Testimony of Cathy Ventrell-Monsees
On Behalf of the National Employment Lawyers Association
Before the
Subcommittee on Commercial and Administrative Law
House Judiciary Committee
October 25, 2007

Madame Chair and other Members of the Subcommittee, good afternoon. I am Cathy Ventrell-Monsees, of Chevy Chase, Maryland. I am a member of the Executive Board of the National Employment Lawyers Association (NELA) and co-chair of its Mandatory Arbitration Task Force. I am testifying today on NELA's behalf.

NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. It is the largest professional organization of lawyers who represent primarily workers in disputes with their employers. In addition, 67 regional, state, and local employment lawyers associations are affiliated with NELA. The 3,000 members of NELA and its affiliates have extensive experience with representing clients who are bound by mandatory arbitration clauses – with challenging such mandatory arbitration clauses; with representing clients in arbitration; and with having to turn prospective clients away because they are bound by mandatory arbitration clauses.

My experience with the issue of mandatory arbitration in employment cases began in 1990, when I wrote an *amicus* brief opposing involuntary pre-dispute mandatory arbitration on behalf of the AARP in the United States Supreme Court case of *Gilmer v. Interstate Johnson*. My biography is attached to this testimony.

Madame Chair, we very much appreciate your holding this hearing and the opportunity to testify. My remarks today will focus on the widespread use of pre-dispute, binding, mandatory arbitration programs to resolve employment disputes and its effect on employees' ability to enforce their employment and civil rights. (For brevity, I will refer to these programs as "MA programs.") I would like to stress that I will not be talking about MA clauses contained in contracts that are voluntarily negotiated between employer and employee after a dispute arises. *NELA strongly supports arbitration when it truly is voluntarily agreed to by the employee post-dispute.* Nor are we concerned with MA clauses contained in collective bargaining agreements.

This testimony will address three topics – the current prevalence of MA programs in employment; how MA programs undermine employees' rights; and how the courts treat MA programs – and conclude with a brief discussion of what Congress can and should do about the problem.

Prevalence

As NELA members can attest from the cases they see in their practices, the use of MA programs as a tool for companies to "stack the deck" in their favor in disputes with their employees has grown exponentially over the last 15 years. Today, 15% to 25% of United States employers use MA programs – covering a conservatively estimated 30 million workers, a greater number than union contracts cover. The attached NELA fact sheet, "Data Points: Increasing Prevalence of Mandatory Arbitration Programs Imposed on Employees," reviews available statistics showing the dramatic growth of these programs.

Thousands of American companies use or have used mandatory arbitration, including such household names as Circuit City, Hooter's, Dillard's Department Stores, Cisco Systems, Anheuser-Busch, and Halliburton. These companies are in virtually every industry – retail, food services, manufacturing, and financial services, to name a few. The attached list of companies for which the American Arbitration Association (AAA) held at least five employment arbitrations between January 1, 2003, and March 31, 2007, is, of course, just the tip of the iceberg, but it again shows that the use of mandatory arbitration is alive and well in the United States in the 21st century.

How Mandatory Arbitration Programs Undermine Employee and Civil Rights

When employees are forced into arbitration, they are forced into a system of separate and unequal, private, second-class "justice." In arbitration, employees lose their rights to:

- Trial by a jury. Indeed, avoiding jury trials is perhaps one of the main reasons why employers implement mandatory arbitration programs.

- An impartial judge who is on the public payroll. By definition, an arbitrator is paid not by the public, but by the parties to the arbitration. In employment cases, the employer frequently pays the entire cost.

- A public ruling based on law and precedent. Arbitrators can, and frequently do, refuse to follow the law. They don't even have to be lawyers.

- An appeal to a higher civil authority. Arbitrators' decisions cannot be appealed except in the most limited circumstances. This is true even if the arbitrator completely misinterprets the law, refuses to look at evidence presented, or even sleeps through the arbitration proceeding.

None of these safeguards that we take for granted in the legal system are guaranteed in arbitration.

The private pay aspect of arbitration is one of its most troubling features. First, to be truly impartial, decision-makers must avoid even the appearance of impropriety – much less a conflict of financial interest. Unlike judges, who are public servants paid by the

tax-payers, arbitrators' professional careers and even livelihoods depend on the repeat business of employers who are in a position to hire them again in the future. In one case, almost *half* of an arbitration provider's annual income came from just one employer's fee. In another, the panel of arbitrators was partners of the accounting firm *the employee was suing*. No single employee is likely to have more than one opportunity to hire an arbitrator in her or his entire working life.

It is not surprising that studies show a higher rate of success for repeat players like employers than for individuals such as employees. An employer who forces its employees into this separate system can pick its favorite arbitrator or arbitration company, and then use that same arbitrator or company again and again to rule in its favor in other cases brought by other employees. Indeed, some mandatory arbitration programs limit an employee's "choice" of arbitrator to those that the employer has already chosen.

Here are just two examples of the repeat player phenomenon, taken from the AAA's public reports – between January 1, 2003, and March 31, 2007, the AAA held 62 arbitrations for Pfizer, of which 29 went to a decision. Of the 29, the arbitrator found for the employee once, and for the employer 28 times – that's *97%* of the cases. Halliburton's win rate was only 32 out of 39 cases that went to decision – still a telling 82%.

Second, despite arbitration often being touted as an inexpensive system, arbitrators of employment and discrimination cases are frequently quite costly. Fees can be exorbitant just to schedule a hearing. Arbitrators typically charge $250 to $450 an hour, and arbitrations can drag on for 100 hours or more. In fact, unlike salaried public judges, arbitrators have financial incentives to allow the proceedings to drag out, since they are paid by the hour. In some places, the arbitrators' fee average between $2,000 and $5,000 per day, and most clock for a minimum of half a day for anything that they do. In some instances, not one but three arbitrators are required. If the fee is split between the employer and employee, a worker who has been fired from her job simply cannot afford such prices. If, on the other hand, the fee is paid entirely by the employer, the arbitrator's conflict of financial interest is exacerbated.

The high cost of arbitration is not the only barrier that arbitration clauses can create for employees pursuing their claims of employment or civil rights violations. Mandatory arbitration programs can, and do, require that the arbitration be held at a location distant from the employee – making it difficult if not impossible for an employee to participate. For example, an employee returning from active military service was required to go to Virginia to arbitrate his claims for reinstatement and retaliation – even though he lived and worked in Georgia. Mandatory arbitration programs can, and do, eliminate disclosure of highly relevant documents and data that can help show if, for example, discrimination was a motivating factor of the challenged employment decision. Mandatory arbitration programs in most places can, and do, allow the employer to change the terms of the program unilaterally, even after the employees have (supposedly) agreed to one set of terms. Mandatory arbitration programs (or individual arbitrators) can, and

do, limit the total time allocated to an arbitration hearing, regardless of the amount of time the employee needs to put on evidence.

The problems that employees face when forced into mandatory arbitration are by no means only procedural. Despite the Supreme Court's admonition that arbitration should not affect parties' *substantive* rights (see discussion below), employees attempting to enforce their civil and employment rights frequently do lose the law's substantive protections in arbitration:

- As noted above, arbitrators can, and do, refuse to follow the substantive law. In one example of this, an employee who alleged that her co-worker ogled her breasts, gyrated against her from behind, complimented her on her "onion shaped butt," bragged of his sexual prowess, and asked repeatedly for one-night stands, lost her sexual harassment case in mandatory arbitration. On appeal, the judge agreed that, under the law, she should have won – but could not reverse the arbitrator's failure to follow the law correctly because arbitrators' decisions are binding.

- Mandatory arbitration provisions can, and do, limit the injunctive relief that arbitrators can order. Moreover, judges have the authority to enforce injunctive relief; arbitrators do not. Thus, some of the most important remedies that judges can order and oversee – such as prohibitions of future discrimination and orders to implement new, non-discriminatory hiring practices – are not realistically available in arbitration.

- Mandatory arbitration provisions can, and do, specifically limit or even prohibit the award of remedies that an employee would be entitled to under the law as enforced in court. The following remedies limitations – none of which would be enforceable in court – are common: back pay only; caps on front pay, compensatory, or punitive damages; no exemplary or punitive damages; no attorneys' fees or expenses to prevailing plaintiffs; no class or collective relief; and all costs paid by non-prevailing party. In one reported case, an employee had to pay her employer's legal fees for the unsuccessful arbitration of her wrongful discharge claim – to the tune of *over $207,000*.

- Mandatory arbitration provisions can, and do, shorten the statutory limitations period that would otherwise be available for filing a lawsuit. In Mary Kay Morrow's case (which is attached to this testimony), her employer's arbitration program required that all claims must be filed within 30 days of the end of internal dispute resolution procedures. Although she filed her age discrimination claim well within the time limit for such claims under Missouri law, the arbitrator dismissed her action, with prejudice, because of the 30-day rule. (Amazingly, the arbitrator made this decision in spite of the fact that Missouri law specifically prohibits arbitration agreements from placing artificial time limits on legal claims.) The case is currently on appeal before the Court of Appeals for the Western District of Missouri.

- Mandatory arbitration programs in most places can, and do, specifically prohibit employees from bringing class actions, even if doing so is the most efficient way of righting the wrong.

Experts agree that in all these ways, MA programs create a modern version of SEPARATE – AND UNEQUAL – JUSTICE for employees (see the attached fact sheet, "What The Experts Say About Binding Mandatory Arbitration"). *Our employment and civil rights laws mean nothing if an employee cannot go to court to enforce them.*

How the Courts Treat Mandatory Arbitration of Employment Claims

For many years, the United States Supreme Court has given great deference to agreements to submit to mandatory binding arbitration as an alternative to courts for resolving employment disputes. This is true when arbitration is agreed to before any dispute arises ("pre-dispute") and therefore before the parties have any idea what the dispute is about, much less what their rights in court might be. This principle of deference derives from the Federal Arbitration Act (FAA), which directs courts to enforce valid contracts to arbitrate disputes. In a landmark case in 1991, the Court enforced a pre-dispute, binding, mandatory arbitration agreement in an age discrimination case, even though the Age Discrimination in Employment Act explicitly gives the right to a trial before a judge and jury.

The deference to arbitration agreements applies in virtually every kind of employment case. NELA members' clients face many different kinds of employment or civil rights problems – sex, race, religious, national origin, age, disability, sexual orientation, and gender identity discrimination; being fired for taking family or medical leave; military and reserve personnel returning from Iraq or Afghanistan not getting their jobs back; employees who are required to work "off the clock" so their employers don't have to pay them overtime; whistleblowers risking their careers to report dishonest or risky corporate or government behavior who are being retaliated against; wrongful termination; failure to receive pension benefits; and retaliation for asserting workers' compensation claims. It does not matter which laws are involved, or whether they are federal or state laws – the courts have held that *all* of them are subject to mandatory arbitration. The attached fact sheet, "Mandatory Arbitration Prevents Employees from Holding Their Employers Accountable in Court in All Kinds of Employment Cases," collects cases compelling arbitration under many different employment-rights statutes.

The premise behind the Supreme Court's jurisprudence on enforcing mandatory arbitration of statutory claims is that arbitration does not change employees' *substantive* rights; it is just a change in forum. Following that reasoning, many courts presented with the issue in recent years have invalidated mandatory arbitration provisions that limit remedies, shorten the statute of limitations, restrict the award of attorneys' fees, or otherwise substantively affect employees' rights. On the other hand, some courts *do* enforce MA programs that contain such provisions.

In any event, even if these provisions wouldn't stand up to legal scrutiny, employers continue to insert remedies or other substantive limitations in MA clauses. For example, the MA program that Neiman Marcus instituted this past July prohibits class actions, shortens the limitations period, and limits the pool of potential arbitrators to Texas residents who are also members of that state's bar. Circuit City attempts to enforce its nationwide MA program that limits remedies and imposes costs on the employee. Seeing such provisions, most employees who believe their employment rights have been violated either accept them and go to arbitration under these conditions, or are deterred from challenging the employers' practices at all. Unless they consult counsel, they certainly don't realize that they can fight the conditions.

Mandatory arbitration provisions can also be challenged under state law contract principles (*e.g.*, contract formation, such as offer, acceptance, and consideration; defenses to contract enforceability, such as fraud, duress, and unconscionability; and any other generally applicable grounds available under governing state law). An agreement to arbitrate is not enforceable if it is not a valid contract under state law, or if excessive fees imposed on the employee render the contract unconscionable. Nevertheless, many courts validate MA provisions that are challenged on these grounds.

For example, courts have enforced MA "agreements" even when employees specifically refused to sign them. This is precisely what happened in the cases of Fonza Luke and Debbie Dantz (whose stories are attached). Briefly, Ms. Luke, of Princeton, AL, worked loyally as a nurse for a hospital for almost 30 years. She was asked to sign a document agreeing to use of an MA program. She *explicitly refused to sign the agreement.* Nevertheless, a court forced her to bring her case of race and age discrimination to arbitration, and she drew an arbitrator who ruled entirely against her. Ms. Dantz's experience was similar.

Employees are frequently informed of MA programs only in the fine print of official company documents, such as employment applications, employment handbooks, and pension plans, which they must sign if they want to get a job or to keep the job they have. For example, in a recent case involving Halliburton, the preprinted, boilerplate "contract" that the employee signed as a condition of employment stated, way down in paragraph 26, that she agreed to the "terms of the Halliburton Dispute Resolution Program which are herein incorporated by reference" – which, however, she was never given. In another case, employees were informed of the MA program *via* a link at the bottom of an e-mail. Yet many courts have enforced such MA programs as valid contracts against employees' arguments that they are contracts of adhesion or that the employee could not have accepted a contractual provision she or he didn't even know about.

Courts have even enforced, as contracts, MA provisions that are completely one-sided, binding only the employee to arbitration of disputes; that can be changed at any time by the employer, unilaterally; and that designate interested parties as arbitrators. At the same time, there are courts that do not view such sham contracts as binding employees to use arbitration, creating significant confusion about the law in many jurisdictions.

Conclusion: Time For Congress To Step In

From the Supreme Court down, the courts have so protected the private, separate and unequal system of arbitration as a way of resolving employment disputes that companies that routinely discriminate against their employees are simply not held accountable to the public. When it enacted the various civil and employment rights statutes that protect employees, Congress never intended to permit employers to subvert those statutes' enforcement schemes in this way. It is time for Congress to step in to correct this injustice.

Indeed, Congress has acted to ban binding predispute arbitration in other contexts. Due to the Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, automobile manufacturers are not permitted to require mandatory arbitration of their disputes with automobile dealers. And last year's Defense Authorization Act contained a provision *voiding* contracts to loan money to members of the military or their families that contain mandatory arbitration clauses.

The Arbitration Fairness Act of 2007 (AFA) would deal with the problem comprehensively, in consumer as well as in employment cases. NELA applauds Representative Hank Johnson for introducing the AFA, which restore Congress's original intent in enacting the Federal Arbitration Act by eliminating the mandatory arbitration of employment claims unless pursuant to a collective bargaining agreement or agreed to *after* a dispute has arisen.

NELA urges Congress to enact the Arbitration Fairness Act without delay. Congress should no longer allow the employment rights of nearly a quarter of America's non-union workforce to be subject this separate and very unequal system.

Attachments

Biographical Information for Cathy Ventrell-Monsees, Esq.

Data Points: Increasing Prevalence of Mandatory Arbitration Programs Imposed on Employees (NELA Fact Sheet)

Companies for Which the American Arbitration Association Held Five or More Employment Arbitrations (List)

What the Experts Say About Binding Mandatory Arbitration (NELA Fact Sheet)

Mandatory Arbitration Prevents Employees from Holding Their Employers Accountable in Court in All Kinds of Employment Cases (NELA Fact Sheet)

Binding Mandatory Arbitration of Employment Claims:
- The Story of Mary Kay Morrow
- The Story of Fonza Luke
- The Story of Debbie Dantz

Biographical Information for Cathy Ventrell-Monsees, Esq.

Cathy Ventrell-Monsees has been practicing in employment discrimination law since 1983. She litigated several ADEA class actions and has written more than 50 amicus briefs in the U.S. Supreme Court and circuit courts She has a part-time law practice and teaches employment discrimination law at the Washington College of Law at American University. From 1985 to 1998, she worked in and directed an age discrimination litigation project at AARP. With Steve Platt, she is the co-author of AGE DISCRIMINATION LITIGATION (James Publishing 2000). Ms. Ventrell-Monsees has appeared in numerous national and local media as a commentator on age discrimination and employment issues.

Since 1996, Ventrell-Monsees has been a member of the Board of Directors of the National Employment Lawyers Association, where she served as its Vice-President of Public Policy. She is currently President of Workplace Fairness, a nonprofit dedicated to educating workers about their employment rights.

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NELA Advocates for Employee Rights
National Employment Lawyers Association

DATA POINTS:
INCREASING PREVALENCE OF MANDATORY ARBITRATION SYSTEMS IMPOSED ON EMPLOYEES

More Than 30 Million Non-Union American Workers Are Covered By Binding Mandatory Arbitration Programs

Good research about the prevalence of employer-promulgated binding mandatory arbitration programs is notoriously hard to find. In fact, the only large-scale, nationally representative survey was done by the Government Accountability Office (GAO) in 1994, more than 13 years ago. But as the data points beginning on the next page show, we *do* know that use of mandatory arbitration of employment claims has been on the increase since at least the 1980s, and his risen rapidly since the early 1990s after Congress made jury trials and money damages available under Title VII (in 1991), the passage of the Americans with Disabilities Act in 1992, and the number of discrimination charges filed skyrocketed. 1991 was also the year in which the United States Supreme Court upheld imposition of mandatory arbitration of an age discrimination claim in *Gilmer v. Interstate/ Johnson Lane Corporation*.[1]

> "*Gilmer* 'unleashed a torrent' of mandatory arbitration provisions in (non-collectively bargained) employment contracts that employees were required to sign as conditions of employment."
>
> -- Law Professor Jean Sternlight

The best estimates we have today are that 15% to 25% of employers nationally have adopted mandatory employment arbitration procedures, and that (conservatively) 25% of the total non-union workforce is covered by such procedures.[2] This means that more than 30 million employees (out of a non-union workforce of 121 million employees)[3] are covered by mandatory arbitration programs. Their employers have effectively removed themselves from the Congressionally mandated enforcement of employment rights laws.

The data points beginning on the next page report available information about the prevalence of mandatory employment arbitration programs since 1979. While they are not comparable – some describe the incidence of mandatory arbitration plans among employers, others, among employees, for example – together they do tell one clear, simple story: the imposition of binding, mandatory arbitration by employers has increased exponentially in the past decades, and now covers a significant portion of the workforce.

Mandatory Arbitration of Employment Claims:
Data Points

1979: Only 1% of employers used arbitration for employment disputes.[4]

1991: The percentage of employers in the private sector using employment arbitration was 3.6%.[5]

1993: Fewer than 1.5 million employees were covered by arbitration plans administered by the American Arbitration Association.[6]

1994: 10% of a nationally representative sample of businesses with more than 100 employees used arbitration; about 40% of these, or 4% of all businesses of this size, explicitly made arbitration mandatory for all employees.[7]

1997: 3 million employees were covered by arbitration plans administered by the American Arbitration Association – more than double the number covered in 1993.[8]

1998: Fully 62% of Fortune 1000 corporations surveyed had used employment arbitration at least once between 1995 and 1998.[9]

2000: 5 million employees were covered by arbitration plans administered by the American Arbitration Association, adopted by approximately 500 corporations. The covered employees were in a "wide range of jobs including clerical workers, sales personnel, first line supervisors, middle managers and top executives in virtually every industrial and service sector."[10]

2000: 19% of firms had adopted employment arbitration procedures, according to one small study.[11]

2001: By now, 6 million employees were covered by arbitration plans administered by the American Arbitration Association – double the number in 1997 and quadruple that in 1993.[12]

2002: 37% percent of the employment contracts made with key employees by a sample of more than 2800 publicly-held companies included pre-dispute mandatory arbitration clauses. Of the 13 types of contracts studied, employment contracts were most likely to have such arbitration provisions.[13]

2003: 14% of establishments in the telecommunications industry had adopted employment arbitration procedures. This covers fully 23% of nonunion employees in that industry.[14]

2006: In California, private arbitrators handle more commercial cases than the courts do, according to industry experts.[15]

2007: 15% to 25% of employers nationally impose binding mandatory arbitration on their employees, covering (conservatively) 25% of non-union American workers.[16] That's ***more than 30 million American workers*** who have lost their right to a trial by jury in an impartial, public forum.[17]

ENDNOTES

[1] GAO, *Alternate Dispute Resolution: Employers' Experiences with ADR in the Workplace* (August 12, 1997), GGD-97-157 http://www.gao.gov/archive/1997/gg97157.pdf, pp. 9-10. Sternlight, "Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial," 16 *Ohio State Journal on Dispute Resolution* 669 (2001) ("[*Gilmer*] unleashed a torrent…"). *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991).

[2] Colvin, "Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?" forthcoming, *Employee Rights and Employment Policy Journal,* Vol. 12 (2007), at p. 7 ("Empirical Research") (employer figures); NELA Legislative and Public Policy Director Donna Lenhoff's conversation with Alexander Colvin, October 23, 2007 (employee figure). Calling it a conservative estimate, Professor Colvin extrapolates the 25% figure from his 2003 finding that 23% of the non-union telecommunications workforce was covered by mandatory arbitration programs. *See* note 14, *infra,* and accompanying text.

[3] Bureau of Labor Statistics, "Current Employment Statistics: Highlights" (August 2007), http://www.bls.gov/web/ceshighlights.pdf, p. 2; union workforce statistic from tp://www.census.gov/compendia/statab/tables/07s0645.xls. The assumption that 20% of employers employ 20% of the workforce is a substantial underestimate, because the employers who are likely to adopt mandatory arbitration programs are likely to be those with larger than average workforces. Empirical Research at 6.

[4] Bureau of National Affairs, "Policies for Unorganized Employees" (PPF Survey No. 125) (1979), *cited in* Maltby, "Private Justice: Employment Arbitration and Civil Rights," National Workrights Institute (no date) ("Private Justice"), http://www.workrights.org/issue_dispute/adr_columbia_article.html#1.

[5] Hill, "AAA Employment Arbitration: A Fair Forum at Low Cost," *Dispute Resolution Journal* (May/July 2003), http://www.adr.org/si.asp?id=2532 ("AAA Employment Arbitration") at 2, *citing* Feuille & Chachere, "Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces," 21 *Journal of Management* 27 (1995).

[6] "Private Justice."

[7] GAO, *Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution* (July 1995), GAO/HEHS-95-150, pp. 7, 21. The employers surveyed were those who had 100 employees in 1992. Later GAO calculations put the incidence of binding mandatory arbitration *outside the union context* at 8%. "Empirical Research," at p. 5.

[8] "AAA Employment Arbitration" at 2. Of course, this represents only a portion of the universe of employees subject to binding mandatory arbitration, as there are many other arbitration service providers besides the AAA.

[9] D. Lipsky & R. Seeber, "Patterns of ADR Use in Corporate Disputes," 5 *Dispute Resolution Journal* 66 (Feb. 1999), http://findarticles.com/p/articles/mi_qa3923/is_199902/ai_n8838884 (excerpted from Cornell/ PERC Institute on Conflict Resolution, Cornell University, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* (1998)); D. Lipsky & R. Seeber, "Patterns of ADR Use in Corporate Disputes," *reprinted at* http://www.marquette.edu/disputeres/downloads/patterns.pdf (Table 4, p. 4) (no date); D. Lipsky & R. Seeber, "In Search of Control: The Corporate Embrace of ADR," 1 *U. Pa. J. of Lab. & Emp. L.* 133 (1998) (describing survey).

[10] Brief *Amicus Curiae* of the American Arbitration Association in Support of Reversal, filed in *Circuit City Stores v. Adams,* U.S. Supreme Court, October Term, 2000, No. 99-1379 (August 7, 2000), p. 6.

[11] "Empirical Research" at 6-7, *citing* Galle and Koen, "Reducing Post-Termination Disputes: A National Survey of Contract Clauses Used in Employment Contracts," 9 *Journal of Individual Employment Rights* 227-241.

[12] "AAA Employment Arbitration" at 2, *citing* American Arbitration Association (AAA), National Rules for the Resolution of Employment Disputes (eff. June 1, 1997) at 1.

[13] Eisenberg, Miller, "The Flight from Arbitration: An Empirical Study of *Ex Ante* Arbitration Clauses in Publicly-Held Companies' Contracts," *N.Y.U. Law and Economics Working Papers*, Paper No. 70 (2006) (available at http://lsr.nellco.org/nyu/lewp/papers/70), at 37, 1.

[14] "Empirical Research" at 6. *See also,* Colvin, "Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution," 13 *Cornell Journal of Law and Public Policy 581*-597 (2004).

[15] Berkowitz, "Is Justice Served?" *West* (*LA Times Sunday Magazine?)*, October 22, 2006, p. 20 (*citing* Stanford/Rand study).

[16] "*See* notes 2 and 3 and accompanying text.

COMPANIES THAT HAD FIVE OR MORE EMPLOYMENT ARBITRATIONS WITH THE AMERICAN ARBITRATION ASSOCIATION

January 1, 2003 To March 31, 2007

Company
ACE INA
AIG
Accredited Home Lenders
Ace American Insurance Company
Aetna
Affiliated Computer Services
American General
Ameriquest Mortgage Company
Anheuser-Bush Company, Incorporated
Arizona State University
Austin Industrial
BFS Retail & Commerical Operations
Baptist Health System Inc.
Bayer
Bechtel
Behr Process Corp
Bill Heard Chevrolet
Blue Cross Blue Shield
Bridgestone
Brookwood Medical Center
Burns International Security
Busch Entertainment Corporation
CBSK Financial Group
CIGNA Corp. (Connecticut General Life Insurance)
Chevron
Cintas
Cisco Systems, Inc.
CitiGroup
Clear Channel
Coca-Cola Enteprises, Ltd.
Country Wide Financial
Darden Restaurants, Inc.

Delta Faucet Company
Diamond Shamrock
Dillard's, Inc.
Dollar Financial Group
Doskocil Manufacturing Corporation
Duke University

El Dorado Enteprises
Equity Properties

Four Seasons Hotels
Friendly Ice Cream Corporation

GMRI
General Dynamics
General Electric
GlaxoSmithKline

H.E. Butt Grocery Company
Halliburton
Hallmark Cards, Inc.
Harris County Hospital District
Hooters Restaurant
Hovensa

Igloo Products Corp.

J.C. Penny
Johnson & Johnson

KBR
KLA-Tencor Corporation
Kellogg, Brown and Root, Inc.
Kinko's
Kraftmaid Cabinetry, Inc.

Labor Ready, Inc.
LensCrafters
Long John Silver's, Inc.
Los Alamos National Laboratory
Lowe's HIW

Mariner Health Care
Marriott International
Masco Corporation
Menard Inc.
Merillat Corp.
Merrill Lynch
Metal Container Corp.

Milgard Manufacturing Corp.
Mills Pride
Morgan Tire & Auto Inc.
Morton's of Chicago

NCR Corporation
Nabors Drilling Corporation
Nintety Nine Restaurant & Pub
Nordstrom, Inc.
Northern Arizona University
Northrop Gruman Coporation

O'Charley's, Incorp.

Pfizer, Inc.
Prudential Financial
Public Storage, Inc.
Publix Super Markets

Qwest Communications

Raytheon Company
Rent-A-Center
Ritz Carlton Hotel

SAIC (Science Applications International Corp.)
Securitas Security Services, Inc.
Selma Automall
Shell International Petroleum Company
Sherwin Williams Company
Software Spectrum, Inc.
Sports and Fitness Clubs of America
St. Paul Travelers Insurance
Sterling Jewelers, Inc.
Swift Transportation Company, Inc.

TRW Automotive, Inc.
Tenet Healthcare Systems
Terminix
The Boeing Company
The Krystal Company
Toll Bros., Inc.
Turner Construction Company

UPS Supply Chain
USAA (United Services Automobile Association)
Uniprise, Inc.
United Healthcare Group (UnitedHealth Group, United-Healthcare Group)
University of Southern California

Valero Energy Corporations
Visteon Corporation
Volt

Waffle House, Inc.
Washington Mutual
Wells Fargo
World Aviations Systems, Inc.

4751 Total Employment Arbitration Cases

Taken from **American Arbitration Association, "CCP Section 1281.96 Data Collection Requirements** (From Jan 01, 2003 To Mar 31, 2007)" (April 2, 2007), http://www.adr.org/si.asp?id=4591

WHAT THE EXPERTS SAY ABOUT BINDING MANDATORY ARBITRATION

"Civil rights laws have no meaning if you cannot go to court to enforce them but instead are relegated to a private forum where the sometimes untrained decision maker is not even required to know or follow the law."

-- Cliff Palefsky, civil rights lawyer and a co-founding member of the National Employment Lawyers Association[1]

Arbitration is "[d]espotic decisionmaking..."

-- U.S. Supreme Court Justice John Paul Stevens[2]

"Private judging is an oxymoron because those judges are businessmen. They are in this for money."

-- California State Appellate Judge Anthony Kline[3]

"We should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges."

-- U.S. Supreme Court Justice Hugo Black[4]

"Let us assume for a minute that for some reason all the rabbits and all the foxes decided to enter into a contract for mutual security, one provision of which were [*sic*] that any disputes arising out of the contract would be arbitrated by a panel of foxes. Somehow that shocks our consciences, and it doesn't help the rabbits very much either.[5]

-- West Virginia Supreme Court of Appeals Justice Richard Neely

"What the (Supreme) Court has not yet recognized is that it has allowed corporations to avoid not only the courts, but the regulatory impact of the law."

-- Professor David Schwartz, University of Wisconsin Law School[6]

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[1] "The Civil Rights Struggle Against Mandatory Arbitration," 1 *Employee Rights Quarterly* 22, 23 (2001).

[2] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 656-657 (1985) (J. Stevens, dissenting).

[3] *Quoted in* Berkowitz, "Is Justice Served?" *West* (*LA Times Sunday Magazine)*, October 22, 2006, http://www.latimes.com/features/magazine/west/la-tm-arbitrate43oct22,1,3335771.story?coll=la-headlines-west&ctrack=1&cset=true, p. 22.

[4] Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 149 (1968).

[5] *Board of Education of Berkeley County v. Miller, Inc*., 160 W. Va. 473, 236 S.E.2d 439, 443 (W. Va. 1977).

[6] *Quoted in* R. Holding, "Private Justice: Millions are losing their legal rights," *San Francisco Chronicle* (October 7, 2001) ["Private Justice"].

"Employment arbitration is well on its way to replacing the courts as the primary method of resolving statutory employment disputes. If arbitration does not provide justice to those who have been victims of racial discrimination or sexual harassment, *our civil rights laws are in great danger*."

-- Lewis Maltby, President, National Workrights Institute[7]

Arbitration is "…a service to corporations that don't like jury trials."

-- Professor Paul Carrington, Duke University Law School[8]

Mandatory arbitration "subverts our system of justice as we have come to know it."

-- Montana Supreme Court Justice Terry Trieweiler[9]

Most people who exempt themselves from the law are called criminals and end up behind bars. But when an employer does the same thing [via mandatory arbitration clauses], it's considered good business."

-- Professor Ellen Dannin, California Western School of Law[10]

"Clearly, a contract agreeing to binding arbitration was to the advantage of the subcontractor, who had attorneys on staff with nothing to do but delay, throw curves and run up attorney fees for the partners.... Always consult with an attorney before signing a contract. Question the section about arbitration[ ] or trial...."

-- Jeffrey Moses, writing for the National Federation of Independent Business's "Business Toolbox" website section[11]

[7] Testimony Regarding Civil Rights Procedures Protection Act (S. 121) before the U.S. Senate Subcommittee On Administrative Oversights and the Courts (March 1, 2000), http://www.workrights.org/issue_dispute/adr_house_testimony.html) [emphasis supplied].
[8] *Quoted in* "Private Justice."
[9] *Quoted in* "Private Justice."
[10] E. Dannin, "Employers Can Just About Bank on Winning in Arbitration," *L.A. Times* (December 24, 2000), M-2.
[11] J. Moses, "Beware of Contracts Calling for Mandatory Arbitration," *Business Toolbox,* National Federation of Independent Business (2004), http://www.nfib.com/object/IO_16916.html.

NELA
Advocates for Employee Rights
National Employment Lawyers Association

MANDATORY ARBITRATION PREVENTS EMPLOYEES FROM HOLDING THEIR EMPLOYERS ACCOUNTABLE IN COURT IN *ALL* KINDS OF EMPLOYMENT CASES

Americans with Disabilities Act (ADA)
Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756 (9th Cir. 1997); *Miller v. Pub. Storage Mgmt., Inc.,* 121 F.3d 215 (5th Cir. 1997)

Age Discrimination in Employment Act (ADEA)
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)

Employee Polygraph Protection Act
Saari v. Smith Barney, Harris Upham & Co., Inc., 968 F.2d 877 (9th Cir. 1992)

Employee Retirement Income Security Act (ERISA)
Bird v. Shearson Lehman American Express, 926 F.2d 116 (2d Cir. 1991)

Equal Pay Act
Hurst v. Prudential Securities, Inc., 21 F.3d 1113 (9th Cir. 1994)

Fair Labor Standards Act (FLSA)
Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294 (5th Cir. 2004)

Family and Medical Leave Act (FMLA)
Martin v. SCI Mgmt., L.P., 296 F. Supp. 2d 462, 467 (S.D.N.Y. 2003)

Older Workers Benefit Protection Act
Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656 (5th Cir. 1995)

Race, National Origin, Sex, and Religious Discrimination (1964 Civil Rights Act, Title VII)
Booker v. Robert Half Int'l, Inc., 315 F. Supp. 2d 94 (D.D.C. 2004) (race discrimination); *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994) (sexual harassment); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 18 (1st Cir. 1999) (sex discrimination)

Section 1981
Gillispie v. Village of Franklin Park, 405 F. Supp. 2d 904 (N.D. Ill. 2005)

State Employment Discrimination claims
Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (discrimination on basis of sexual orientation)

Uniformed Services Employment and Reemployment Rights Act (USERRA)
Garrett v. Circuit City Stores, Inc., 449 F.3d 672 (5th Circ. 2006)

Workers' Compensation
Melena v. Anheuser-Busch, 847 N.E.2d 99 (Ill. 2006)

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BINDING MANDATORY ARBITRATION OF EMPLOYMENT CLAIMS: THE STORY OF MARY KAY MORROW

Mary Kay Morrow
Kansas City, Missouri

Mary Kay Morrow shares this story:

Ms. Morrow worked at Hallmark Cards, Inc., creating, marketing, and distributing social expressions products for nearly 20 years. In January of 2002, Hallmark sent a letter to its employees stating that it was changing its terms of employment so that any legal disputes an employee had with Hallmark would have to be decided through a new involuntary "dispute resolution program," culminating in binding arbitration. The letter implied that simply showing up to work after the effective date would be deemed an agreement to this new policy. As the primary breadwinner for her household, Ms. Morrow, like most employees, was not in a position to walk away from her long-time employer. Also, like most employees, she thought that this new mandatory arbitration clause would never affect her. But she was wrong.

Throughout her 20 years of employment at Hallmark, Ms. Morrow had received good job reviews. But in 2003, things at Hallmark began to change for her. Despite Ms. Morrow's good history and loyalty to the company, Hallmark began holding Ms. Morrow and other older workers to higher performance standards than those applied to the younger workers in similar positions. Eventually Ms. Morrow was required to participate in a "Performance Improvement Plan" a program that was used to mark older employees for termination. When Ms. Morrow told the company that she thought they were discriminating against her based on her age, she was fired.

Ms. Morrow decided to take Hallmark to court on the grounds of discrimination and retaliation, and her lawyer filed the papers well within the time limit for such claims under Missouri law. Hallmark asked the court to move the case into arbitration, and the court granted its request. But when Ms. Morrow filed her complaint with the arbitrator, Hallmark asked the arbitrator to dismiss the claim altogether because it was not filed soon enough under Hallmark's own arbitration rules, despite Missouri's statute of limitations.

It turns out that Hallmark's arbitration clause had a rule that all claims must be filed within 30 days of the end of internal dispute resolution procedures, which Ms. Morrow had participated in before filing her lawsuit. The arbitration agreement put the employees at a disadvantage in other ways as well, for example, by significantly limiting discovery,

prohibiting class action claims, enforcing confidentiality and barring certain types of injunctive relief. Unlike a court that can order a business to stop discriminatory practices, these arbitrators do not have that ability. Even with this stacked-deck arbitration, the clause also stated that Hallmark, and Hallmark alone, could modify or terminate the "agreement" at any time.

As is frequently the case with big businesses and mandatory arbitration clauses, the arbitrators make a lot of money from repeat business from their corporate clients. Thus, they have a lot to lose by ruling against the employer in arbitration. So it is perhaps not that surprising that the arbitrator in Ms. Morrow's case dismissed the action because of the 30-day rule. The case was dismissed with prejudice, meaning that Ms. Morrow was barred from bringing any further action on the same claim. Amazingly, the arbitrator made this decision in spite of the fact that Missouri law specifically prohibits arbitration agreements from placing artificial time limits on legal claims.

Says Ms. Morrow: "It seems as if Hallmark has discovered that imposing stacked-deck mandatory arbitration programs on their employees means that they can act with virtual immunity from employment laws. At least, that's what happened in my case."

As of August, 2007, the Court of Appeals for the Western District of Missouri is considering Ms. Morrow's appeal of the order permanently dismissing her claims.

Ms. Morrow's case was reported in the Kansas City Business Journal on March 19, 2004. She can be reached through her attorney, Mark Jess, at (816) 474-4600.

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BINDING MANDATORY ARBITRATION OF EMPLOYMENT CLAIMS:
THE STORY OF FONZA LUKE

Fonza Luke
Princeton, Alabama

Fonza Luke tells the following story:

Fonza Luke, a mother of four and a grandmother of four, started working as a licensed nurse practitioner for Baptist Health Systems (BHS) at its Medical Center in Princeton, Alabama, in 1971. For almost 30 years, she received the highest performance ratings from the doctors she worked with everyday. When the hospital needed her to work extra days and hours because of staffing shortages, she came to the call, including once working almost every day of the year to give them the help they needed. Whenever the hospital offered new training or skills development, she took advantage of it so she could do her job better.

In November 1997, Ms. Luke had to attend a meeting of hospital employees where she was given a copy of a new "Dispute Resolution Program." She, along with other hospital employees, was told that BHS was starting this new program, that they would have to give up their right to go to court if they have legal claims, that all claims would be brought to binding arbitration, and that this program would take effect in January for anyone working for the hospital. Ms. Luke refused to sign this agreement because she didn't want to give up her rights. She was twice told that if she didn't sign it she would be fired, but both times she refused.

Three years later, in early 2001, the hospital fired Ms. Luke after she returned from a continuing education class in Atlanta. The hospital's human resources director told her that she was being fired for "insubordination" after almost 30 years of working for BHS. Ms. Luke said she was devastated because she never thought that she would lose her job after all those years.

When Ms. Luke was terminated, she went to a lawyer because she believed that BHS fired her because of her race and age, as well as in retaliation for filing a complaint after she contracted tuberculosis on the job because of unsafe conditions. Ms. Luke is an African-American, she was 59 years old when she lost her job, and the only things she did that were "insubordinate" were things that younger, white employees did all the time without getting fired. She filed race and age discrimination claims with the U.S. Equal Employment Opportunity Commission, and then in federal court.

BHS asked the federal court to dismiss Ms. Luke's case because she had agreed to bring all of her claims to arbitration. Ms. Luke told the federal court that she never signed the arbitration agreement and never gave up her right to go to court. But the federal court said that BHS could force her to arbitrate because she kept working in her job after BHS showed her its arbitration agreement. When she appealed the federal court's decision, the appeals court ordered her into arbitration.

Ms. Luke said, "I did everything I could to keep my right to go to federal court, but the courthouse doors were closed when I got there."

At arbitration, she lost completely. The arbitrator, a defense counsel, was chosen by process of elimination from the arbitrators' list, which was composed heavily of defense counsel. The arbitrator didn't look at the other side. Indeed, according to her lawyer, it was impossible for Ms. Luke to get someone who was in the middle of the road, much less pro-employee. As a result, Ms. Luke's claims of discrimination and retaliation were denied, and she got no relief whatsoever.

Ms. Luke told her story at a press conference of the Give Me Back My Rights! campaign in February 2005. She can be reached through Donna Lenhoff at the National Employment Lawyers Association, 202-898-2880.

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BINDING MANDATORY ARBITRATION OF EMPLOYMENT CLAIMS: THE STORY OF DEBBIE DANTZ

Debbie Dantz
Tallmadge, Ohio

Debbie Dantz tells the following story:

In 2000, Ms. Dantz was a server at Applebee's in Tallmadge, Ohio. Within weeks of beginning her job, Ms. Dantz was made the victim of a brutally hostile work environment that included physical harassment, daily sexual insults, intense intimidation, and retaliation by her boss, the restaurant's manager. For example, the manager required the waitresses to wear skirts – and then he would lift them and look up them, which he did regularly, with crude commentary. At times, he would force Ms. Dantz to sit in a chair for over an hour and circle her like a predator, staring at her, saying nothing. After she complained of the various types of harassment, he and the kitchen staff (all male) flung food at her and held up her orders. He and the kitchen staff also hurled crude epithets at the women servers and mostly at Ms. Dantz, who had had the audacity to complain. The music in the kitchen was the worst variety of "gangsta rap," all about cutting up women with knives, raping them, and treating them as sexual objects. The manager also forced Ms. Dantz to work brutal schedules (12-14 hours, 6 days per week).

In 2001, Applebee's was bought out and the new ownership put a Mandatory Arbitration program into place. The program required the signatures of both the employer and the employee. When Ms. Dantz received the form, she consulted a lawyer who advised her not to sign. On the signature page of the agreement Ms. Dantz wrote: "I cannot sign this as I have been contacted by an attorney(s) in regard to certain strong issues that have happened at Applebee's." No one from the company ever executed the agreement either.

Her manager tried a number of times to get her to sign the form, and again she expressly wrote on the documents that she would not sign. In retaliation, he forced her to work only for tips by marking her as working zero hours – with the threat that if she complained, she would be fired.

The company gave up asking for her consent, and Ms. Dantz continued her employment, believing that she had preserved her right to her day in court. Meanwhile, the manager at Applebee's was still – unlawfully – making her work for nothing more than the tips she earned, even after she explained to him that she was taking care of two teenage daughters and a terminally-ill father and that she didn't even have enough money to afford a car or even a bed. In short, she was trapped – Applebee's was at least within walking distance to her house.

In January 2003, Ms. Dantz finally filed suit against Applebee's. By necessity, she was still working there, and continued there throughout the bulk of the litigation. The company asked the court to send the matter to arbitration. Ms. Dantz's lawyer asked the court to force the company

to produce the form that had Ms. Dantz's refusal to accept arbitration on it, but the court refused. In fact, even though Applebee's admitted that the form needed to be signed before it could be binding, and even though the company could not produce a signed form, the court still decided that Ms. Dantz had given up her rights to a trial simply because she had continued her employment with Applebee's.

Ms. Dantz appealed this ruling, and at around the same time was granted a second separate trial on a related cause of action. Her lawyer asked the second court to stay this new trial because its outcome could be impacted by the still undecided appeal from the first trial. But the second court would not put the case on hold, and so it proceeded. To make her case, Ms. Dantz had to spend thousands of dollars extracting evidence from Applebee's.

When the Sixth Circuit finally heard Ms. Dantz's appeal of the ruling compelling arbitration, the judges ignored the evidence about her specific refusal to agree to arbitration. Instead, the court ruled that Ms. Dantz was bound by the mandatory arbitration clause simply because she showed up to work on the day that the program took effect.

When this ruling was announced, the second court – the court which had refused to put a hold on the trial because it didn't think that the ruling in the appellate court would have any bearing on the outcome – reversed itself, and shut down Ms. Dantz's second trial.

After so many disheartening defeats in court, without ever having had the chance to have her case tried on its merits, Ms. Dantz's struggle was finally lost. She refused to take her case to Applebee's hand-selected arbitration company. Applebee's was never called to account for its violations of law, and Ms. Dantz never received the compensation she was owed for the humiliation and pain from the abusive and discriminatory treatment she suffered and for the all the time that she worked for tips only.

After her experiences, Ms. Dantz felt the courts treated her as badly as the employer. The courts put the final stamp on her perceived lack of control over her own life and circumstances. "I cannot go on any more. There is no justice," is her way of explaining how she felt.

In short – Ms. Dantz showed up to work for an employer who abused and cheated her, because she could not afford to walk away. The courts said that this action was a clear signal of agreement to waive her right to bring that employer to court – a clearer signal, in fact, than Ms. Dantz's own written statement on the arbitration form saying "I cannot sign this."

Ms. Dantz's cases are reported at N.D. Ohio, No. 5:03-00329 and N.D. Ohio, No. 5:04-CV-00060; Dantz v. Am. Apple Group, LLC, 123 Fed. Appx. 702 (6th Cir. 2005). She can be reached through her lawyers, Christy Bishop or Dennis Thompson, 330-753-6874, or Donna Lenhoff at the National Employment Lawyers Association, 202-898-2880.