questionable labor practices and firms often use day labor agencies to avoid liability, Labor Ready’s ability to suppress claims is particularly concerning.

In comparing courts’ support of pre-hire arbitration agreements for day laborers with the dicta of *Gilmer* itself, a stark contrast emerges between the initial logic for allowing such clauses and their ultimate effects in the workplace. Many of the policy concerns discussed in *Gilmer* have proven to be well founded. The decision has resulted in a lack of good-faith notice for workers, a stifling of the law, and a curtailment of workers’ right to seek effective legal remedies.

Part I provides a general background, briefly charting the judicial movement toward employment arbitration, the unrelated trend toward contingent work arrangements such as day labor agencies, and the confluence of those trends with the adoption of forced arbitration provisions by day labor agencies such as Labor Ready.

Part II analyzes the experience of day laborers trying to assert claims against Labor Ready and argues that forced arbitration has allowed the company to immunize itself from suit and avoid public scrutiny. Part II.A shows how forced arbitration can suppress claims through class action waivers, arbitrators’ fees, and limitations on equitable relief. Part II.B argues that the privacy of the arbitration process and the nondisclosure of arbitration awards can obscure industry practices from public knowledge and reduce the deterrent power of adjudication. Part II.C argues that the unequal bargaining power of parties should preclude certain forced arbitration clauses and shows how unconscionability doctrine has failed as a safeguard against the inequitable effects of forced arbitration provisions.

Part III makes policy recommendations and explores current proposals for reform, suggesting that federal legislation be enacted to mitigate some of the inequitable effects of *Gilmer*. 
I. BACKGROUND


Congress established a new level of legitimacy for arbitration in 1925 when it passed the Federal Arbitration Act ("FAA"). While courts had previously shown hostility towards arbitration, the FAA ushered in a new era of judicial deference to arbitration proceedings. Under the FAA, arbitration decisions are generally valid and enforceable, and courts are required to stay judicial proceedings and compel arbitration when one party has refused to honor a binding agreement to resolve disputes through arbitration.

For over 60 years, the FAA applied to commercial contracts only, expressly excluding employment contracts for "workers engaged in foreign or interstate commerce." Later legislation extended similar support for arbitration of union members' employment contracts, but outside of the collective bargaining sphere, employment contracts were considered beyond the scope of the FAA.

The FAA's endorsement of arbitration provisions was also limited to disputes that arose from contractual rather than statutory rights. The distinction—erected by the Supreme Court—served as the rough boundary of arbitrators' province into the 1980s. The Court conceptualized the arbitral forum as strictly a place to resolve disputes inherent to a bargained-for contract and rejected the notion that arbitrators could resolve questions of substantive law.

5. Congress further promoted the use of arbitration for conflicts arising under collective bargaining agreements with the passage of the Labor Management Relations Act of 1947 ("L.M.R.A."). 29 U.S.C. § 141. In Textile Workers Union v. Lincoln Mills, the Supreme Court held that the L.M.R.A. provided support to labor arbitration that was similar to the FAA. 353 U.S. 448, 451 (1957) ("[the LMRA] authorizes federal courts ... to arbitrate grievances under collective bargaining agreements").
10. Id. at 57 ("[T]he resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts."). In explaining this division, the Gardner-Denver Court cited the qualifications of labor arbitrators (who are often not lawyers) and the reduced procedural processes of arbitration. Id. at 53 ("A proper conception of the
But the Supreme Court once again emboldened the arbitral forum by permitting the arbitration of statutory claims in the “Mitsubishi Trilogy” in the late 1980s. With the broadening of the FAA, arbitration became increasingly relevant outside of the employment arena as parties capitalized on the reduced costs, faster resolutions, and greater privacy that arbitration provides.

Meanwhile, employment claims proliferated in the second half of the twentieth century, as employees enjoyed new statutory remedies such as Title VII. This came at significant cost to the business community and prompted firms to search for ways of avoiding the expense of employee-related litigation.

1. Courts Begin to Support Employment Arbitration

The Supreme Court ultimately met this demand by further broadening the FAA to support employment contracts in two important rulings: Gilmer v. Interstate/Johnson Lane Corp. and Circuit City Stores, Inc. v. Adams. These rulings clearly opened the door for forced employment arbitration.

In Gilmer, the respondent, a regional stock brokerage, sought to enforce an arbitration clause in a contract with its former Manager of Financial Services, the petitioner. Robert Gilmer brought suit claiming that he had been fired in violation of the Age Discrimination in

arbitrator’s function is basic. He is not a public tribunal imposed upon the parties by superior authority, which the parties are obliged to accept. He has no general charter to administer justice for a community, which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement.” (citations omitted). Predictably, this threshold was never perfectly clear, and arbitrators got away with forays into statutory interpretation long before Gardner-Denver was overruled. See, e.g., Evans Products v. Millmen’s Union No. 550, 159 Cal. App. 3d 815, 820 (1984) (requiring arbitrator to consider FLSA when interpreting a contract dispute).


14. Alexander J.S. Colvin, From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution, 13 CORNELL J.L. & PUB. POL’Y 581, 584 (2004) (“Employers soon recognized the potential of using mandatory arbitration to avoid the risks and occasionally massive damage awards of litigation and began adopting these procedures in large numbers.”).


17. See, e.g., Colvin, supra note 14, at 584.

Employment Act ("ADEA"). The employer's contract called for arbitration "of any controversy arising out of a registered representative's employment or termination of employment." The Court saw the petitioner's ADEA claim as falling within the purview of this agreement and followed its Mitsubishi Trilogy decisions by rejecting the petitioner's proposed distinction between contractual and statutory claims. After a lengthy discussion of the policy issues surrounding employment arbitration, the Court compelled arbitration of Mr. Gilmer's statutory claim.

The impact of Gilmer was not immediately clear. Two dissenting justices stressed the momentousness of the decision, arguing that it virtually ignored the FAA's section 1 exclusion of workers engaged in interstate commerce. The dissent also pointed to legislative history indicating that Congress would not have contemplated that the FAA would apply to employment contracts, not least because such contracts were rare in 1925. The majority countered, however, by pointing out that, technically, Mr. Gilmer's contract was not an employment contract: it was a condition of his registration as a representative of several stock exchanges. As such, the ruling did not definitively extend the FAA to statutory claims under non-union employment contracts. But the ADEA was an employment statute, and many observers believed that Gilmer signified the Court's willingness to interpret section 1 narrowly.

This proved to be true when the Supreme Court clarified the issue nine years later in Circuit City Stores, Inc. v. Adams, where a lower court had compelled arbitration of an employee's claim under a state labor law. A five-justice majority affirmed this decision, unequivocally signaling that courts would now support arbitration of statutory employment claims. The majority construed the FAA's section 1 exclusion to apply to a narrower definition of workers involved in interstate commerce, such as truckers and railroad workers.

---

20. Id. at 20.
21. Id. at 32.
22. See Case, supra note 8, at 851 (describing "conflicting results" of lower courts post-Gilmer).
23. Gilmer, 500 U.S. at 36 (Stevens, J., dissenting).
24. Id. at 39.
25. The Gilmer dissent urged the Court to address the issue more specifically, but the majority chose to limit its holding, and the policy of extending the FAA to support employment arbitration did not clearly bear the Supreme Court's imprimatur until Circuit City. Id. at 36-37 (Stevens, J., dissenting) ("Notwithstanding the apparent waiver of the issue below, I believe that the Court should reach the issue of the coverage of the FAA to employment disputes because resolution of the question is so clearly antecedent to disposition of this case.").
26. See Nicolau, supra note 18.
28. Id. at 106 ("The better reading of § 1 . . . is that § 1 exempts from the FAA only employment contracts of transportation workers.").
Since *Gilmer* and *Circuit City*, employers across the country have embraced pre-hire contracts with forced arbitration clauses. While the *Gilmer* decision, by its own terms, was not intended to decide the issue of the FAA’s application to employment contracts, it is nonetheless widely recognized as the landmark case that triggered a massive and ever-growing movement toward pre-hire arbitration clauses in the workplace.

2. Assessing the Arbitration Process

Many commentators have criticized the policies set forth in *Gilmer* and *Circuit City*. They question the fairness and validity of “take-it-or-leave-it” contracts between an individual, non-union employee and an employer, whose lawyers may construct the contract “with an eye toward protecting and furthering the interests of the employer.” Critics also question the adequacy of arbitral proceedings to fairly represent parties’ rights and competently resolve disputes. Among the most forceful arguments is that of the “repeat-player effect,” which suggests that employers are more likely to predict arbitrators’ rulings and more able to influence arbitrators’ decisions because they are the arbitrators’ core clientele. Some also question the constitutionality of letting employment arbitrators make binding statutory interpretations.


30. See, e.g., *Employment Arbitration Law and Practice* § 1:3 (“[T]he floodgates of employment arbitration were not opened until [Gilmer].”).


32. Summers, supra note 31, at 687; see also Cole v. Burns Intern. Sec. Servs., 105 F.3d 1465, 1477 (D.C. Cir. 1997) (“[M]andatory arbitration agreements in individual employees’ contracts often are presented on a take-it-or-leave-it basis; there is no union to negotiate the terms . . . Thus, employers are free to structure arbitration in ways that may systematically disadvantage employees.”).


34. Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* 128 (1997) (“[K]nowledge that the employer is far more likely than the employee to have an opportunity to hire an arbitrator for a successive case may consciously or subconsciously induce the arbitrator to favor the employer in a current case. This problem will be particularly acute in areas where a single employer employs a disproportionately large percentage of workers.”).

Other reactions have been more positive. Most observers acknowledge that the rulings were a boon for employers’ profitability. Others note that the ruling “could dislodge the logjam of employment cases clogging the judicial system,” and allow employers to benefit from the lower costs and better predictability of arbitration.

Further studies suggested that employees were not necessarily worse off in arbitration than they were in court: In the mid-1990s, surveys found that plaintiffs’ attorneys only accepted about five percent of employment discrimination cases brought to them. If lucky enough to find representation, employment plaintiffs faced an uphill battle in court, with empirical studies showing that employer-defendants prevailed in over three-quarters of discrimination cases. Even if arbitration fees match or surpass court fees, an employee can more easily succeed in arbitration without an attorney, the cost of which is prohibitively expensive for many would-be litigants.

Defenders of employment arbitration also point out that grievants are not without procedural protections. Statutory procedural safeguards are found in the Uniform Arbitration Act (“UAA”). Additional protections are provided by the American Arbitration Association’s (“AAA”) rules when the contract calls for AAA arbitration, as day labor applications often do. Many other, often overlapping statutory and institutional provisions

37. See Development in the Law, supra note 12, at 1672.
39. See, e.g., Martin H. Malin, The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition, 87 IND. L.J. 289, 291, 294-95 (2012) (citing empirical research on employment litigation and opining: “consider[ing] the employer advantage in employment litigation in federal court, one is left wondering why an employer would ever want to leave the federal court system”).
40. See Samuel Estreicher, Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Agreements, 16 OHIO ST. J. DISP. RES. 559, 563 (2001) (“[W]ithout employment arbitration as an available option, we would essentially have a ‘Cadillac’ system for the few and a ‘rickshaw’ system for the many.”).
41. The UAA requires states to adopt their own version of it, so there is some variance in jurisdiction. It sets up required disclosures by the arbitrators, including conflicts and previous relationships to any parties, and requires that parties be allowed representation. UNIF. ARB. ACT §§ 12, 16 (2000), available at http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20(2000).
42. These provide the most detailed procedural framework, fixing arbitrator’s fees and claim-filing procedures, and promulgating ethical standards for arbitrators. THE AMERICAN ARBITRATION ASSOCIATION, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES RULES (2009), available at http://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTG_004362&revision =latestrevised. The AAA has also endorsed the Due Process Protocol for Mediation and Arbitration of Statutory Arbitration Disputes, which offers additional guidelines to protect parties’ rights.
apply to employment arbitration in various jurisdictions. Nonetheless, critics of employment arbitration argue that these safeguards have no teeth or are not enforced by any substantial oversight.

Importantly, parties have the right to seek judicial review. The FAA calls for courts to hold arbitrators’ decisions “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Section 10 also allows courts to vacate awards where there is evidence of corruption, fraud, partiality or misconduct, or where an arbitrator’s decision exceeds her power.

But as the Tenth Circuit recently put it, the standard of review of arbitral awards is “among the narrowest known to the law.” Moreover, courts have given increasing deference to arbitrators’ interpretation of the law. The extent to which these provisions allow courts to review or vacate arbitrators’ awards is now unclear; the law is conflicted and dynamic, and a spirited academic debate continues.

An in-depth discussion of the procedural adequacy of arbitration and the fairness of arbitration decisions in the day labor industry is outside the scope of this Comment. Instead, my focus is on the systemic impact of the widespread use of mandatory arbitration provisions. Even if individual grievants are well represented and satisfied with arbitration, the more serious issues arise outside the arbitral forum itself. Do employees have any real choice when they commit to resolve all employment disputes through arbitration? After a dispute arises, will the costs and limited

---


44. See, e.g., Malin, supra note 3939, at 302 (“There are two primary vehicles for judicial policing of abusive provisions in employer-imposed arbitration mandates: the requirement that the arbitral forum be one in which employees are able to vindicate their claims effectively, and the common law doctrine of unconscionability. The first has effectively failed, and the Supreme Court has recently dealt the second two blows that could turn to be fatal.”).


46. 9 U.S.C. §§ 10-11 (2012). Section Eleven also allows courts to modify or correct awards where material errors were made, or arbitrator’s decisions exceeded their power. Some courts have crafted additional criteria for review and grounds for vacatur, but these rulings have been overruled or limited by the Supreme Court’s recent decision in Hall St. Associates, L.L.C. v. Mattel, Inc. 552 U.S. 576 (2008).

47. ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995) (internal citations omitted).

48. See, e.g., Ginevra Ventre, The Federal Arbitration Act Preempts A State Law That Renders Unconscionable A Class Arbitration Waiver in A Consumer Adhesion Contract Likely to Involve Disputes over Small Sums of Money: AT&T Mobility LLC v. Concepcion, 50 D.U. L. REV. 919, 948-49 (2012) (“There is a considerable amount of judicial action on the issue of the unconscionability of certain arbitration clauses, and it remains to be seen where the Supreme Court will draw the line in its consistent enforcement of the mechanism.”).

49. This is also difficult to gauge, as the arbitrators’ decisions from the day labor industry are extremely hard to find.
remedies of individualized arbitration prohibit claims that might otherwise be brought as a class action? Once disputes are arbitrated, will the decision have the same effect as a court ruling?

B. History of Day Labor Agencies and the Contingent Workforce

The last fifty years have brought dramatic changes to the American economy. On the whole, today’s workers navigate a more volatile job market. The postwar era featured internal labor markets and an abundance of permanent jobs, but by the mid-1970s various factors began to turn the economy towards higher job turnover. There was a period of deregulation, and a movement away from the traditional union model. In many industries, firms increasingly utilized outsourcing and subcontracting, making their businesses more adaptable as they approach today’s more complex and dynamic markets. Meanwhile, the service sector grew to consume a much larger share of America’s workforce, and traditional blue-collar industries have declined. The economy became more globalized and technological developments created a faster, less predictable environment for most businesses. This environment left firms struggling to connect with eligible job seekers while maintaining flexibility in their relationships with employees.

1. The Rise of Labor Market Intermediaries and Day Labor Agencies

A variety of businesses have stepped in to meet this demand for staffing. These Labor Market Intermediaries (“LMIs”), or staffing firms, have always existed in some form, but now play a larger role in the job market. At the same time, contingent workers have become a larger sector of the workforce. In 2000, a Government Accountability Office (“GAO”)...
of the roughly forty-two million Americans categorized as contingent workers, the GAO found that six percent were day laborers or on-call workers. Many of these 2.7 million workers utilize day labor agencies, which provide applicants with work on a strictly day-to-day basis.

Day labor agencies represent an affordable and flexible way to acquire low-skilled workers on short notice. They are particularly attractive to firms in the construction or light manufacturing industries. They allow “client” firms to weather the ebbs and flows of volatile or project-based markets. For many workers, they provide an opportunity to earn a quick day’s wage while not making a long-term commitment or undergoing the typical scrutiny of a job application. But the temporary, triangular relationship between laborers, day labor agencies and client-employers brings up some difficult regulatory issues.

2. The Legal and Regulatory Treatment of Day Laborers

Some critics attribute the growth of the day labor industry to a deficit of regulatory oversight, observing that the day labor industry exists in a legal gray area. This regulatory void is concerning because the day labor industry employs a particularly disadvantaged population and has been plagued with labor violations.
Workers finding temporary employment through licensed staffing agencies are entitled to many statutory rights, both federal and state. But the Department of Labor ("DOL") has documented problems in applying current laws to the practices of day labor agencies. It has noted "difficult[ies] getting complete information for potential violations involving day laborers." The DOL has also found that its "investigative procedures are generally not designed for individuals in nonstandard work arrangements." Finally, DOL officials have expressed "uncertain[ty] about the extent of coverage for some day laborers and the responsibilities of their employers."

Many scholars have also explored the lack of regulation in the day labor industry, even calling it a "black hole." These scholars note three characteristics of the industry that are incompatible or ill adapted to the current system of labor and employment law: (a) the triangular employment relationship; (b) the one-day employment contract, and (c) differential treatment of private sector staffing and traditional union hiring halls.

a. The Triangular Employment Relationship

The first characteristic of day labor, and temporary staffing broadly, that frustrates the application of labor law is the "triangular" relationship between the firm seeking temporary employees, the firm providing those employees, and the employees themselves. This issue is particularly impactful in legal disputes because it can be unclear who is liable—the

65. With regards to working conditions, workers benefit from both the provisions of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 151–169, and the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 15, both executed by the Department of Labor. Day laborers are also protected by the various antidiscrimination laws promulgated by the EEOC. This Comment focuses mostly on labor standards as opposed to discrimination, as issues of worker safety and fair compensation are more pertinent to the day labor industry. There have been instances, however, of class action discrimination claims against day labor agencies that have been forced into arbitration. See Latulas v. Labor Ready Northeast, Inc., No. 03–CV–0120A(SR), 2004 WL 1570304 (W.D.N.Y. June 25, 2004).


67. Id. at *22-24.

68. Id. at *2.

69. Id. at *3.

70. See, e.g., Befort, supra note50, at 154 (describing a "veritable regulation-free zone in portions of the contingent work landscape"); see also Patricia Ball, The New Traditional Employment Relationship: An Examination of Proposed Legal and Structural Reforms for Contingent Workers from the Perspectives of Involuntary Impermanent Workers and Those Who Employ Them, 43 SANTA CLARA L. REV. 901, 906 (2003) ("A line of recent federal and state cases has led to more confusion regarding the legalities of contingent workers, prompting a consensus among many scholars that the law is outdated and ineffectual.").

71. See Heidi Gottfried, In the Margins: Flexibility as a Mode of Regulation in the Temporary Help Service Industry, 6 Work, Emp. & Soc'y 443 (1992) (describing the "triangulated" employment relationship and its dynamics); GAO, Employment Arrangements, supra note 58, at *25.
staffing agency or the client-firm. It is also often unclear whether labor standards apply to the staffing agency, the client-employer, or both. Finally, the triangular employment relationship can provide employers an opportunity to end-around labor laws or to misrepresent their treatment of employees by having a day labor agency "front" workers.

b. The One-Day Employment Contract

Day laborers' uniquely fleeting employment relationship also causes regulatory confusion. In most day labor agencies, laborers' employment technically lasts one day. Though day laborers often work repeat assignments and maintain consistent relationships with day labor agency branches, the company does not commit to providing them with any consistent employment. When day laborers are paid at the end of the day, they are "deemed to have quit." On any given day, they may not be given an assignment. Branch-level "dispatchers" typically have complete discretion in deciding which applicants receive assignment. This informal, fleeting relationship confounds some aspects of employment law. Particularly, discrimination and retaliation are difficult to spot and even harder to prove. For example, a worker who files a claim against Labor Ready could find that she never again "catches out" for a job with the company, as it maintains national databases of worker information. Yet a legal argument for retaliation would be extremely difficult to prove.

---

72. See, e.g., Middleton, supra note 52, at 578.
73. The NLRB has referred to the employment agency as the "supplier employer" and the client-employer as the "user employer." Frances Raday, The Insider- Outsider Politics of Labor-Only Contracting, 20 COMP. LAB. L. & POL'Y J. 413, 425 (1999).
74. See REVIS, supra note 62, at 107 (describing his experience as a day labor, and how, on one occasion, he had the impression that his "straw boss" had been hired by a day labor agency and an air-conditioning firm on the same day: "in effect, Labor-4-U was fronting workers for companies whose regular employees were covered by medical plans, and who earned vacation pay and the like. The gambit was obvious: in seeking contracts, the air-conditioning company could brag to public officials and other humanitarians that all of its employees—without getting specific—were covered by benefit packages.")
75. NLRB v. Labor Ready, Inc., 253 F.3d 195, 197 (4th Cir. 2001) ("Assignments ordinarily last one day . . . At the end of each day, the worker is contractually 'deemed to have quit'.").
78. Mark Berger, Unjust Dismissal and the Contingent Worker: Restructuring Doctrine for the Restructured Employee, 16 YALE L. & POL'Y & REV. 1, 28 (1997) ("How should the public policy and contract-based restrictions on the right to terminate a continuous employee apply to temporary help, leased workers, and employees converted to . . . contract worker status?").
79. See REVIS, supra note 62, at 35 (describing how dispatchers can "wordlessly put them on a second string.").
c. Competition with Construction Union Hiring Halls

The third aspect of day labor agencies that presents unique regulatory issues is the reality that they sometimes directly rival unions, but are subject to less regulation than unions. This argument is attenuated in the more general arena of staffing firms, which seldom compete directly with unions because federal law generally prohibits labor contracts that establish union membership as a precondition for employment (so-called “closed shops”), so most unions cannot offer “temporary services.” But construction industry unions are exempt from the closed-shop prohibition because Congress recognized the unique demands of the heavily project-based, irregular nature of the construction industry. Thanks to this exemption, unions once played a central role in pairing construction workers with employers on a day-to-day basis. Private agencies and union hiring halls often competed directly.

Scholars such as Freeman and Gonos observe that private sector staffing agencies have now come to dominate the market for low-skilled workers, pushing union hiring halls into a “relatively marginal role.” They attribute this to the disparate legal treatment of union hiring halls and private temp agencies. While both institutions serve largely the same functional role, union hiring halls are subject to not only the broader federal scrutiny of the National Labor Relations Board (“NLRB”), but also specific pre-hire regulation. Meanwhile, agencies like Labor Ready are not yet subject to any specific federal oversight.

3. Endemic Labor Violations and At-Risk Employee Population

The various difficulties in applying law in the day labor context are particularly concerning, given (a) the specific vulnerability of the day labor population and (b) the industry’s record of consistent labor violations. Both problems are disproportionate compared to long-term employers in “client industries.” Day laborers are among the most disadvantaged members of

---

82. Id. at 280.
83. Id. at 278.
84. Id. at 286; see also NLRA § 8(f), U.S.C. § 158(f).
86. See GAO, Protections for Day Laborers, supra note 66, at *1-2.
society, often recruited from homeless shelters. Minority populations are overrepresented in the temp industry as a whole, and day labor is no exception. And the industry is particularly prone to workplace abuses and skirting workers' rights. Among LMIs broadly, researchers cite consistent problems with "disingenuous marketing and recruitment" practices and failure to pay statutory overtime rates. Day labor agencies, particularly, are described as "notorious" for exploitative wage practices and safety violations.

C. Labor Ready's Forced Arbitration Clauses

One of the largest day labor firms is Labor Ready, Inc., which boasts 400,000 "temporary associates" and over 600 offices in North America. The Tacoma, Washington-based firm was founded in the late 1980s and rapidly grew, its stock soaring in the mid- to late-90s. The self-described

90. Bartley & Roberts, supra note 77, at 43-44 ("One large day labor agency has suggested that 50 percent of its labor force is homeless . . . [a 1997-1998 study] found that roughly 25 percent of all homeless individuals had recently worked in a day labor job.") (citations omitted).

91. Schroeder, supra note 57, at 733 ("Women and minorities are represented disproportionately in the part-time and temporary work force."); see also Ball, supra note 70, at 913-14 (2003).

92. See generally GAO, Protections for Day Laborers, supra note 66.

93. Freeman & Gonas, Taming the Employment Sharks, supra note 64, at 296-301 (discussing various abuses that are common in among LMIs). Though there have been some concerted efforts at collective organizing in day laborer populations, those efforts have proved ineffective, even despite some favorable rulings from the NLRB. See, e.g., Labor Ready, Inc., 332 N.L.R.B. 375 (2000). Obvious barriers prevent unionization in the day labor industry: for one, day laborers are in great supply and easily replaceable, as they take the least skill-intensive jobs in the workplace. The population is also relatively transient, making commitments to union activities unlikely. See GAO, Employment Arrangements, supra note 58, at *24 ("Temporary workers and day laborers may find it difficult to form bargaining units because they do not work at one location or with one employer long enough to identify with a particular group of workers and organize a union.").

94. Damian T. Williams, Grounding the Regime of Precarious Employment: Homeless Day Laborers' Negotiation of the Job Queue, 36 WORK & OCCUPATIONS 209, 211 (2009) ("Day labor agencies like Ready Body are notorious for their flagrant violation of minimum wage laws and exploitative fees, both of which are abetted by the deliberately opaque nature of the triangular employment relationship (agency/worker/client firm) responsible for their very existence—job placements are at the dispatcher's discretion, whereas wage rates and terms of negotiation with client firms are guarded industry secrets. Despite these potential legal liabilities and according maltreatment of its workforce, the day labor industry has burgeoned, extending its reach into pockets of deeply discouraged workers.") (citations omitted).

95. See REVIS, supra note 62, at 107 (describing safety issues, and how "the consequences of minor injuries and bad weather are [for the workers] to bear alone").


“McDonald’s” of day labor, Labor Ready has spearheaded the industry’s boom, entering the Fortune 500 and becoming the largest player in the market. Among the company’s key innovations is its patented software platform, LabPro, which allows unprecedented efficiency in coordinating among branches.

Labor Ready also took the lead in adopting forced arbitration clauses post-Gilmer. Upon arriving at the staffing agency, new workers are required to sign an employment application in order to receive a placement. The applications often include a broad forced arbitration provision. A typical provision in such an application reads:

Labor Ready and I agree that any claim arising out of or relating to this Agreement, or the breach of this Agreement, or my application, employment, or termination of employment, shall be submitted to and resolved by binding arbitration under the Federal Arbitration Act. Labor Ready and I agree that all claims shall be submitted to arbitration including, but not limited to, claims based on any alleged violation of a constitution, or any federal, state, or local laws; Title VII, claims of discrimination, harassment, retaliation, wrongful termination, compensation due or violation of civil rights; or any claim based in tort, contract, or equity.

The excerpts herein have been drawn from case law, as Labor Ready maintains a strict policy of keeping its application private. Many offices do not even permit applicants to retain copies of the application forms after signing.

Labor Ready’s forced arbitration provision offers a prime example of the benefits that employers can gain by requiring prospective employees to arbitrate statutory disputes. Parties to arbitration can draw a mutual benefit from the process because it is cheaper, more efficient and more predictable than litigation. But forced arbitration also offers specific advantages to the employer which may contravene workers’ statutory rights. As discussed in

99. Id.
100. Id.
101. These provisions may vary from jurisdiction to jurisdiction, as different laws apply and jurisdictions have interpreted the Gilmer ruling in different ways. They may also have been tweaked over the past years as the law has reacted to the rapid rise of employment arbitration. For instance, in many early post-Circuit City cases, contracts were invalidated for lack of mutuality. See, e.g., Labor Ready Central III, et al., v. Gonzalez, 64 S.W.3d 519, 522 (Tex. Ct. App. 2001). Labor Ready appears to have altered its contract to meet this standard.
103. This was a policy expressed to the author after inquiries to various branches in Maryland and Virginia from March of 2013 to April 2014 (notes on file with the author).
Part II.A, class action waivers and the requirement of splitting arbitrators' fees, both used by Labor Ready, can make a worker's prospect of filing a grievance much more expensive than litigating the same issue. And as discussed in Part II.B, the privacy of arbitration proceedings allows unique firms such as Labor Ready to avoid publicity and perhaps "hide a pattern of abuse," or to avert court rulings that may subject them to greater regulation.104

Since the late-1990s, Labor Ready's forced arbitration clause has been frequently challenged in court, and the company almost always prevailed.105 Because Labor Ready has the most experience among day labor agencies in defending its use of pre-hire arbitration clauses in court, this Comment focuses primarily on cases involving this company. Most day labor agencies are smaller than Labor Ready, and perhaps lack the resources to implement an arbitration policy. But Labor Ready is by no means an exception or the only company that benefits from the effects of the Gilmer decision; rather, it is a polestar for applications of forced arbitration clauses that cause serious policy concerns.

II. ANALYSIS

An analysis of employment arbitration in the day labor industry shows that many of the concerns voiced by the dissent in Gilmer have proven to be well-founded. In both Gilmer and Circuit City, vigorous dissents refuted the majority's interpretation of the law and voiced serious policy concerns.106 While both dissents' legal and jurisprudential arguments are

104. Arbitration decisions are often sealed in the day labor industry, particularly in the case of Labor Ready. See also infra note 103 and accompanying text; Cole v. Burns Intern. Sec. Servs., 105 F.3d 1465, 1477 (D.C. Cir. 1997) ("The unavailability of arbitral decisions also may prevent potential plaintiffs from locating the information necessary to build a case of intentional misconduct or to establish a pattern or practice of discrimination by particular companies."); Stephanie Brenowitz, Deadly Secrecy: The Erosion of Public Information Under Private Justice, 19 OHIO ST. J. DISP. RESOL. 679, 682 (2004) ("Arbitration of consumer or employment complaints can hide a pattern of abuse by a company or industry... [ADR] can prevent the public from knowing that a public safety risk exists. These private mechanisms are often intended to avoid publicity, which they easily accomplish because the disputes are never entered onto a court docket; they are unlikely even to come to the attention of the press or consumer advocates, who serve as the public's watchdogs.").


compelling, this Comment focuses on the public policy discourse the Supreme Court first contemplated arbitration for statutory claims under non-union employment contracts.

Three concerns stand out in particular, all voiced by the petitioner and reiterated by the dissenting justices in *Gilmer*: (1) the limitations that mandatory arbitration place on class action claims and equitable relief, which results in claim suppression; (2) the lack of publicly available decisions; and (3) the unequal bargaining power between parties to the employment contract.

This Comment argues that Labor Ready’s forced arbitration provisions illustrate the prescience of the *Gilmer* dissent’s concerns. The *Gilmer* majority cited various safeguards and policy estimations to refute the dissenting justices’ policy apprehensions, but by revisiting the majority’s rationale on these three issues, this Comment shows that—for many workers—these safeguards were illusory, and the Court’s policy estimations were poor. Twenty years after *Gilmer*, the sweeping decision has precipitated workplace practices that its authors may not have contemplated. Firms such as Labor Ready have been able to use forced arbitration to not only lessen litigation costs, but also to immunize them from certain claims.

**A. Claim Suppression**

In the day labor setting, forced arbitration provisions often render potential claims pointless by denying them three legal mechanisms: class actions, injunctions, and deterrence. Day laborers’ claims are often for very small sums. Where small sums are at issue, collective-action suits are the only economically practicable way for day laborers to be remunerated. Day laborers’ claims are also entirely retrospective, as they have no ongoing employment relationship. Thus, a day labor claimant likely has

---

107. The *Circuit City* Court’s decision to sidestep the FAA’s express exclusion of employment contracts certainly does appear inconsistent; it interprets the § 1 exclusion of workers “engaged in interstate commerce” with a narrow, 1920s bent, despite the fact that the FAA’s definition of commerce had since been stretched in accordance with the sweeping expansions of congressional power that took place in the mid-1900s.


109. *Id.* at 21 (majority opinion).

110. *Id.* at 42 (Stevens, J., dissenting); *Circuit City*, 532 U.S. at 132 (“As the history of the legislation indicates, the potential disparity in bargaining power between individual employees and large employers was the source of organized labor’s opposition to the Act, which it feared would require courts to enforce unfair employment contracts.”) (Stevens, J., dissenting).

111. 500 U.S. at 32.

112. Collective-action suits include traditional class action lawsuits under *FED. R. CIV. P.* 23(b) or applicable state law, as well as collective action suits under section 216(b) of the FLSA. 29 U.S.C. § 216. These actions have been equally affected by *Concepcion*. See, e.g., Bershad, supra note 6; infra discussion accompanying note 198.
more to gain from enacting change—either through injunction or deterrence—than from being compensated for past wrongs.

1. Claim Suppression Through Collective-Action Waivers

The petitioner in *Gilmer* argued that arbitration was inadequate for his ADEA claims because it would not allow him an opportunity to bring a class action. The majority rejected this argument for a variety of reasons, most of which applied to the facts of the *Gilmer* case, a New York Stock Exchange ("NYSE") stockbroker's ADEA claim, but not to many other employment contexts where arbitration is now used. First, the majority notes that Robert Gilmer's contract did not "restrict the types of relief an arbitrator may award" and that "NYSE rules also provide for collective proceedings." This may have been true in the *Gilmer* case, but there is no doubt that many enforceable arbitration clauses now bar collective-action suits and limit equitable relief.

After the *Circuit City* ruling, many courts voided forced arbitration provisions that precluded collective action or class arbitration. But in *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the FAA pre-empted California’s "judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts." The Court held that standard-form contracts requiring waiver of the right to collective action in favor of individual arbitration would be enforceable. Ironically, where in *Gilmer* the Supreme Court relied on the fact that the arbitration agreement "provide[d] for collective proceedings," it would later find itself both criticizing class arbitration and aggressively denying states' attempts to protect employees' rights to bring class actions.

In *Gilmer*, the Court went on to say that "[e]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that [class actions were barred] does not mean that individual attempts at conciliation were intended to be barred." But as

113. 500 U.S. at 32.
114. Id. at 21, 32.
115. See supra notes 98, 101, 105 for instances where the company prevailed.
118. *Concepcion*, 131 S. Ct. 1740. The preempted rule, established in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), presumed certain types of collective action waivers to be unenforceable. 131 S. Ct. 1740, 1746. The Court has not only enforced contracts requiring individualized arbitration, but has also criticized the value of class arbitration as a practice. See id. at 1750-52 (requiring that parties specifically consent to class arbitration as a remedy); *Stolt-Nielsen S.A. v. AnimalFeeds Intl. Corp.*, 559 U.S. 662, 665 (2010).
119. *Gilmer*, 500 U.S. at 32; see *Concepcion*, 131 S. Ct. at 1750-53.
120. *Gilmer*, 500 U.S. at 32.
scholars and jurists have pointed out, requiring individual claims often renders an action unfeasible, effectively blocking the claim.\textsuperscript{121} Day laborers' experience in the courts has provided an ideal illustration of this claim-blocking effect. Labor Ready's applications carry a straightforward waiver of the applicants' rights to bring any collective claim against the company: "Where permitted by law I further agree to bring any disputes I may have as an individual and I waive any right to bring or join a class action."\textsuperscript{122}

a. The \textit{Flynn} Example

Workers challenged this clause in a case heard by the Supreme Court of New York, \textit{Flynn et al. v. Labor Ready, Inc.}\textsuperscript{123} In that case, workers brought a class action suit, contesting Labor Ready's practice of charging workers one to two dollars to cash their Labor Ready-issued paychecks in a Labor Ready-owned Cash Dispensing Machine (CDM). The workers claimed these charges were unlawful deductions under New York labor laws.

Labor Ready responded with a motion to compel individual arbitration. The workers argued that arbitration was unfeasible because "the costs they would each incur . . . would far outweigh any potential recovery."\textsuperscript{124} They claimed that the "beneficial purposes of arbitration, which include the lowering of costs, would be turned upside down" and that individual arbitration would not offer injunctive relief. The court acknowledged that the "plaintiffs might have a strong case for class action certification if there had been no arbitration agreement, since the institution of individual arbitration would have been unavailable."

\begin{footnotes}
\textsuperscript{121} See Concepcion, 131 S. Ct. at 1760 ("In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate.") (Breyer, J., dissenting); see generally O'Keefe, supra note 116; David S. Schwartz, \textit{Claim-Suppressing Arbitration: The New Rules}, 87 IND. L.J. 239, 242 (2012) ("Nothing is more claim-suppressing than a ban on class actions, particularly in cases where the economics of disputing make pursuit of individual cases irrational."); Ann C. Hodges, \textit{Can Compulsory Arbitration Be Reconciled with Section 7 Rights?}, 38 WAKE FOREST L. REV. 173, 174-75 (2003) ("The cost of arbitration and the abolition of class actions provide significant potential for virtually eliminating small claims and claims by lower wage employees.").


\textsuperscript{124} Id. at 723.
\end{footnotes}
lawsuits for the modest sums at issue would be self-defeating.” But the court ultimately demurred to the arbitration clause itself, saying it represented an effort to “conserv[e] . . . judicial effort.”

This meant that the individual plaintiffs in Flynn could pay an initial filing fee of at least $400 for a chance to arbitrate their individual claims of one to two dollars per check cashed. Even with a favorable ruling and the company’s non-contractual offer to pay arbitration costs after the initial fee, the workers would have had to at least worked 200 days under the policy to make the claim worthwhile, even disregarding the time they would spend in arbitration. Flynn is a perfect example of how “[s]mall, quotidian violations of wage and hour laws by mass employers . . . go unremedied if relegated to individual suits.”

This issue was forcefully described by the four-justice dissent in Concepcion, which said that “California’s perfectly rational” application of unconscionability doctrine, struck down by the majority, was put in place because “nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims.” This rationale is especially compelling in the context of day laborers’ employment relationships, which are necessarily day-to-day and involve small sums. Class actions allow laborers to vindicate their rights and be compensated for smaller individual sums. By allowing those rights to be contracted away, courts have allowed companies like Labor Ready to effectively immunize themselves from small-sum wage disputes.

b. Arbitrators’ Fees

Another important dimension of claim suppression through forced arbitration provisions is the issue of arbitrators’ fees. Many pre-hire arbitration agreements call for parties to split the cost of arbitration. Case

125. *Id.* at 724.

126. *Id.* Notably, the court also withheld judgment as to “whether or not it might be considered unreasonable to expect plaintiffs to pay all of the costs associated with arbitration of their modest claims” because Labor Ready voluntarily “offered to bear such costs after plaintiffs pay the initial filing fee.” *Id.*

127. In its seemingly charitable, one-time offer to pay the arbitrator’s filing fee, Labor Ready was thereby allowed to avoid a judicial ruling on the issue of fee-splitting. See *id.* at 723.


129. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting) (citing Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.”)); see also Gentry v. Superior Court, 165 P.3d 556 (Cal. 2007) (finding contracts unenforceable in part due to the unlikelihood that plaintiffs’ rights would be vindicated absent a class action mechanism).
law shows that Labor Ready's worker contract requires fee-splitting, to where permitted by law. Arbitrators' fees far exceed those of courts, and employment arbitrators typically charge more than labor or commercial arbitrators, in part because they tend to charge hourly rather than per diem rates. The initial filing fee for an AAA employment arbitration costs a minimum $750.3

Considering that day laborers typically earn $45 a day, the requirement that they pay half of employment arbitrators' steep filing fees and per diem rates is guaranteed to suppress many grievances. Day laborers have challenged Labor Ready with unconscionability arguments against fee splitting (or arbitration itself), but as discussed in Part II.C, the Supreme Court has foreclosed such unconscionability arguments. Given that fee-splitting can deter even an individual's claim, the combination of fee-splitting and a collective action-waiver can prove fatal to many wage and hour disputes. For a firm like Labor Ready, which pays its workers in


131. Most jurisdictions simply allow fee-splitting or apply an ad-hoc analysis focused more on the grievant's ability to pay. Some jurisdictions do require the employer to bear the cost of employment arbitrator's fees. In Cole v. Burns Int'l Sec. Servs., for instance, the U.S. Court of Appeals for the D.C. Circuit established a requirement that employers bear fees where they exceed relevant court fees. 105 F.3d 1465, 1484 (D.C. Cir. 1997) ("[I]t would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court."). Another example is Shankle v. B-G Maint. Mgmt. of Colo., Inc., where the court observed:

Assuming Mr. Shankle’s arbitration would have lasted an average length of time, he would have had to pay an arbitrator between $1,875 and $5,000 to resolve his claims... Mr. Shankle could not afford such a fee, and it is unlikely other similarly situated employees could either. The Agreement thus placed Mr. Shankle between the proverbial rock and a hard place—it prohibited use of the judicial forum, where a litigant is not required to pay for a judge’s services, and the prohibitive cost substantially limited use of the arbitral forum... Such a result clearly undermines the remedial and deterrent functions of the federal antidiscrimination laws.

163 F.3d 1230, 1234-35 (10th Cir. 1999).

The Supreme Court has not set forth a bright line rule on this issue, but it did visit the topic in Green Tree Financial Corp.–Alabama v. Randolph, 531 U.S. 79, 92 (2000). In that case the contract did not specify who should bear the costs of its mandatory arbitration. The court held that the mere risk that a grievant would be “saddled with prohibitive costs” was simply “too speculative to justify the invalidation of an arbitration agreement.” It ruled that the party seeking to invalidate the agreement bears the burden of showing the likelihood of prohibitive costs. This ruling seems to promote the ad-hoc, ability-to-pay analysis, neither prohibiting any fee-splitting nor finding them presumptively reasonable. Subsequent decisions reflect this interpretation. See, e.g., Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 556 (4th Cir. 2001); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 665 (6th Cir. 2003).

132. EMPLOYMENT ARBITRATION RULES, supra, note 42, at 47.

133. Adkins v. Labor Ready, Inc., 185 F. Supp. 2d 628, 640 (S.D.W. Va. 2001) ("[T]he plaintiff has presented the court with no argument or evidence that it is likely to incur prohibitive costs."); Brown v. TrueBlue, Inc., No. 1:10-CV-0514, 2011 WL 5869773, at *3 (M.D. Pa. Nov. 22, 2011) ("In the present matter, Plaintiffs have failed to put forth an affidavit of their financial inability to pay the arbitration fees.").
small, daily sums, this breed of contract can virtually immunize a firm from wage and hour suits.

c. The Adkins Example

Other cases challenging Labor Ready’s forced arbitration provisions highlight their claim-suppressing effects. The Court of Appeals for the Fourth Circuit heard Adkins v. Labor Ready, a landmark case in which 64 day laborers brought suit claiming that their average payment, around $5.15-$6 an hour, violated the minimum wage provisions of the Fair Labor Standards Act (“FLSA”). Though technically paid minimum wage, the workers alleged that the FLSA required them to be paid for the time they spent waiting for assignments at the labor agency. Day laborers are not typically paid for this time, which researchers have found to average one hour and forty-five minutes. Their total wage for hours spent on one of the two jobsites, then, falls below state or federal minimum wage. And occasionally client-employers ask workers to work overtime that the staffing agency has not authorized and may not account for.

But in Adkins the court did not need to decide any FLSA issues; instead it focused mainly on whether or not it could enforce arbitration. The court ultimately did compel arbitration under the FAA, relying on the newly-minted Circuit City ruling to reject Adkins’ claim that the contract was unenforceable. The court also rejected Adkins’ claim that the contract’s fee-splitting provision was unconscionable. The workers’ small claims were either settled privately in individualized claims or abandoned by the claimants.

2. Lack of Equitable Relief

Perhaps even more important than the workers’ remuneration for unlawful wage practices is their ability to enjoin or deter those practices. Generally speaking, the only thing that laborers stand to gain in arbitration is remuneration for past injury. This concern was also voiced by the dissent in Gilmer:

---

134. Adkins, 185 F. Supp. 2d at 639.
136. This issue was recently submitted to a federal court in Illinois in the lawsuit Burks v. Wal-Mart Stores, No. 1:12CV08457, 2012 WL 5192740 (N.D. Ill. Oct. 22, 2012), which joined Labor Ready and QPS Employment Group, another day labor agency, as co-defendants in the suit.
137. Adkins, 185 F. Supp. 2d 628 was a landmark decision at the time, because it marked the formation of a circuit split by rejecting the argument that an employment contract was substantively unconscionable due to the unequal bargaining power and the waiver of class action claims. The Adkins decision differed from California’s Discover ruling, for instance. Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005). This split was largely settled by the Concepcion decision. AT&T Mobility LLC v. Concepcion, 131 U.S. 1740 (2011); see supra text accompanying notes 119-21.
As this Court previously has noted, authorizing the courts to issue broad injunctive relief is the cornerstone to eliminating discrimination in society. The ADEA, like Title VII of the Civil Rights Act of 1964, authorizes courts to award broad, class-based injunctive relief to achieve the purposes of the Act. Because commercial arbitration is typically limited to a specific dispute between the particular parties and because the available remedies in arbitral forums generally do not provide for class-wide injunctive relief, I would conclude that an essential purpose of the ADEA is frustrated by compulsory arbitration of employment discrimination claims. 138

Some may argue, as the Gilmer majority asserted, that arbitrators may issue broad equitable relief. But this is unrealistic. Arbitrators are unlikely to issue broad injunctions for several reasons. First, arbitrator’s remedies may be restricted by contract or by law. 139 Second, if an arbitrator does issue an injunction, such as ordering a day labor agency to pay its employees for check-cashing services, a slew of logistical issues arise. For instance, at what level will it affect a national company with many subsidiaries and franchise branches in different jurisdictions? How will the individual arbitrator, lacking any public office or ongoing relationship with the parties, know that her order is enforced? 140 The question of arbitrators’ power to issue injunctions is complex, and more scholarship is needed to compare arbitrators’ use of their injunctive powers with those of courts, particularly in the context of the FLSA. 141

The issue of nonmonetary remedies provides a fitting segue into the next section. As illustrated above, forced arbitration provisions that require individual grievances and fee-splitting can make claims unfeasible from a purely economic standpoint. And forced arbitration can even foreclose traditional nonmonetary remedies such as injunctions. But perhaps the most distressing consequences of mandatory arbitration need to be understood by taking a broader view of the purpose of litigation, which not only serves the parties, but also society at large.

138. 500 U.S. at 41-42 (internal citations omitted).
139. See, e.g., Broughton v. Cigna Healthplans of Cal., 988 P.2d 67, 76 (Cal. 1999) (finding that an arbitrator lacked the power to issue a permanent injunction); see also Ramirez v. Labor Ready, Inc., No. 836186-2, 2002 WL 1997037 (Cal. Super. Ct. July 12, 2002) (following Broughton in finding that Labor Ready workers’ claims under California’s Labor Code and Unfair Competition Law were appropriate for class action, not arbitration); Ann C. Hodges, supra note 121, at 226 (“An arbitrator’s ability to award injunctive relief benefiting others, in addition to (or in lieu of) the plaintiff will depend upon the arbitration agreement and the law pursuant to which the arbitration is conducted.”).
140. See generally Hodges, supra note 121; see also Broughton, 988 P.2d at 76 (noting plaintiffs’ argument that arbitrators “lose all ability to correct or otherwise modify arbitration awards 30 days after service of the award” under section 1284 of the California Code of Civil Procedure and that “arbitrators are without authority to enforce their own injunctions... mak[ing] such injunctions unworkable.”).
141. See Hodges, supra note 121.
B. Lack of Public Arbitration Decisions

Even where no injunctions are issued and there is no threat of class action lawsuits, employers are still often deterred from unfair or unlawful practices by the threat of a public lawsuit. But forced arbitration also frustrates employment law in a broader sense through the privacy of its proceedings.142

Both civil and criminal trials have historically been presumed to be open.143 The Supreme Court has never clearly established a constitutional right to open civil trials,144 but many courts of appeal impose a First Amendment right to access in civil trials,145 and the Supreme Court has noted that “there is little record, if any, of secret proceedings, criminal or civil, having occurred at any time in known English history” and that “the earliest charters of colonial government expressly perpetuated the accepted practice of public trials.”146 Courts have perennially respected the tradition of public trials as part of the “right to report about the administration of justice,” providing “contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”147

By contrast, one of the key benefits of arbitration is its privacy: parties can avoid the often uncomfortable or even destructive effects of publicity surrounding a trial. In the employment arbitration sphere, there are obvious reasons why employers can benefit from the relative discretion of alternate dispute resolution (“ADR”), including the preservation of novel business practices (such as “trade secrets”) and the avoidance of “bad press.” Likewise, employees can benefit from privacy by avoiding the sometimes traumatic or career-affecting exposure to the scrutiny of nonparties. Just as

---

142. This has been referred to as the “public justice” critique. See, e.g., Sternlight, supra note 31, at 1661 (“The most significant attacks on mandatory binding arbitration relate to its effect on society as a whole, rather than to its effect on individual consumers or employees. Even if ... mandatory arbitration were beneficial for many or potentially all [claimants], some argue it would still be detrimental to society in that it curtails the use of public ... trials and eliminates the development of public precedent ... [T]o the extent mandatory arbitration eliminates class actions, it also diminishes the public's opportunity to use the public justice system to enforce public laws.”).


144. At least one opinion of the plurality in Richmond concluded that “the First and Fourteenth Amendments clearly give the press and the public a right of access to trials, civil as well as criminal.” Id. at 599 (Stewart, J., concurring).

145. See, e.g., Delaware Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493, 498 (D. Del. 2012) (“Although the Supreme Court has never addressed access to civil judicial proceedings, every Court of Appeals to consider the issue ... has held that there is a right of access to civil trials.”).

146. Richmond, 448 U.S. at 590 (quoting Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 420 (1979) (Blackmun, J., concurring and dissenting)).

parties have a right to privacy and a right to contract between each other, they have a right to agree to settle disputes in a private forum.\footnote{148}{Michael Collins Q.C., \textit{Privacy and Confidentiality in Arbitration Proceedings}, 30 TEX. INT'L. L.J. 121, 122 (1995) ("It is commonly provided by institutional arbitration rules that an arbitration conducted under those particular rules shall be held in private.").}

As one of the principal distinctions between arbitration and litigation, the issue of closed proceedings juxtaposes the different competing freedoms: the right of access and openness in judicial proceedings against the freedoms of contract and privacy. But as previously discussed, the \textit{Gilmer} and \textit{Circuit City} rulings have carried employment arbitrators' domain beyond the terms of a contract itself—now arbitrators interpret complex state and federal statutes.

The privacy of arbitration proceedings presents four serious policy concerns. First, private arbitration hides controversial business practices from the public and governmental scrutiny that are typically associated with litigation, thereby denying the public an opportunity to see how statutory policies are applied. Second, the repeated arbitration of claims can suspend the issuance of novel judicial rulings, thereby "stifling" the law. Third, private proceedings provide only an ad-hoc resolution without causing a change in business practices or benefiting third parties who never learn that an arbitrator has found an employer's practices unlawful. Fourth, private arbitration undermines the legitimacy of the contract itself, where contracting parties cannot know how the terms of that contract are interpreted by decision-makers.

1. Hiding Labor Practices from Public Scrutiny

The petitioner in \textit{Gilmer} argued that because arbitrators "will often not issue written opinions," there will be a resulting "lack of public knowledge."\footnote{149}{\textit{Gilmer}, 500 U.S. at 31. The petitioner also noted that the limited procedures of arbitration, particularly in discovery, would cause "an inability to obtain effective appellate review." \textit{Id}.} The majority rejected this "alleged deficiency," noting that NYSE rules, which governed the plaintiff's particular employment contract, required, among other things, that "award decisions are made available to the public."\footnote{150}{\textit{Id}. at 31-32.} But a laborer-grievant who enters arbitration against Labor Ready or its staffing industry peers will have a substantially different experience. Once again the \textit{Gilmer} majority, in defending what proved to be sweeping policy shift, relied on safeguards which were present in the specific facts of \textit{Gilmer} but are uncommon in today's employment arbitration world.\footnote{151}{The Court also noted that Gilmer's argument here "applied equally to settlements, which are clearly allowed." But this argument seems plainly disingenuous—legal settlements are necessarily consented to by both parties at the time of settlement. In most cases a judge also approves the settlement. Arbitration decisions are not based on mutual, post-dispute consent of the parties. Further,}
Labor Ready’s workers will find no rule or policy requiring the company to make arbitration available to the public. Instead, they have limited, if any, access to past decisions, other than those of the selected arbitrator. The public, for its part, will usually enjoy no access at all, as a matter of strict company policy. In the case of Labor Ready, an exhaustive search of LexisNexis, Westlaw and Bloomberg’s databases will yield only a handful of published employment arbitration decisions from a company that employs 350,000 people. The author’s personal requests to Labor Ready’s headquarters for past decisions were left unanswered, and other academic researchers have felt similarly constrained. Even when arbitration decisions are challenged in court, the Federal Alternative Dispute Resolution Act of 1998 restricts courts’ disclosure of arbitration decisions.

Litigation does not only serve the parties involved in a particular dispute. When issues go to trial, society is given an opportunity to assess the law and its application. Policy-makers have a chance to see how laws are impacting the body politic and perhaps to identify areas where legislative reform is needed. More broadly, the American civil society at large has a chance to view and understand government policies and business practices, and in this case, to explore the plight of at-risk populations who are trying to earn a very modest wage.
2. Stifling the Law's Development

The petitioner in *Gilmer* also argued that a lack of judicial rulings caused by ubiquitous arbitration could result in a "stifling of the law's development." The majority rejected this, saying that relevant judicial opinions (in this case those addressing ADEA claims) would continue to be issued because "it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements." But once again, this reasoning is not easily applied to the day labor context. As previously discussed, the law is often unsettled as to the definition of various statutory rights in the context of day labor on account of its sudden growth and its unique employment relationship. The framework for labor and employment regulation is dated and difficult to apply in this industry. To make matters worse, mandatory arbitration provisions are becoming the norm.

This combination of unclear, insufficient regulation being applied in uniformly undisclosed arbitration decisions has negative results. It hides the effects and applications of various employment laws and allows for inconsistent, perhaps even arbitrary results in arbitration decisions. While courts may continue to render decisions about ADEA claims, the law surrounding the rights of day laborers seems likely to be stifled by the increasing prevalence of inaccessible arbitral decisions.

A telling example is the *Adkins* decision, wherein the Court of Appeals for the Fourth Circuit compelled arbitration rather than issuing an opinion on whether Labor Ready needed to pay its employees for wait times. Since that decision, neither courts nor policy-makers have clarified the merits of their claim. Instead, the issue occasionally surfaces in a district court, only to be compelled to arbitration. Since the *Adkins* decision came

---

159. *Id.* at 32.
160. *Supra,* discussion in Part II.
161. *See supra,* discussion on pp. 13-15. This also applies, in many respects, to the entire temporary staffing industry.
164. *Adkins* v. Labor Ready, Inc., 185 F. Supp. 2d 628, 634 (S.D.W. Va. 2001). Though courts and the NLRB have visited this "wait-time" issue many times, its direct application to day labor agencies remains unclear. It has applied an "economic realities" test in this instance, but courts have sometimes limited that test to interpretation of the NLRA (affecting unionized workplaces), or have interpreted the test itself in different ways. Moreover, wrongful termination suits are unheard of in the day labor industry, as the contract is said to be daily. The discretion of the dispatcher is inscrutable and private, so discrimination suits are often similarly impracticable. *See Bartley & Roberts, supra* note 77, at 47.
down over a decade ago, it is still unclear how the FLSA pertains to day laborers.\textsuperscript{166} While AAA arbitrators may have special access to prior, sealed decisions, their approach to an issue such as this FLSA application may vary substantially. It is not clear how they will treat conflicting arbitral decisions, or court decisions in different venues.\textsuperscript{167} As a result, potential applicants to day labor agencies, as well as the public at large, do not benefit from an authoritative legal conclusion on novel questions, such as that in \textit{Adkins}.\textsuperscript{168}

3. \textbf{Impeding the Deterrence Function of Private Actions}

The \textit{Gilmer} court further argued that “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”\textsuperscript{169} But as scholars have pointed out, the obscurity of arbitration proceedings can hinder this deterrent function.\textsuperscript{170} A successful employment law claim, “effectuate[s] [a] statutory scheme by proclaiming to the workforce as a whole that illegal employer conduct will not succeed.”\textsuperscript{171} It “deter[s] violations and . . . provide[s] incentives for victims of employer violations to enforce their rights.”\textsuperscript{172} By contrast, the nondisclosure of arbitration awards seems to guarantee that day laborers will not know their rights. Even if particular grievances win private awards, there is no easy way for other day laborers to know they should bring similar claims.

4. \textbf{Obscuring the Meaning of Contractual Terms}

Not only does nondisclosure of awards obscure labor practices and blunt the deterrent effect of traditional adjudication. It also undermines the legitimacy of the contract itself. In a particularly unregulated and

\begin{itemize}
  \item \textsuperscript{166} For a greater understanding of this complex wage issue, see discussion in Bernal v. TrueBlue, Inc., No. 1:08-cv-508, 2009 WL 3661068 (W.D. Mich. Sept. 23, 2009).
  \item \textsuperscript{167} W. Mark C. Weidemaier, \textit{Toward A Theory of Precedent in Arbitration}, 51 WM. & MARY L. REV. 1895, 1899 (2010) (“Both theoretically and empirically . . . arbitral precedent remains a poorly understood phenomenon. As a result, assessments of arbitration’s lawmaking potential vary significantly.”).
  \item \textsuperscript{168} See \textit{id.} at 1954.
  \item \textsuperscript{169} \textit{Gilmer v. Interstate/Johnson Lane Corp.}, 500 U.S. 20, 28 (1991) (internal quotation marks omitted).
  \item \textsuperscript{170} \textit{See, e.g., Cole v. Burns Int’l Sec. Servs.}, 105 F.3d 1465, 1477 (D.C. Cir. 1997) (“A lack of public disclosure may systematically favor companies over individuals. Judicial decisions create binding precedent that prevents a recurrence of statutory violations; it is not clear that arbitral decisions have any such preventive effect.”); Jeffrey J. Mayer & Theodore W. Seitz, \textit{Recognizing and Understanding Consent Issues in Arbitration}, 79 MICH. B.J. 504, 507 (2000).
  \item \textsuperscript{172} \textit{Id.} at 599-600.
\end{itemize}
unconventional part of the labor market, the obscurity of arbitration proceedings limits employees’ ability to understand the implications of a pre-hire agreement.\textsuperscript{173} The Supreme Court’s employment arbitration jurisprudence is based entirely on the concept of voluntary contractual consent:\textsuperscript{174} when parties enter a contract enforceable by law, their interpretation of the terms of that contract is ideally based on the legal or judicial decisions that establish the meaning of those terms. If this interpretation occurs time after time in the obscurity of private dispute resolution, parties cannot be fully cognizant of their rights and obligations under that contract. This both undermines the legal reasoning used to support the policies of Gilmer\textsuperscript{175} and bolsters the policy argument against private, mandatory employment arbitration.\textsuperscript{176} As addressed in the next Part, the fairness of these contracts at the formation stage is an issue all its own.

\textbf{C. Unequal Bargaining Power and the Impotence of Unconscionability Doctrine}

Robert Gilmer further argued that forced arbitration clauses were unfair in the employment setting because of the parties’ unequal bargaining power. The Court responded, “The unequal bargaining power between employers and employees is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”\textsuperscript{177} This suggests that some arbitration provisions \textit{could} be unenforceable because of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{173} To be fair, this argument may be merely academic in the day labor industry because, as a practical matter, day laborers seldom read and understand their pre-hire agreements and perhaps never research potential legal ramifications. Nonetheless, courts’ reliance on the notion of consent assumes that parties can fairly interpret contractual terms. \textit{See generally Mayer & Seitz, supra note 170.}
\item \textsuperscript{174} Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1775 (2010) (discussing the “foundational FAA principle that arbitration is a matter of consent”).
\item \textsuperscript{175} For an illustration of this issue in the courts, see Casarotto v. Lombardi, 886 P.2d 931, 939 (Mont. 1994), \textit{rev’d sub nom.} Doctor’s Assoc. v. Casarotto, 517 U.S. 681, 688 (1996). In that case, the Montana Supreme Court found a pre-hire agreement to arbitrate lacked knowing consent: Presumably, therefore, the Supreme Court would not find it a threat to the policies of the [FAA] for a state to require that before arbitration agreements are enforceable, they be entered knowingly. To hold otherwise would be to infer that arbitration is so onerous as a means of dispute resolution that it can only be foisted upon the uninformed. That would be inconsistent with the conclusion that the parties to the contract are free to decide how their disputes should be resolved. \textit{Casarotto}, 886 P.2d at 939. \textit{Id.} The Supreme Court reversed because it found that Montana’s first-page notice requirement resulted in a higher standard for arbitration agreements than other contract provisions. This, the Court said, was “antithetical” to the FAA’s requirement that arbitration agreements be held “upon the same footing” as other contract provisions, and therefore preempted. Doctor’s Assoc., 517 U.S. at 687-88.
\item \textsuperscript{176} \textit{See supra Mayer & Seitz, note 170, at 506 (“[T]he court’s all encompassing embrace of arbitration is not only of concern from a policy perspective, but an actual legal issue. In many situations, the freely consenting party is a legal fiction.”); Stephen J. Ware, \textit{Employment Arbitration and Voluntary Consent}, 25 HOFSTRA L. REV. 83, 105-08 (1996).}
\item \textsuperscript{177} Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 22 (1991) (emphasis added).
\end{enumerate}
\end{footnotesize}
unequal bargaining power. The *Gilmer* Court went on to say that “courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract.”\(^7\)

Yet this has proven to be another empty promise for employee-grievants. Since *Gilmer*, the Supreme Court has gone out of its way to foreclose state and lower courts’ use of unconscionability doctrine to invalidate pre-dispute arbitration agreements. To be fair, the Court has good reason to be reluctant in finding contract provisions unenforceable because they seem unfair; fine print, “adhesive” contracts have become common in many areas of the economy, particularly for consumers. To drop a clause simply because it is unlikely to be read by contracting parties would undermine many economic relationships.

But when forced arbitration provisions have the effect of suppressing claims, preserving unfair labor practices, and obscuring important workplace issues, the lack of a workable judicial safeguard against such contracts becomes alarming. In such instances, courts have relied on unconscionability doctrine to subvert the FAA’s notoriously “narrow” standard of review for arbitral decisions.\(^8\) But under the discipline of the Supreme Court, courts have increasingly struck down a variety of unconscionability arguments in the day labor setting, both in the previously discussed *Flynn*\(^9\) and *Adkins*\(^10\) cases, and many others.\(^11\)

---

178. Id. at 33 (internal quotation marks omitted). Such cases, the Court said, were “best left for resolution in specific cases.” Id.

179. ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir.1995).

180. Flynn v. Labor Ready, Inc., 751 N.Y.S.2d 722 (N.Y. Sup. Ct. 2002). There the court allowed Labor Ready to avert an unconscionability ruling by voluntarily paying the costs of arbitration: “Whether or not it might be considered unreasonable to expect plaintiffs to pay all of the costs associated with arbitration of their modest claims, defendants have offered to bear such costs after plaintiffs pay the initial filing fee. Therefore, the court conditions the relief herein on that offer.” Id. at 724. This resolution may have mitigated the claim-suppressing effects of arbitration for that particular group of plaintiffs, but it did not require Labor Ready to extend the benefit to future grievants, who may have to pressure Labor Ready in court all over again just to escape fee-splitting.

181. Adkins v. Labor Ready, Inc., 303 F.3d 496, 501-02 (4th Cir. 2002) (rejecting the plaintiff’s unconscionability argument because the doctrine requires not only unequal bargaining power, but also that the terms of the contract were inherently unfair).

I. Fading Unconscionability Doctrine

Unconscionability doctrine has not protected day laborers from inequitable applications of forced arbitration provisions. Traditional unconscionability doctrine allows for the invalidation of a clause or contract if it contains both procedural unconscionability and substantive unconscionability.¹⁸³

Procedural unconscionability regards the contract itself and its formation. “Overwhelming economic power” or one party’s lack of a meaningful choice are considered aspects of procedural unconscionability.¹⁸⁴ In Gilmer, the Court was not persuaded by the petitioner’s argument that his contract was procedurally unconscionable, noting that he was “an experienced businessman” and could not claim that the arbitration provision was an unfair surprise.¹⁸⁵ But unlike Robert Gilmer, an experienced securities manager, day laborers are often homeless individuals recruited from shelters.¹⁸⁶ Once they arrive at the staffing agency, they must sign a lengthy application¹⁸⁷ and are often not permitted to leave the agency with copies of the agreement.¹⁸⁸ If a Fortune 500 company does not possess overwhelming economic power when they effectively block the claims of indigent day laborers, then what could possibly represent “overwhelming economic power” to merit procedural unconscionability in the employment context? In one case involving Labor Ready, a federal judge stated the law: “adhesion contracts do not exist where applicants have a choice of where to apply for a job.”¹⁸⁹

Substantive unconscionability refers to a contract’s harsh or unreasonable effects, rather than its terms or formation.¹⁹⁰ In many instances day laborers can also make strong claims for the substantive


¹⁸⁴. 21 WILLISTON ON CONTRACTS § 57:15 (4th ed.).

¹⁸⁵. Gilmer, 500 U.S. at 22. Contra id. at 39 (citing Senator Walsh to explain the legislative history of the FAA: “The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all.”) (Stevens, J., dissenting).

¹⁸⁶. Bartley & Roberts, supra note 77, at 43-44.

¹⁸⁷. See Jacklet, supra note 98.

¹⁸⁸. This was the policy expressed to the author after inquiries to various branches in Maryland and Virginia in March of 2013 and April 2014 (notes on file with the author).


¹⁹⁰. Stempel, supra note 183, at 794 (explaining procedural unconscionability as “bargaining naughtiness,” involving unfair contracting practices, and substantive unconscionability as “terms that—no matter how openly set forth or voluntarily accepted—are simply too unfair to merit judicial enforcement”).
unconscionability of forced arbitration provisions. In both *Flynn* and *Adkins*, workers had strong arguments for the substantive unconscionability of arbitration, where individual arbitration would defeat the purpose of their claims, but the courts in both of these cases rejected the unconscionability arguments.\textsuperscript{191} If arbitrators’ fees render a grievance effectively pointless while a court could offer a meaningful remedy, what effect could be more “harsh and unreasonable” to merit a finding of substantive unconscionability?

2. The Brown Example

Time and again day laborers have argued that forced arbitration provisions should be struck down as unconscionable, and while they have succeeded in the past,\textsuperscript{192} under the Supreme Court’s continued championing of arbitration in *Concepcion*, courts now have to reject such arguments.\textsuperscript{193} The *Gilmer* decision’s express promise of oversight through traditional “grounds for the revocation of any contract” has proved to be a nonfactor.\textsuperscript{194} A telling example comes from *Brown v. TrueBlue*, where day laborers once again sought to bring a class action against Labor Ready Northeast and its parent corporation, now called TrueBlue, Inc., for violation of Pennsylvania labor and wage laws.\textsuperscript{195} The plaintiffs relied on a 2006 Pennsylvania Supreme Court holding\textsuperscript{196} that “where the arbitration clause is contained in an adhesion contract and unfairly favors the drafting party, such clauses are unenforceable.”\textsuperscript{197} But the court found that this ruling was

\textsuperscript{191.} *See supra* notes 180-181; *see also supra* note 182 (discussing other rejected unconscionability arguments by Labor Ready workers).

\textsuperscript{192.} In *Labor Ready Northwest, Inc. v. Crawford*, for example, an arbitrator found that the employment contract’s class action waiver clause was substantively unconscionable under Oregon law, permitting the arbitration to proceed on behalf of the class. No. 07-1060-HA, 2008 WL 1840749, at *2 (D. Or. Apr. 21, 2008). The company challenged the decision in federal court, but it was upheld under the FAA’s deferential standard of review. 2008 WL 1840749 (D. Or. 2008); cf *Nicholson v. Labor Ready, Inc.*, No. C 97-0518 FMS, 1997 WL 294393 (N.D. Cal. May 28, 1997) (holding forced arbitration clause unconscionable for lack of mutuality).


\textsuperscript{196.} This rule, based on *Thibodeau v. Comcast, Corp.*, 912 A.2d 874 (Pa. Sup. Ct. 2006), was equivalent to California’s *Discovery* rule, struck down in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

\textsuperscript{197.} *Brown*, 2011 WL 5869773, at *3.
“no longer good law”; Concepcion had overruled it. The district court maintained that, under Concepcion, it could not “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.”

This application of the jurisprudence on binding arbitration provisions has completed a full circle of contradiction: from Gilmer’s assurance that courts could “remain attuned to well-supported claims” for contract revocation by a determination “best left for resolution in specific cases” to a new, hard-and-fast rule that the “uniqueness” of an arbitration contract is not a permissible basis for unconscionability. As a result, day laborers and similar grievants face an impassable bar to the courts, with judges’ hands tied both in law, by the FAA’s narrow standard of review, and in equity, by the foreclosure of unconscionability doctrine for arbitration provisions.

III.
REFORM

Day laborers’ attempted suits against Labor Ready—such as those in Flynn, Adkins, Brown and others—illustrate how employment arbitration: (a) can systemically defeat the purpose of many statutory remedies by prohibiting class actions and limiting equitable relief; (b) lacks the transparency and deterrent power needed to legitimize the process as an alternative to court, and (c) as applied, lacks equitable limiting principles for the enforcement of pre-hire arbitration contracts, such as the safeguard of unconscionability doctrine. Reform is needed to mitigate the inequitable results of forced arbitration.

A. Congressional Action

For a variety of reasons, the responsibility for reform falls squarely on Congress. First, federal legislation is preferable because state statutes and court rulings are pre-empted by the Supreme Court’s surprisingly bold FAA

198. Id. at *3. Post-Concepcion, this kind of FAA pre-emption of state unconscionability doctrine is occurring in courts throughout the country. For an example with a more specific discussion of the FLSA’s interaction. See Bailey v. Ameriquest Mortg. Co., 346 F.3d 821, 822 (8th Cir. 2003) (overruling—under Concepcion—a lower court finding a forced arbitration clause was unenforceable because its terms were inconsistent with "procedural and remedial rights under the FLSA"); see generally Michael D. Schwartz, A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA, 81 FORDHAM L. REV. 2945, 2985 (2013).


preemption doctrine.\textsuperscript{202} In defending the \textit{Gilmer} paradigm shift, the Supreme Court has repeatedly rebuffed efforts by state legislatures and courts, both state and federal, to effect change in arbitration practices.\textsuperscript{203}

Second, congressional action will also avoid problematic variations in state law on the issue. Even if state legislatures could respond to this issue in varied ways without FAA preemption, this seems imprudent. Such a state-by-state approach will aggravate employers trying to apply company-wide arbitration policies in different states.

Third, federal legislation could help clarify many of the thorny, post-\textit{Gilmer} issues that are burdening courts and causing uncertainty for businesses. The rise of employment arbitration occurred swiftly, and the result has been a chaotic, in part because of the manifold issues playing out at once, including: the standard of review for arbitrators;\textsuperscript{204} minimum standards for arbitration proceedings;\textsuperscript{205} the scope of FAA preemption;\textsuperscript{206} and the application of rulings about one type of arbitration (e.g., consumer-contracts in \textit{Concepcion}) to other type of arbitration (employment contracts in \textit{Brown}\textsuperscript{207}). Even disregarding the conflict and flux in courts, judicial policy-making has proven clumsy in this arena.\textsuperscript{208} A good example of this clumsiness is the standard of "ad-hoc analysis" for fee-splitting provisions\textsuperscript{209} that requires grievants to go to court to settle the fee-splitting issue, turning the initial justification for arbitration (to "conserve[e]... judicial effort") on its head.\textsuperscript{210} A new federal statute could mitigate the uncertainty that harms both employers and employees as they wait for courts to clarify the nascent law of employment arbitration.\textsuperscript{211}

\begin{itemize}
  \item \textsuperscript{203} See, e.g., California Arbitration Act, supra note 43.
  \item \textsuperscript{204} See, e.g., Richard E. Speidel, \textit{Consumer Arbitration of Statutory Claims: Has Pre-Dispute Mandatory Arbitration Outlived Its Welcome?}, 40 ARIZ. L. REV. 1069, 1083 (1998) (discussing some courts' "greater willingness to embrace the 'manifest disregard' of law standard" or the judicially crafted requirement that there be "an opportunity for a 'meaningful' judicial review").
  \item \textsuperscript{205} See, e.g., Bales & Iion, supra note 202, at 1095 (discussing how the FAA is vague with regards to discovery and other procedural aspects of arbitration).
  \item \textsuperscript{206} See generally Schwartz, supra note 31.
  \item \textsuperscript{208} See, e.g., Bales & Iion, supra note 202, at 1088 (discussing conflicts on subsidiary post-\textit{Gilmer} issues).
  \item \textsuperscript{209} This is the standard set forth in \textit{Green Tree Financial Corp.-Ala. v. Randolph,} 531 U.S. 79, 92 (2000).
  \item \textsuperscript{211} Aside from the subsidiary issues that courts are currently grappling with, there is also the possibility of a power-shift on the Supreme Court and resulting backslide of the pro-arbitration movement. With 5-4 decisions in both \textit{Circuit City} and other recent clarifying decisions such as \textit{14 Penn Plaza v. Pyett,} 556 U.S. 247 (2009), and \textit{AT&T Mobility LLC v. Concepcion,} 131 S. Ct. 1740 (2011), it appears as though the Court's pro-arbitration majority could easily lose control. Such a
1. Proposed Legislation

It falls on Congress, then, to pass new comprehensive regulation for arbitration practices, or at least to tune-up the outdated FAA. It was, after all, Congress that created the fairly terse (but now broadly-interpreted) FAA in 1925. Such reforms were underway at the outset of the Obama Administration’s first term, but they have stalled.212

These recently proposed arbitration reform bills have been sweeping.213 The most recent draft—the Arbitration Fairness Act of 2013 (“AFA”)214—would render all pre-dispute mandatory arbitration agreements unenforceable.215 Since its first introduction in 2007, this bill has repeatedly died in committee and apparently lacks the necessary support to pass.216

Indeed, outright prohibition of pre-dispute arbitration clauses seems unlikely to succeed politically, and it could harm the economy and overwhelm already overburdened courts.217 Many of the shortcomings of employment arbitration are also true of the courts, such as underutilization of claims, which is common because would-be litigants can rarely obtain willing counsel for many types of claims.218 This is particularly true of middle- to low-income earners and discrimination or wage claims.219

reversal would certainly cause even more confusion for lower courts and the workplace. Furthermore, the complexity of the jurisprudence on this topic has notable externalities, such as benefitting larger players like Labor Ready, who have the legal resources to implement arbitration policies, while smaller firms have to avoid the uncertainty of “cutting-edge” legal contracts.


215. The AFA drafts have specifically exempted collective bargaining, which is an absolutely necessary caveat: union employees have substantially more bargaining power, and are less needful of courts to enforce fair labor treatment.

216. See Bennett, supra note 212, at 35 ("[T]he AFA . . . lacks any real chance of adoption.").

217. See, e.g., Laura J. Cooper, Employment Arbitration 2011: A Realist’s View, 87 Ind. L.J. 317, 320 (2012) (arguing that the proposed reforms would unlikely be passed as it “would increase employers’ costs and discourage hiring of additional workers” and speculating that “federal judges may have some self-interest in granting pretrial motions in individual employment cases in order to focus on what they may view as more worthy criminal caseloads and large commercial litigation"); Bennett, supra note 212.

218. Elizabeth Hill, Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association, 18 Ohio St. J. Disp. Resol. 777, 783 (2003) (discussing the lack of access to courts for middle and lower income employees, and citing “a survey of 321 plaintiff's attorneys found that these lawyers accepted only 5% of the employment discrimination cases offered to them by prospective plaintiffs.").

219. Id. (Citing other surveys showing that “only highly-compensated employees pursue . . . employment-related claims in the courts.").
Sophisticated parties on equal footing should be able to consent to binding arbitration at the outset of an economic relationship.

2. The Need for Information

Before acting, Congress should systematically assess the new ecosystem of arbitration practices. Although forced arbitration is an extensively debated topic, some scholars have noted that there is a need for empirical data on the actual use and effects of such provisions in the workplace and the market. Federal legislation should be informed by an apolitical, rigorous assessment of arbitration practices.

This assessment should consider the various dimensions of arbitration. For instance, employment arbitration procedure is now well developed, but research is needed to understand how the distinct aspects of procedure affect outcomes and costs. Research is also needed to investigate issues pertaining to arbitrator selection and potential conflicts of interests that may arise, such as the "repeat-player" effect.

Further, research is needed to understand the differential benefits and costs of arbitration for different types of claimants, such as low-income or contingent workers. Day laborers' experience with Labor Ready's forced arbitration provisions shows that certain classes of claimants may lose their opportunity to assert statutory rights. Likewise, certain classes of employers are able to evade public exposure and even manipulate their treatment under current employment law.

B. Legislation to End Claim Suppression

Instead of a hasty ban, Congress should work towards a more nuanced regulation of the federal policy on arbitration. The archaic, outdated FAA was never designed to pre-emptively govern the diverse landscape of arbitration that it does today—it could certainly use a tune-up, perhaps by adding a more specific procedural framework. But the most concerning effect of pre-dispute arbitration agreements is their potential to suppress claims, as they have for day labor claimants. As such, any legislation should focus on those effects. This can be achieved by a variety of methods, as outlined below:

220. See Id.
221. See Bingham, supra note 33.
222. Hill, supra note 218, at 782 (exploring the "particular need for empirical data on the experience of middle and lower-income employees in employment arbitration.").
223. See Brenowitz, supra note 104.
224. See Bales & Irion, supra note 224, at 1085-87 (observing that the FAA was designed for parties of "roughly equal bargaining power" and describing the Act as "too thin" and "relatively unchanged since its 1925 form.").
1. **Restore Right to Collective Actions**

Congress could overrule *Concepcion* and hold collective-action waivers to be unenforceable. This seems like the most preferable broad-strokes solution to ending claim suppression through forced arbitration clauses.\(^{225}\) Or, for a more moderate reform, Congress could require that class arbitration be available wherever collective actions are waived, and establish minimum standards for class arbitration procedures.\(^{226}\)

2. **Settle the Issue of Arbitrators’ Fees**

Congress could enact legislation to settle the jurisdictional conflict over who can be required to pay arbitrators’ fees.\(^{227}\) Courts’ have gone lengths to ensure that low-income parties are not barred from asserting their legal rights, both through inexpensive filing fees and *in forma pauperis* rights. Arbitrators’ should be required to do the same, in a clear and uniform way.

3. **Specific Exclusions from the FAA**

Congress could enact a more limited prohibition on pre-dispute employment arbitration agreements, focusing on classes of workers and consumers who particularly lack bargaining power.\(^{228}\) One such class could be employees who lack a long-term contract of employment, such as day laborers.\(^{229}\)

Congress could also enact a prohibition on pre-dispute agreements to arbitrate certain types of claims. For example, Congress could prohibit forced arbitration provisions that frustrate the FLSA and state wage and hour laws.\(^{230}\) The AFA or amendments to the FLSA could restore workers’ right to bring wage and hour claims, particularly collective actions, in court.

---

\(^{225}\) Malin, *supra* note 39, at 314 (discussing class action waivers, and stating: “[a]ny legislative solution should ban the waiver of the right to bring a class action in court”).

\(^{226}\) Currently, while class action waivers must be strictly enforced, there is no presumption that a collective action waiver implies the availability of class arbitration. Instead, the Supreme Court has held that a party should not be required to “submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 664 (2010).

\(^{227}\) See discussion *supra* note 134, describing *Cole, Green Tree*, and the circuit split on fees.

\(^{228}\) See also Malin, *supra* note 39, at 294.

\(^{229}\) See also Karen A. Lorang, *Mitigating Arbitration’s Externalities: A Call for Tailored Judicial Review*, 59 UCLA L. REV. 218, 222 (2011) (proposing that legislatures implement a standard of judicial review that considers the sophistication of parties to an arbitration agreement).

\(^{230}\) See, e.g., Bershad, *supra* note 6, at 388; Schwartz, *supra* note 198.
4. Broader Judicial Review

Perhaps the most politically feasible legislative option is to amend the FAA to broaden the grounds for which courts may review arbitrators' decisions.\textsuperscript{231} To combat claim suppression, Congress should amend grounds for non-enforcement of an arbitration agreement "[w]here arbitration would frustrate the pursuit of a legal remedy." Such a small addition to the FAA could allow plaintiffs, in pre-discovery hearings, to make a case as to how arbitration is not suitable for their claims. With a broader standard of review, judges would not need to struggle with unconscionability doctrine in order to ensure that workers claims are not foreclosed by the cost of arbitration, restrictions on collective action, or remedies. This measure would risk being marginalized by the Supreme Court, which repeatedly insists that arbitration is simply an alternative forum, not affecting substantive rights. But hopefully a clear message from Congress would dampen the enthusiasm of the pro-arbitration majority.

C. Legislation to Improve the Transparency of Arbitration

The issue of nondisclosure is discussed less frequently. This is perhaps in part because many employers do disclose and because individual grievants are less likely to take issue, in courts or in public, with private awards. Nonetheless, if mandatory arbitration remains, the legislature should enact reforms to ameliorate the problems caused by undisclosed arbitration decisions. By extending and formalizing the presumption of disclosure for employment arbitration, Congress could help restore transparency to the arbitral forum.\textsuperscript{232}

Legislation should require that individual grievants have access to not only their arbitrators’ past decisions, but all past decisions involving their employer.\textsuperscript{233}

Further, no pre-dispute agreement should ever limit a grievants right to publicize an arbitrator’s decision. When an arbitrator finds that a specific business practice violated the law, regulation should be in place to ensure that third-party employees are notified of the decision, perhaps by requiring submission of decisions to a publically managed registry or database.

\footnotesize{\textsuperscript{231}} See generally Lorang, supra note 229.

\footnotesize{\textsuperscript{232}} Courts could also establish this by requiring disclosure under a First Amendment or right of access argument.

\footnotesize{\textsuperscript{233}} The 2003 amendments to California's Civil Procedure Code section 1281.96 provide an example of how such a regime could work. The law requires any "private arbitration company" to publish and "make available to the public in a computer-searchable format," various details about every "commercial" arbitration dispute they resolved in the past 5 years. CAL. CIV. PROC. CODE §1281.96 (West 2013); see also Pat K. Chew, Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?, 46 WAKE FOREST L. REV. 185, 194 (2011) (discussing the requirements 1281.96 and noting that it has allowed researchers to study arbitration in more detail).}
CONCLUSION

The rapid ascendance of ADR as a faster and cheaper alternative to litigation has offered some notable benefits to employers, employees, and the economy as a whole. But the long-term effects of the sweeping policy change set forth in *Gilmer* are still emerging. The *Gilmer* Court "opened the door" to a binding arbitration agreement for a college-educated stock trader bringing an age discrimination case. But did it intend for the door to remain open for minimum-wage earning day laborers seeking to enjoin unfair labor practices?

The day labor context offers an extreme example of a sector where forced arbitration continues to manifest itself in some concerning, perhaps inequitable, ways. Comparing the situation of a laborer-grievant with that of Robert Gilmer highlights the distance that courts have travelled since the *Gilmer* ruling first sanctioned an arbitrator’s resolution of statutory claims in an employment setting. The day labor industry is a bleak but telling illustration of how employment arbitration has wrought negative consequences to certain sectors of the workforce, and in this case, to a particularly desperate portion of the American underclass.