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Can Compulsory Arbitration Be Reconciled With Section 7 Rights?

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CAN COMPULSORY ARBITRATION BE RECONCILED WITH SECTION 7 RIGHTS?

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Employers are increasingly imposing arbitration agreements on their employees as a condition of employment. These agreements force the employees to arbitrate, rather than litigate, any legal claims arising out of their employment. For employees covered by the National Labor Relations Act, such agreements may impair their rights to engage in concerted activity, since litigation of employment claims is protected by Section 7. Employee rights to file class actions, consolidate claims, and seek broad injunctive relief are concerted actions that are particularly threatened by the move to compelled arbitration. The Article analyzes the impact of arbitration agreements on various forms of activity protected by Section 7, urging the National Labor Relations Board and the courts to invalidate agreements that diminish Section 7 rights.

I. INTRODUCTION

In recent years, arbitration agreements have proliferated in numerous sectors of the economy. Employees increasingly find themselves faced with the choice of agreeing to arbitrate disputes or refusing to enter into an employment relationship. The Supreme Court's decision in *Circuit City Stores, Inc. v. Adams,*[1] finding arbitration provisions in employment contracts enforceable under the Federal Arbitration Act,[2] has spurred additional employers to adopt arbitration provisions for nonunion employees.

The employer promulgating the agreement selects the rules under which the arbitration will proceed. Some businesses are

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1. 532 U.S. 105 (2001).
2. *Id.* at 119.

using arbitration agreements in an attempt to avoid class action law suits.[3] Others impose at least half of the cost of arbitration on the employee.[4] Employees forced into arbitration frequently lose the opportunity to proceed on a class basis and may be denied some forms of injunctive relief. The cost of arbitration and the abolition of class actions provide significant potential for virtually eliminating small claims and claims by lower wage employees, unable to afford

3. *Attorney Urges Employers to Adopt Mandatory Programs as Risk Management Tools*, 17 INDIVIDUAL EMP. RTS. 41, 42 (2001) (noting that major advantages of mandatory arbitration are capping damages and eliminating class actions); Paul E. Starkman, *Open Issues After* Circuit City*: Still No Easy Answers on Mandatory Arbitration*, 27 EMPLOYEE REL. L.J. 69, 76 (2002) (noting that arbitration can prevent class actions—the "bane of employers"); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 5-6, 9 (2000). In one of the few empirical studies of arbitration agreements, Professor Christopher Drahozal found that eighteen of thirty-four arbitration clauses in franchise agreements precluded class relief, either expressly, or by limiting arbitration to the franchiser. Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 731-32. The costs and potential liability resulting from class action lawsuits have caused employers to seek various ways to avoid class action claims. For recent articles advising employers on how to avoid such claims, see G. Roger King & Jeffrey D. Winchester, *Building an Internal Defense Against Class Action Lawsuits and Disparate Impact Claims*, 16 LAB. LAW. 371 (2001); Deborah A. Sudbury et al., *Keeping the Monster in the Closet: Avoiding Employment Class Actions*, EMP. REL. L.J., Autumn 2000, at 5 [hereinafter Sudbury et al., *Keeping the Monster in the Closet*]; Deborah A. Sudbury et al., *Section 216(b) Collective Actions: A Vehicle for Group-Initiated Claims*, EMP. REL. L.J., Autumn 2001, at 45, 64-65 [hereinafter Sudbury et al., *Collective Actions*].

4. Some courts have refused to enforce or rewritten arbitration agreements that charge fees for cases involving statutory claims. *See, e.g.*, Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 780-88 (9th Cir. 2002) (refusing to enforce unilaterally imposed arbitration agreement that required the employee to pay half of the arbitration costs, covered claims employers are likely to bring but excluded those employees are likely to bring, and contained discovery provisions favorable to the employer); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1059-60 (11th Cir. 1998) (refusing to require arbitration where large fees were imposed on employee and Title VII damages were not available); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1468 (D.C. Cir. 1997) (reading agreement to require employer to pay all fees in order to enforce arbitration agreement). Other courts have enforced such agreements. *See, e.g.*, Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 16 (1st Cir. 1999) (finding that fee-splitting provision did not affect enforceability of arbitration agreement). The Supreme Court recently held that an agreement which failed to specify the amount and apportionment of fees was enforceable because the plaintiff, although arguing that the cost was prohibitive, did not meet her burden of showing that the cost was so great that it would impermissibly interfere with her right to vindicate her claim. *See* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90-91 (2000).

individual arbitration.[5] In addition, the opportunity for broad relief, which has the potential to eliminate unlawful conduct directed at many employees, and thus to achieve the public purpose behind many employment statutes, may be lost.

The National Labor Relations Act's ("Act" or "NLRA") protection of concerted activity has been virtually ignored in the debate about the enforceability of arbitration agreements imposed as a condition of employment.[6] The National Labor Relations Board's ("NLRB" or

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5. In *EEOC v. Waffle House, Inc.*, for example, the employee was paid $5.50 per hour and was terminated after two weeks of employment. 193 F.3d 805, 807, 816 (4th Cir. 1999), *rev'd*, 534 U.S. 279 (2002). The arbitration fees included a $2000 filing fee, paid prior to the arbitration, a $250 per day administrative fee, which was divided between the employer and the employee, and hourly arbitrator fees to be divided between the parties. Brief of Amici Curiae National Employment Lawyers Association et al. at 3-4, EEOC v. Waffle House, Inc., 193 F.3d 805 (4th Cir. 1999), *rev'd*, 534 U.S. 279 (2002) (No. 99-1823). In *Waffle House*, the employer argued that the EEOC could not seek or obtain relief on behalf of the employee who had entered into an arbitration agreement. *Waffle House, Inc*, 193 F.3d at 808. Although the Fourth Circuit agreed with the employer, the Supreme Court rejected the argument, providing at least one avenue for recovery by low wage employees forced to agree to arbitration. EEOC v. Waffle House, Inc., 534 U.S. 279, 284-87, 298 (2002). The EEOC's limited resources prevent it from litigating on behalf of most employees, however. *See id.* at 290 n.7 (stating that "in fiscal year 2000, the EEOC received 79,896 charges of employment discrimination. Although the EEOC found reasonable cause in 8,248 charges, it only filed 291 lawsuits"). Professor St. Antoine has argued that arbitration may provide the best venue for the claims of "the ordinary blue- or pink-collar claimant." Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83, 93 (2001). He suggests that such employees may be unable to obtain legal representation for their lawsuits, may have more difficulty prevailing in court than in arbitration, and may suffer long delays in litigation. *Id.* at 91-92. He conditions his argument on the availability of due process safeguards in arbitration. *Id.* at 93. For a similar argument, see Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001) [hereinafter Estreicher, *Saturns for Rickshaws*]. While the suggestion is well worthy of further consideration, the value of arbitration for individuals will depend on a number of factors, including whether they are able to obtain capable representation by either lawyers or union representatives, whether the cost is affordable in relation to the value of the claim, and whether they can effectively participate in arbitrator selection. Many current compulsory arbitration systems do not meet these requirements. If the arbitration system does not prove to be an effective vehicle for statutory enforcement, then employers who impose arbitration systems on their employees will get a pass on statutory compliance, since most enforcement agencies are under funded and overworked.

6. I have argued elsewhere that individual arbitration agreements cannot be imposed unilaterally on employees represented by a union because of the impact of such arbitration on mandatory subjects of bargaining. *See* Ann C.

"Board") General Counsel has taken the position that such agreements violate the Act where they impede access to the NLRB. Several administrative law judges have agreed,[7] but the Board itself has not addressed the issue directly,[8] and no court has considered the argument. The General Counsel has declined to issue complaints where the right to file charges with the Board is clearly preserved by the arbitration agreement.[9] But the Act itself broadly protects the right to engage in concerted activity, which includes legal action to vindicate employment rights, and prohibits employers from interfering with such rights. While the right to engage in concerted activity can, in some cases, be waived, employment cannot be conditioned on the waiver of the right to participate in concerted activity.

This Article looks at the question of whether the NLRA's right to engage in concerted activity protects employees from being forced to agree to arbitration of employment claims as a condition of employment.[10] First, the Article provides an introduction to employment arbitration. Then it reviews the General Counsel's position on mandatory arbitration agreements and related agency decisions. The Article goes on to explore whether filing a lawsuit to enforce statutory or contractual employment rights is protected under the NLRA, as concerted activity for mutual aid and protection. Then, it analyzes the NLRB and court decisions holding that employers cannot require employees to waive their right to engage in concerted activity. In analyzing the application of the NLRA to compulsory arbitration, the Article supports a broad reading of concerted activity, which would protect even individual invocation of statutory rights in judicial proceedings. But even if this interpretation of concerted activity is not accepted, as under the current Board view, a requirement of waiver may well interfere with concerted activity. In the final sections, which review the

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Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 OHIO ST. J. ON DISP. RESOL. 513, 544-56 (2001).

7. *See infra* notes 34-62 and accompanying text; *see also* NLRB Chairman Gould, Speech on Alternative Dispute Resolution (Apr. 8, 1997), *in* 1997 DAILY LAB. REP. (BNA) No. 69, at E-3 to E-4 nn.15-17 (Apr. 10, 1997) (discussing cases on which the General Counsel issued complaints against employers for imposing arbitration agreements).

8. *See infra* notes 63-64 and accompanying text.

9. *See* O'Charley's Inc., No. 26-CA-19974, 2001 NLRB GCM LEXIS 25, at *2-3, 5, 9 (Apr. 16, 2001).

10. References herein to compulsory or mandatory arbitration mean arbitration agreements that are required by employers as a condition of either obtaining or retaining employment.

application of Section 7 to compulsory arbitration agreements, the Article urges the General Counsel, the Board, and the courts to examine arbitration agreements and their effects to determine whether concerted activity, such as class actions, consolidated claims, and requests for broad injunctive relief, is barred. Given the state of current law on class actions, consolidation of claims, and broad injunctive relief in arbitration and the efforts of employers to use arbitration to bar such claims, arbitration agreements without express provisions permitting such concerted activity should be found unlawful and unenforceable because of their interference with Section 7 rights.

II. EMPLOYMENT ARBITRATION

While arbitration of contractual grievances has been a fixture under collective bargaining agreements for many years, arbitration of employment law claims in the union and nonunion context is a relatively recent development. The growth of employment litigation and the expansion of the movement toward alternative dispute resolution have spurred employers to incorporate arbitration as a method of resolving employment claims.[11] In *Gilmer v. Interstate/Johnson Lane Corp.*,[12] the Supreme Court held that a securities broker's agreement to arbitration as a condition of registration on the New York Stock Exchange required him to arbitrate his claim under the Age Discrimination in Employment Act ("ADEA").[13] While recognizing that Congress could preclude waivers of the right to litigate under employment statutes, the Court found no evidence of such congressional intent under the ADEA.[14] Similarly, courts have found no congressional intent to preclude waiver of a judicial forum under Title VII.[15] Courts have

11. Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 399, 407 (2000) (citing the rise in the use of employment arbitration but arguing that arbitration is less favorable to employers than many suggest and offering reasons that employers should not impose blanket arbitration requirements on employees).

12. 500 U.S. 20 (1991).

13. *Id.* at 23.

14. *Id.* at 24-26.

15. *See, e.g.*, EEOC v. Luce, Forward, Hamilton, & Scripps, 303 F.3d 994, 1004 (9th Cir. 2002) (reversing the court's conclusion to the contrary in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998)); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc., 170 F.3d 1, 3 (9th Cir. 1999); Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361, 365 (7th Cir. 1999); Seus v. John Nuveen & Co., 146 F.3d 175, 182 (3d Cir. 1998); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837 (8th Cir. 1997).

also ordered arbitration of many other federal statutory claims.[16] Where state employment law claims are the subject of arbitration agreements, the Federal Arbitration Act will preempt most state laws that attempt to restrict arbitration.[17]

While *Gilmer* left open the question of whether arbitration agreements in employment contracts were enforceable under the Federal Arbitration Act, the Supreme Court resolved that issue in favor of enforceability in *Circuit City Stores, Inc. v. Adams.*[18] Accordingly, there is a wide scope for arbitration of employment law claims and many employers have stepped in to mandate that employees agree to arbitrate all claims as a condition of employment. A review of the arbitration cases reveals that such well-known employers as Circuit City, Waffle House, Ryan's Steak

16. *See, e.g.*, Wikle v. CNA Holdings, Inc., No. 01-1119, 2001 U.S. App. LEXIS 8440, at *1, 3 (4th Cir. Apr. 23, 2001) (requiring employee to arbitrate Family Medical Leave Act ("FMLA") claim under collective bargaining agreement); Williams v. Imhoff, 203 F.3d 758, 767 (10th Cir. 2000) (requiring arbitration of ERISA claims, in agreement with Second, Third, Fifth, and Eighth Circuits); Johnson v. Circuit City Stores, Inc., 148 F.3d 373, 374, 378-79 (4th Cir. 1998) (ordering arbitration of claim under the Civil Rights Act of 1866, 29 U.S.C. § 1981); Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 150 (1st Cir. 1998) (finding Americans with Disabilities Act does not preclude waiver of right to litigate); O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274 (4th Cir. 1997) (finding nothing in FMLA precludes waiver of right to judicial remedies); Stewart v. Paul, Hastings, Janofsky & Walker, LLP, 201 F. Supp. 2d 291, 291, 294 (S.D.N.Y. 2002) (requiring arbitration of FMLA and disability discrimination claims); Adkins v. Labor Ready, Inc., 185 F. Supp. 2d 628, 646-47 (S.D. W. Va. 2001) (ordering arbitration of Fair Labor Standards Act claim over objection of plaintiff), *aff'd*, 303 F.3d 496 (4th Cir. 2002); Horenstein v. Mortgage Mkt., Inc., No. 98-1104-AA, 1999 U.S. Dist. LEXIS 22995, at *12 (D. Or. July 23, 1999) (same), *aff'd*, No. 99-36125, 2001 U.S. App. LEXIS 9267 (9th Cir. May 10, 2001).

17. *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996) (preempting Montana statute requiring that an arbitration clause be "typed in underlined capital letters on the first page of the contract"); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995) (holding that the scope of the Federal Arbitration Act's ("FAA") coverage expanded with expansion of the commerce power and preempted Alabama statute that invalidated pre-dispute arbitration agreements); Perry v. Thomas, 482 U.S. 483, 492 (1987) (holding that the FAA preempted state law, which allowed judicial actions to collect unpaid wages despite any agreement to arbitrate the claim). For an example of a decision ordering arbitration of state law claims pursuant to the FAA, see *Tupper v. Bally Total Fitness Holding Corp.*, 186 F. Supp. 2d 981, 985, 993 (E.D. Wis. 2002) (ordering arbitration of plaintiffs' common law claims that their terminations violated implied contracts with the employer).

18. 532 U.S. 105, 119 (2001) (interpreting the FAA's Section 1 exclusion for employment contracts to apply only to contracts of transportation workers). *Circuit City* involved allegations that the employer violated the California Fair Employment and Housing Act, as well as state law tort claims. *Id.* at 110.

House, Tenet Health Care, Hooter's, and O'Charley's have required their employees to agree to arbitrate all claims as a condition of employment.[19]

Mandatory arbitration has been the subject of widespread criticism by academics.[20] In addition, the plaintiffs' bar has mounted judicial challenges to arbitration agreements. While employment arbitration agreements have been widely enforced,[21] the Supreme

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19. EEOC v. Waffle House, Inc., 534 U.S. 279, 282-83 (2002); *Circuit City Stores, Inc.*, 532 U.S. at 109-10; Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 309 (6th Cir. 2000); Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 935 (4th Cir. 1999); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 833-34 (8th Cir. 1997); O'Charley's, Inc., No. 26-CA-19974, 2001 NLRB GCM LEXIS 25, at *7 (Apr. 16, 2001). Notably, each of these employers hires many low wage employees, supporting the theory that arbitration is used to preclude claims by such employees who may be unable to afford arbitration. *See also In re* Halliburton Co., 80 S.W.3d 566, 557 (Tex. 2002) (upholding arbitration agreement imposed on employees by energy firm); *Getting Veteran Workers to Sign Arbitration Pacts*, 18 INDIVIDUAL EMP. RTS. 57 (2002) (noting comments by counsel for Valu, Inc., Dain Rauscher Corp., and United Healthcare Corp. regarding their companies' mandatory arbitration policies for current workers).

20. For criticisms of mandatory arbitration, see Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. Rev. 449 (1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L.J. 1, 1-3, 44-55 (1996); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 456-59 (1999); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 660-63 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1036-42 (1996). For contrary views, see Estreicher, *Saturns for Rickshaws*, *supra* note 5, at 562-63 (arguing that most employees will be better off in arbitration); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1349-51 (1997) [hereinafter Estreicher, *Predispute Agreements*]; St. Antoine, *supra* note 5, at 93 (suggesting that arbitration with appropriate protections for employees may be "the most realistic hope of the ordinary blue- or pink-collar claimant"); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73 (1999).

21. *See, e.g.*, Seus v. John Nuveen & Co., 146 F.3d 175, 186 (3d Cir. 1998) (finding that ambiguous arbitration clause covered employment dispute in light of policy of favoring arbitration); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835 (8th Cir. 1997) (finding employee bound by arbitration provision in handbook and acknowledgment form, although handbook contained disclaimer asserting that it was not a binding contract); Armijo v. Prudential Ins. Co. of Am., 72 F.3d 793, 798 (10th Cir. 1995) (finding that ambiguous arbitration

Court's arbitration jurisprudence has not foreclosed all avenues for challenge and courts have struck down some of the most egregious arbitration provisions.[22] Courts have found unenforceable arbitration agreements that fail to specify the rules and procedures governing arbitration or are overwhelmingly favorable to the employer.[23] In addition, employees can resist arbitration on the basis of "generally applicable contract defenses, such as fraud, duress, or unconscionability."[24] While fraud and duress have been difficult to establish,[25] courts have found arbitration agreements unconscionable on various grounds. Some courts have refused to

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clause covered employment dispute in light of policy of favoring arbitration).

22. Other avenues for challenging arbitration agreements exist as well. For a discussion of the possible arguments, see David S. Schwartz, Short-Circuiting Employee Rights: Compelled Arbitration after *Circuit City* (2001) (unpublished manuscript) (on file with the author).

23. Dumais v. Am. Golf Corp., 299 F.3d 1216, 1219 (10th Cir. 2002) (refusing to enforce arbitration agreement where illusory because employer can alter the agreement at will); Murray v. United Food & Commercial Workers Int'l Union, Local 400, 289 F.3d 297, 304-05 (4th Cir. 2002) (refusing to enforce arbitration agreement as one-sided where, inter alia, employer had complete control over selection of panel from which arbitrator would be chosen); Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753, 759-60 (7th Cir. 2001) (finding promise to arbitrate illusory where arbitration provider retains right to change rules without notice and thus, there was no consideration for promise to arbitrate); *Floss*, 211 F.3d at 315-16 (same); *Hooters of Am., Inc.*, 173 F.3d at 938 (refusing to compel employee to arbitrate because Hooters breached the agreement "by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith"). With respect to the rationale in the Ryan's cases, however, it is notable that lack of consideration was found because the employees' agreements were with the arbitration provider, not the employer. Had the agreement been with the employer, a different result might have been obtained. *Penn*, 269 F.3d at 760-61.

24. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); *see, e.g.*, Ferguson v. Countrywide Credit Indus., 298 F.3d 778, 785-86 (9th Cir. 2002) (finding unilaterally imposed arbitration agreement unconscionable where it required the employee to pay half of the costs, covered claims employers were likely to bring but excluded those employees were likely to bring, and contained discovery provisions favorable to the employer); Hendrix v. Countrywide Home Loans, Inc., No. B153848, 2002 Cal. App. Unpub. LEXIS 6598, at *9-10 (Cal. Ct. App. July 17, 2002) (finding unconscionable and unenforceable arbitration agreement that covered claims employers were likely to bring but excluded those employees were likely to bring, required employees to pay half the cost of arbitration after the first hearing day, and allowed arbitrator to impose all costs on employees who lose claims).

25. Simply because a contract is one of adhesion, which is descriptive of most employment arbitration agreements, does not mean that it was signed under duress and is thus invalid. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32-33 (1991).

enforce agreements which limit statutory remedies, while others have declined to require similar remedial schemes in arbitration.[26] Some courts have held that employees cannot be forced to share the cost of arbitration, while others have refused to strike down arbitration agreements requiring cost-sharing.[27] And, most relevant to the discussion that follows, some courts have permitted litigation of class claims where the arbitration agreement precludes class actions or makes no provision for them, while many courts have ordered arbitration even where the effect is to deprive the employees of the opportunity to litigate their claims as a class.[28] Where claims are small, the effect of an order to arbitrate individually may well be to defeat the claim, for the cost of arbitration will exceed the potential recovery for each claimant.[29]

While the Equal Employment Opportunity Commission ("EEOC") has consistently opposed mandatory arbitration,[30] its opposition has not influenced courts to refrain from enforcing agreements to arbitrate discrimination claims. No court has yet addressed the issue of the impact of Section 7 of the NLRA on arbitration agreements. The issue has come before the NLRB's General Counsel and several administrative law judges, however.[31]

III. THE NLRB'S POSITION ON COMPULSORY ARBITRATION

At the outset, it is important to note that the NLRA covers only employees of private employers in interstate commerce, except for railroads and airlines.[32] Excluded from the provisions of the Act are

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26. The Supreme Court has granted certiorari on the question of whether a court must compel arbitration where the agreement prohibits punitive damages that would be available in court, allowing the arbitrator to address the damages issue first. *See* Pacificare Health Sys., Inc. v. Book, 123 S. Ct. 409 (2002) (mem.). For lower court cases addressing the issue of damage limitations, compare *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002) (finding unconscionable an arbitration agreement imposed as a contract of adhesion which limited statutory remedies of plaintiff), and *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060, 1062 (11th Cir. 1998) (refusing to require arbitration where large fees imposed on employee and Title VII damages not available), with *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681-82 (8th Cir. 2001) (severing provision limiting punitive damages while enforcing agreement to arbitrate), and *DeGaetano v. Smith Barney, Inc.*, No. 95 Civ. 1613, 1996 WL 44226, at *5-6 (S.D.N.Y. Feb. 5, 1996) (ordering arbitration despite limitations on Title VII damages).

27. *See supra* note 4 and accompanying text.

28. *See infra* notes 205-33 and accompanying text.

29. *See infra* notes 230-33 and accompanying text.

30. *See* Equal Employment Opportunity Comm'n, *Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment*, 8 LAB. REL. REP. (BNA) 405:7511 (1997).

31. *See infra* notes 32-62 and accompanying text.

32. *See* 29 U.S.C. § 152(2) (2000) (defining employer, excluding the

agricultural employees, domestic service workers, supervisors, managers, confidential employees, and independent contractors.[33] Thus, even assuming that the Act imposes some limitations on compulsory arbitration for employees, there are a wide range of individuals excluded from the statute on whom employers could still impose arbitration agreements consistent with the National Labor Relations Act.

A. *The General Counsel*

In 1995, the NLRB General Counsel, in response to a request for advice from an NLRB Regional Director, took the position in *Bentley's Luggage Corp.*,[34] that mandatory arbitration agreements in the nonunion workplace violate the National Labor Relations Act.[35] The issue submitted for advice was whether the employer violated the Act by requiring employees, under threat of termination, to agree to arbitrate employment claims before seeking redress in any other forum.[36] The General Counsel authorized a complaint, absent settlement, alleging that the action violated Sections 8(a)(1) and (4) of the Act because it required the employees to waive their statutory right to file charges with the Board. The memorandum relied on the

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government and employers covered by the Railway Labor Act such as railroads and airlines); *id.* § 152(3) (defining employee); *id.* § 157 (establishing employee rights).

33. *Id.* § 152(2) (also excluding employees of employers not covered by the statute); *see id.* § 152(11) (defining supervisor); NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 188-89 (1981) (excluding confidential employees, defined as those who assist labor relations managers with confidential information); NLRB v. Bell Aerospace, Inc., 416 U.S. 267, 289 (1974) (excluding managerial employees), *on remand*, 219 N.L.R.B. 384, 385 (1975) (defining managerial employees as "those who formulate and effectuate management policies" and "those who have discretion in the performance of their jobs independent of their employer's established policy").

34. No. 12-CA-16658, 1995 NLRB GCM LEXIS 92 (Aug. 21, 1995).

35. *Id.* at *1. The General Counsel of the Board supervises the investigation, issuance, and prosecution of complaints for violation of the Act. 29 U.S.C. § 153(d). The Division of Advice is one of the four main divisions of the General Counsel's office. JEFFREY A. NORRIS & MICHAEL J. SHERSHIN, JR., HOW TO TAKE A CASE BEFORE THE NLRB 37 (6th ed. 1992). In considering whether to issue a complaint on unfair labor practice charges involving novel, complex, or doubtful legal issues, Regional Directors may, and in some cases must, submit questions to the Division of Advice prior to decision on the charge. *See* NLRB Case Handling Manual, § 11751.1; Memorandum GC 02-03 (Dec. 17, 2001), *at* http://www.nlrb.gov/gcmemo/gc02-02.html. Unfair labor practice complaints are heard initially by administrative law judges and then reviewed by the five member Board. 29 U.S.C. § 160(c).

36. *Bentley's Luggage Corp.*, 1995 NLRB GCM LEXIS 92, at *1.

early Supreme Court decision in *National Licorice Co. v. NLRB*,[37] which held that contracts used to frustrate statutory rights are unlawful.[38] The General Counsel noted that the Board has subsequently held that employers and unions violate the Act by insisting that employees waive either their right to file unfair labor practice charges or their right to use contractual grievance and arbitration procedures.[39] Although the arbitration agreement in *Bentley's* could be read broadly to waive the right to pursue any statutory claim without arbitrating first, the focus of the General Counsel was on the waiver of the right to bring charges to the NLRB. Thus, the General Counsel asserted a violation of Section 8(a)(4), which prohibits discrimination against employees for filing charges or giving testimony under the Act.[40] The General Counsel reasoned that the provision was enacted to protect employee rights to report unfair labor practices, and the arbitration agreement interfered with that purpose.[41]

The employer argued that the agreement was privileged by the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[42] but the General Counsel found the case inapplicable.[43] *Gilmer* does not permit an employer to enforce an agreement to arbitrate statutory claims where the statute evidences an intent to preclude waiver of judicial remedies.[44] The General Counsel read the Act as providing enforcement authority to the Board regardless of other remedies available.[45] Further, the General Counsel noted that the EEOC could pursue an age discrimination claim (the subject of the waiver in *Gilmer*) without the filing of a charge by the employee, but the Board has no such authority.[46] Therefore, a waiver by the employee precludes enforcement of the NLRA.[47]

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37. 309 U.S. 350 (1940).

38. *Bentley's Luggage Corp.*, 1995 NLRB GCM LEXIS 92, at *6-7 (citing Nat'l Licorice Co., 309 U.S. 350 (1940)).

39. *Id.* at *7-8; *see also* Constr. & Gen. Laborers, Local 304, 265 N.L.R.B. 602, 602 (1982).

40. 29 U.S.C. § 158(a)(4); *Bentley's Luggage Corp.*, 1995 NLRB GCM LEXIS 92, at *8.

41. *Bentley's Luggage Corp.*, 1995 NLRB GCM LEXIS 92, at *9-10.

42. 500 U.S. 20 (1991).

43. *Bentley's Luggage Corp.*, 1995 NLRB GCM LEXIS 92, at *11 (citing *Gilmer*, 500 U.S. 20).

44. *Id.* at *10-12 (quoting *Gilmer*, 500 U.S. at 26).

45. *Id.* at *13 (citing 29 U.S.C. § 160(a)). The General Counsel also noted that *Gilmer* involved enforcement of an arbitration agreement already signed, not whether an effort to obtain such an agreement was lawful. *Id.* at *13-14.

46. *Id.* at *14.

47. The Memorandum also noted that since the employees were at will, the arbitration agreement did not clearly provide a basis to challenge a termination

Because the rationale of the General Counsel concentrated on the NLRA and the right to file charges with the Board, the opinion offers limited guidance with respect to compulsory agreements to arbitrate other statutory claims. And since the case settled prior to trial, the Board itself never decided the issue.[48]

Subsequent to *Bentley's*, the General Counsel continued to issue

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proscribed by the statute. *Id.* at *15. In addition, the General Counsel rejected the employer's claim that the agreement did not bar unfair labor practice charges, noting that given the six month statute of limitations and the requirement that employees not only refrain from initiating actions, but dismiss actions already commenced, the right to file charges after arbitration was illusory. *Id.* at *15-18.

48. 1996 DAILY LAB. REP. (BNA) No. 96 at D-15 (May 17, 1996). The case was settled based on the employer's agreement that it would no longer require the employees to arbitrate "as a condition to their filing a complaint with [the] NLRB or to the exercise of rights protected by the NLRA." *Id.* The General Counsel issued complaints in several other cases on the same theory, three of which have been decided by administrative law judges and one by the Board. *See* NLRB Chairman Gould, Speech on Alternative Dispute Resolution, *supra* note 7 (discussing other cases); *see also infra* notes 53-64 and accompanying text. The NLRB defers to arbitration under collective bargaining agreements where unfair labor practice claims and contract claims overlap, reserving jurisdiction to insure that the resolution is not repugnant to the statute. *See* Collyer Insulated Wire, 192 N.L.R.B. 837, 840 (1971). "The Board's authority, in its discretion, to defer to the arbitration process has never been questioned by the courts of appeals, or by the Supreme Court." *Id.* at 840. The deferral is discretionary, however:

> There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held. However, it is equally well established that *the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.*

Id. at 840 (quoting Int'l Harvester Co., 138 N.L.R.B. 923, 925-26 (1962)); *see also* Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1090 (1955) (finding that "[c]learly, agreements between private parties cannot restrict the jurisdiction of the Board. Therefore, we believe the Board may exercise jurisdiction in any case of an unfair labor practice when in its discretion its interference is necessary to protect the public rights defined in the Act"). It might be argued that the General Counsel's position in *Bentley's Luggage* is inconsistent with the deferral doctrine, so long as the employee is not prevented from filing a charge to invoke the Board's review of the arbitration decision. For arguments that the Board should permit mandatory arbitration in the nonunion context and review decisions and the fairness of arbitral procedures under the *Spielberg* doctrine, see Judith B. Sadler, *ADR and the NLRA: Will the Board Defer?*, 16 OHIO ST. J. ON DISP. RESOL. 571 (2001); Tanya A. Yatsco, Comment, *How About a Real Answer? Mandatory Arbitration as a Condition of Employment and the National Labor Relations Board's Stance*, 62 ALB. L. REV. 257, 291 (1998).

complaints where arbitration agreements either explicitly or implicitly barred the employee from filing charges with the Board.[49] In 2001, however, two advice memoranda upheld mandatory arbitration agreements that expressly and unambiguously permitted filing of unfair labor practice charges, despite the agreement.[50] In the lengthier of the two memoranda the General Counsel opined, citing *Gilmer,* that denial of access to the courts restricted only the forum choice and did not limit substantive rights.[51] Accordingly, the General Counsel found no interference with concerted activity.[52]

B. Administrative Law Judge Opinions

Three administrative law judges have found that unilaterally imposed arbitration agreements violate the statute. In *Architectural Building Products, Inc.*,[53] Judge Charno reviewed an employer-adopted mandatory arbitration procedure which specified that it applied to all disputes, and indicated that employees had to file a grievance within five days or lose the right to assert the claim before the Board or in any other forum.[54] The procedure imposed financial penalties on the employee who initiated litigation that was stayed or dismissed on motion of the employer.[55] Judge Charno found that these provisions violated Sections 8(a)(1) and (4), and also found unlawful the employer's conditioning the reinstatement of two employees on the signing of the agreement to arbitrate.[56] The judge relied on the restriction of access to the NLRB to find the procedure unlawful.[57]

Judge Schmidt addressed a similar arbitration provision in

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49. *See* W. & S. Food Servs., No. 14-CA-25948, 2000 NLRB GCM LEXIS 67, at *1-2 (June 13, 2000) (recommending complaint where agreement waived the right to file charges with administrative agencies and where amended agreement preserved that right since other provisions conflicted with and, perhaps, negated the reservation of rights).

50. *See* Den-Tex Cent., Inc., No. 14-CA-26491, 2001 NLRB GCM LEXIS 34, at *1 (Aug. 24, 2001); O'Charley's Inc., No. 26-CA-19974, 2001 NLRB GCM LEXIS 25, at *5 (Apr. 16, 2001).

51. *O'Charley's*, 2001 NLRB GCM LEXIS 25, at *9-13.

52. *Id.* at *12-13. The General Counsel relied solely on the text of the arbitration provision and did not address the issue of whether it could be applied to restrict concerted activity. *Id.* at *12 & n.16.

53. No. 17-CA-19326, 1998 NLRB LEXIS 541 (July 28, 1998).

54. *Id.* at *8.

55. *Id.*

56. *Id.* at *13, 16. The two employees were reinstated pursuant to a settlement in a prior unfair labor practice proceeding. *Id.* at *9.

57. *Id.* at *8, 17 app. C.

Bill's Electric, Inc.[58] Like Judge Charno, Judge Schmidt found that the grievance and arbitration procedure, which required all employees to submit all disputes and penalized them with costs and attorneys fees for bypassing the procedure, violated Section 8(a)(1).[59] In rejecting the employer's argument that the procedure was consistent with the Board's deferral policy, the judge noted that the arbitration system extended to every legal right, and contained no Board review mechanism, far exceeding the scope of the deferral policy.[60] The analysis, however, like the analysis in *Architectural Building Products, Inc.*, focused largely on the interference with access to the Board. The third case was *Exceptional Professional, Inc.*,[61] which was decided by the Board and thus is addressed below.[62]

C. *The Board*

The Board has addressed the issue in only one case, *Exceptional Professional, Inc.*[63] Although the judge in the case found that the employer maintained a mandatory grievance procedure in violation of Sections 8(a)(1) and (4), the Board concluded that the evidence was insufficient to establish that the grievance procedure was mandatory or that it had been communicated to the employees.[64] Thus, the Board found no violation, never addressing the question of whether a mandatory procedure would violate the Act.

Although the rationale of the General Counsel and the administrative law judges relating to the restriction of Board access is persuasive, the absence of a Board ruling limits the utility of the decisions. In addition, the only analysis addressing the impact of the Act on compulsory arbitration of other claims, such as discrimination, minimum wage, and overtime, or even contract claims, is the several paragraphs in the *O'Charley's Advice Memorandum*[65] arguing that an agreement to arbitrate is a restriction of forum choice only, not of substantive legal rights.[66] A more thorough analysis of the applicability of the concerted activity protections in the Act is necessary. In determining how the Act might apply to such situations, it is important first to look at the

58. Nos. 17-CA-18629-1, 17-CA-18697, 17-CA-18787, 17-CA-19112, 1999 NLRB LEXIS 572, at *25-27 (Aug. 10, 1999).
59. *Id.* at *41.
60. *Id.* at *42.
61. 336 N.L.R.B. No. 16 (Sept. 28, 2001).
62. *See infra* notes 63-65 and accompanying text.
63. 336 N.L.R.B. No. 16.
64. *Id.* at *8.
65. 2001 NLRB GCM LEXIS 25 (Apr. 16, 2001).
66. *See supra* note 51 and accompanying text.

issue of what is concerted activity for mutual aid and protection, which the Act was designed to protect.

IV. CONCERTED ACTIVITY FOR MUTUAL AID AND PROTECTION

Section 7 of the National Labor Relations Act protects the rights of individuals to engage in union activity and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[67] The courts and the Board have read this provision as having two requirements for protection.[68] First, the activity must be concerted, and second, it must be for purposes of mutual aid and protection. The first requirement deals with the manner in which the activity is undertaken, specifically whether it is "in concert," and the second deals with the subject matter or purpose of the activity.

A. The Requirement of Concert

When two or more employees act together in a group or "in concert," it is clear that the activity is "concerted." In its most recent, thorough analysis of the interpretation of concerted activity, the Board in *Meyers Industries, Inc.* (*Meyers II*)[69] stated that only "group" activity was protected.[70] In addition to activity clearly undertaken by several employees acting together,[71] group activity includes activity by an individual which seeks to initiate or invoke group activity, or activity by an individual who brings a group complaint to the attention of management.[72] The *Meyers* cases are part of a long line of cases in which the Board and the courts have grappled with the question of when individual activity is concerted. A review of the history of this issue will aid in the determination of

67. 29 U.S.C. § 157 (2000).

68. *See* Meyers Indus., Inc., 281 N.L.R.B. 882, 884 (1986), *enforced sub nom.* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987) [hereinafter *Meyers II*].

69. *Meyers II*, 281 N.L.R.B. 882.

70. *Id.* at 886.

71. *See* NLRB v. Wash. Aluminum Co., 370 U.S. 9, 12-14 (1962) (finding that seven employees who walked off their jobs without permission to protest the temperature in the shop were engaged in protected concerted activity under Section 7); Shell Oil Co. v. NLRB, 561 F.2d 1196, 1197 (5th Cir. 1977) (enforcing Board decision, finding that two employees who assembled coworkers to meet with supervisors regarding complaints about working conditions were engaged in protected concerted activity); Columbia Univ., 236 N.L.R.B. 793, 793 (1978) (finding that two employees who discussed working conditions and the need for a grievance committee among themselves and with other employees and spoke to their supervisor regarding the concerns were engaged in protected concerted activity).

72. *Meyers II*, 281 N.L.R.B at 887. See further discussion of cases following *Meyers II*, *infra* notes 114-20 and 125-34 and accompanying text.

when lawsuits to enforce statutory or contractual rights constitute concerted activity.

Initially, the Board recognized as concerted individual activity to enforce a collective bargaining agreement.[73] The Board concluded that such activity was concerted because it was enforcing contractual rights which applied to all employees and were a product of the employees' concerted action.[74] That interpretation was approved by the Supreme Court in *NLRB v. City Disposal Systems, Inc.*[75] The Board has also held that activity by one individual, who has consulted with other employees who share her interests and speaks on their behalf, is concerted.[76] Thus, where several employees discuss the employer's discriminatory practices and authorize one of them to speak to the employer about the group's concerns, the spokesperson is engaged in concerted activity although the complaint is made individually.

In the 1970s, the Board expanded its view of concerted activity in *Alleluia Cushion Co.*,[77] recognizing that individual complaints to enforce statutory rights were concerted and therefore protected by the statute.[78] The Board presumed that other employees were interested in the conditions complained of and consented to the protest.[79] In addition, the Board reasoned that the statutes pursuant to which the employee complained were themselves the product of employees' protected concerted activity in lobbying for statutory protection.[80] Subsequent to *Alleluia Cushion*, the Board found individual employee complaints relating to discrimination to be protected concerted activity.[81] The Board's rationale in these

73. *See* Bunney Bros. Constr. Co., 139 N.L.R.B. 1516, 1519 (1962). This doctrine became known as the *Interboro* doctrine. Interboro Contractors, Inc., 157 N.L.R.B. 1295, 1298 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967).

74. *Interboro Contractors, Inc.*, 157 N.L.R.B. at 1298; *Bunney Bros. Constr. Co.*, 139 N.L.R.B. at 1519.

75. 465 U.S. 822, 831 (1984).

76. *See Meyers II*, 281 N.L.R.B. at 886.

77. 221 N.L.R.B. 999 (1975).

78. *Id.* at 1000 (involving complaint to government agency about health and safety conditions in the workplace).

79. *Id.*

80. *Id.*

81. *See* Hotel & Rest. Employees Union Local 28, 252 N.L.R.B. 1124, 1124 (1980) (finding union employer violated the Act by terminating business agent for individually filing charges with the California Fair Employment Practices Commission alleging sex discrimination); Gen. Teamsters Local Union No. 528, 237 N.L.R.B. 258, 258 n.1 (1978) (finding union violated the Act by removing an employee from his position as alternate steward because he filed race discrimination charges with the EEOC); Dawson Cabinet Co., 228 N.L.R.B. 290, 290-92 (1977), *enforcement denied*, 566 F.2d 1079 (8th Cir. 1977) (finding employee terminated for refusing to work a job unless she was given equal pay

cases followed that of *Alleluia Cushion,* i.e., that employees acting alone to vindicate rights statutorily provided to all employees are engaged in concerted activity.[82]

In 1984, however, the Board reversed its position on this issue in *Meyers I*,[83] holding that an employee's complaint about the safety of a truck, that he and other drivers were required to drive, was unprotected because the statute precluded a determination that individual activity was protected.[84] The court of appeals reversed the Board's decision that the statute required the conclusion that individual activity was unprotected, finding the decision inconsistent with the Act as interpreted by the Supreme Court in *City Disposal*.[85] The court of appeals read *City Disposal* as imposing on the Board the responsibility for determining the scope of protected activity, within the wide range of permissible interpretations of the statute.[86] On remand, the Board accepted the court's conclusion that the Act did not require the conclusion it reached in *Meyers I*, but retained its position that the activity was not protected.[87] On subsequent review, the court affirmed the Board's interpretation as a permissible interpretation of the statute.[88]

The Board reasoned in *Meyers II* that the purpose of the Act was to protect collective activity, not individual activity.[89] Further, the Board relied on *City Disposal* to find that both the purpose of the activity, i.e., for "mutual aid or protection,"[90] and the element of concert were required in order for activity to be protected.[91] The Board held that the *Alleluia Cushion* rationale eliminated the requirement of concert and focused only on whether the activity was undertaken for mutual aid and protection, assuming concert if that

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to men engaged in protected activity). The employee and another employee had filed charges alleging a violation of the Equal Pay Act, which the employer was aware of, but there was no evidence the employer was aware of her role in filing charges. Nevertheless, the Board found her activity protected as part of her ongoing effort to vindicate the rights of female employees. *Id.*

82. *See Hotel & Rest. Employees Union Local 28*, 252 N.L.R.B. at 1124; *Gen. Teamsters Local Union No. 528*, 237 N.L.R.B. at 258 n.1.

83. Meyers Indus., Inc., 268 N.L.R.B. 493 (1984) [hereinafter *Meyers I*].

84. *Id.* at 493, 498.

85. Prill v. NLRB, 755 F.2d 941, 952-53 (D.C. Cir. 1985) [hereinafter *Prill I*].

86. *Id.* at 952.

87. *Meyers II*, 281 N.L.R.B. 882, 882 (1986).

88. Prill v. NLRB, 835 F.2d 1481, 1482 (D.C. Cir. 1987) [hereinafter *Prill II*].

89. *Meyers II*, 281 N.L.R.B. at 883.

90. 29 U.S.C. § 157 (2000).

91. *Meyers II*, 281 N.L.R.B. at 885.

element of the test were met.[92] Thus, the Board concluded that only "group" activity was protected.[93] In response to concerns expressed by the court of appeals in *Prill I*,[94] however, the Board in *Meyers II* reconciled its decision with prior Board precedent "by emphasizing its intent to protect 'individual employees [who] seek to initiate or to induce or to prepare for group action' and 'individual employees bringing truly group complaints to the attention of management.'"[95] Although *Meyers* has not been overruled, its viability has been questioned by some members of the Board,[96] and some courts have also criticized the doctrine.[97]

The meaning of concerted activity adopted in *Alleluia Cushion* comports with the primary purpose of the NLRA. The Act was designed to protect employees who attempt to improve their working conditions.[98] In their seminal article regarding the interpretation of concerted activity, Professors Gorman and Finkin persuasively argue that the Act protected concerted activity, not to the exclusion of individual activity, but rather to protect organized labor from the conspiracy doctrines applied by the courts to enjoin, as unlawful, concerted activity that would have been lawful if undertaken individually.[99] Gorman and Finkin state: "The assumption of the Act was *not* that action which should be protected when engaged in by a group should be left unprotected when engaged in by the individual, but that lawful individual action should not become unlawful when engaged in collectively."[100]

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92. *Id.* at 884.

93. *Id.* at 885-86.

94. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985).

95. *Prill II*, 835 F.2d 1481, 1484 (D.C. Cir. 1987) (alteration in original) (quoting *Meyers II*, 281 N.L.R.B. at 887). For further discussion about individual activity that remains currently protected by the Act, see *infra* notes 112-36 and accompanying text.

96. In *Aroostook County Regional Ophthalmology Center*, Chairman Gould and Member Browning refused to rely on *Meyers II*. 317 N.L.R.B. 218, 220 n.12 (1995), *enforcement denied in relevant part*, 81 F.3d 209 (D.C. Cir. 1996); *see also* Myth, Inc., 326 N.L.R.B. 136, 136 (1998) (Gould, Chairman, dissenting) (arguing against the *Meyers II* theory of concerted activity).

97. *See, e.g.*, Ewing v. NLRB, 861 F.2d 353, 355 (2d Cir. 1988).

98. *See Myth, Inc.*, 326 N.L.R.B. at 136.

99. *See* Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 335-36 (1981). Professors Gorman and Finkin thoroughly trace the history of Section 7 and its underlying policy, and conclude that it was designed to protect both individual and collective activity addressed to improving terms and conditions of employment. *Id.* at 331-46.

100. *Id.* at 336. Other commentators have agreed with Gorman and Finkin. *See, e.g.*, Christina A. Karcher, *The Supreme Court Takes One Step Forward and the NLRB Takes One Step Backward: Redefining Constructive Concerted*

As Chairman Gould noted in his dissent in *Myth, Inc.*,[101] it is particularly important in this era, when most employees are nonunion, for the Board to interpret Section 7 to protect the rights of employees who attempt to improve their working conditions, whether the efforts be through a direct approach to their employer or by enforcing other statutory protections.[102] Any other interpretation results in protection of the individual employee asserting a contractual right to be free from discrimination, but no Section 7 protection for the individual employee asserting a statutory right to be free from discrimination.[103] Since Section 7 rights are protected "not for their own sake but as an instrument of the national labor policy,"[104] they should be broadly construed to preserve employee rights to effectuate statutory objectives enacted by Congress.

As the Supreme Court recognized in *City Disposal*, the collective bargaining agreement is a product of the employees' concerted activity, and the individual's assertion of contractual rights is an essential part of the concerted activity.[105] Similarly, most employee protective statutes are a result of the concerted activity of unions and employees in many workplaces.[106] Like the employee asserting contractual rights, the individual employee's assertion of statutory rights, through the filing of a charge or a lawsuit, is part and parcel of the concerted activity that led to enactment of the statute.[107]

Finally, as Chairman Gould has noted, making employee rights dependent on the nature of the relationship to group action is a trap for the unwary employee and adds needless complexity to the enforcement of statutory rights, utilizing scarce agency resources for

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Activities, 38 VAND. L. REV. 1295, 1309 (1985); Staughton Lynd, *The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History*, 50 IND. L.J. 720, 727-34 (1975); Thomas M. Mengler, *Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act*, 58 TEX. L. REV. 991, 1006-08 (1980).

101. 326 N.L.R.B. 136.

102. *Id.* at 140 (Gould, Chairman, dissenting).

103. *Id.* at 141 (citing *Prill I*, 755 F.2d 941, 957 (D.C. Cir. 1985)). Although employees may be protected from retaliation by the discrimination statutes, that is not the case for all employment statutes. *Id.* Moreover, the Board's authority to remedy unfair labor practices is not affected by the availability of other remedies. *See* 29 U.S.C. § 160(a) (2000).

104. Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 62 (1975).

105. NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 831-32 (1983).

106. Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1975), *overruled by Meyers I*, 268 N.L.R.B. 493.

107. *Id.*

wasteful litigation.[108] The employee who consults with other employees before speaking on their behalf is protected, while the employee who asserts the rights of all employees without such consultation is not.[109] The sophisticated employee who obtains advice from a lawyer or union representative will be protected, while those who act without such advice may lack protection for the same activity of enforcing statutory rights.[110] In addition, as Professors Gorman and Finkin have argued, this interpretation of concerted activity makes protection dependent on whether the employer knew that the individual was acting with the support of other employees, an anomalous result with little support in the purposes and policies of the Act or in the interests of employers.[111]

Although individual activity to enforce statutory obligations is not protected under current Board doctrine, it is clear that individual activity which seeks to initiate group action is protected as concerted. In *Meyers II*, the Board stated:

> In *Meyers I* we noted with approval *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951), a decision antedating *Meyers I* by 33 years, in which the Board recognized that: "Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization."[112]

In *Circle K Corp.*,[113] the employee spoke twice with a fellow employee about working conditions and sought his support to improve them.[114] She also wrote a letter soliciting the support of other employees.[115] The employee whose support she sought declined to assist her and refused her request to sign the letter.[116] The Board found the employee's activity concerted because it solicited group action, even though her fellow employees declined to participate, and evidence indicated that some thought her motive

108. *Myth, Inc.*, 326 N.L.R.B. at 141 (Chairman Gould, dissenting).

109. *Meyers I*, 268 N.L.R.B. 493, 497 (1984), *aff'd sub nom. Prill II*, 835 F.2d 1481 (D.C. Cir. 1987).

110. *Myth, Inc.*, 326 N.L.R.B. at 141 (Chairman Gould, dissenting).

111. *See* Gorman & Finkin, *supra* note 99, at 348-53.

112. *Meyers II*, 281 N.L.R.B. 882, 887 (1986); *accord* Vought Corp., 273 N.L.R.B. 1290, 1294 (1984) (finding employee's discussion of rumor regarding racial discrimination by employer concerted), *enforced*, 788 F.2d 1378 (8th Cir. 1986).

113. 305 N.L.R.B. 932 (1991), *enforced*, 989 F.2d 498 (6th Cir. 1993).

114. *Id.* at 932.

115. *Id.*

116. *Id.*

was to protect herself from termination for poor performance.[117]

In *Compuware Corp. v. NLRB*,[118] the Sixth Circuit Court of Appeals enforced the Board's decision that an employee was engaged in concerted activity where other employees shared his concerns, although he was the only employee who threatened to speak to the company's client about the concerns.[119] Although there was no evidence that any employee authorized the discharged employee to share their concerns with management, and indeed two employees testified that they had not authorized such representation, the court agreed with the Board that no such authorization was necessary.[120] A similar result was reached in *NLRB v. Guernsey-Muskingum Electric Co-operative, Inc.*[121] The employees, unhappy because a foreman unfamiliar with their job was chosen from outside of their ranks, discussed complaining to a member of the Board of Trustees of the Cooperative.[122] Subsequently three employees individually complained to the board member and one was terminated.[123] The Court of Appeals upheld the Board's finding of concerted activity, stating:

> The mere fact that the men did not formally choose a spokesman or that they did not go together to see [the board member] does not negative concert of action. It is sufficient to constitute concert of action if from all of the facts and circumstances in the case a reasonable inference can be drawn that the men involved considered that they had a grievance and decided, among themselves, that they would take it up with management.[124]

Where an individual acts as a union representative or spokesperson, the activity is also protected.[125] In *Tradesmen International*,[126] the Board found that an individual who testified at a hearing relating to an employer's surety bond was engaged in concerted activity because he testified as a representative of the

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117. *Id.* at 933.

118. 134 F.3d 1285 (6th Cir. 1998).

119. *Id.* at 1287.

120. *Id.* at 1288-89 (citing NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442, 445 (6th Cir. 1981)).

121. 285 F.2d 8, 12 (6th Cir. 1960).

122. Guernsey-Muskingum Elec. Coop., Inc., 124 N.L.R.B. 618, 618 n.1 (1959).

123. *Id.*

124. *Guernsey-Muskingum*, 285 F.2d at 12.

125. *See* Tradesmen Int'l, Inc., 332 N.L.R.B. No. 107, at * 2-3 (Oct. 31, 2000), *enforcement denied*, 275 F.3d 1137 (D.C. Cir. 2002).

126. *Id.*

union.[127] The individual was a union organizer, but also had applied to work for the employer and was refused because of his testimony relating to the surety bond.[128] Noting that the complaint regarding the surety bond was an effort to level the playing field for union contractors, the Board stated that "when an individual assists a union, or engages in union-related activity, by definition he is engaged in concerted activity."[129] Where the employee is acting in furtherance of the interests of the union and its constituents, the activity is concerted even though it is done alone.[130]

Individual activity which constitutes either a continuation of, or an outgrowth of, prior concerted activity also is protected. For example, in *Mobil Oil Exploration & Producing U.S., Inc.*,[131] the Board found that an employee who told coworkers that the employer had an investigator after him, and was trying to fire him for his efforts to "right a wrong," was engaged in protected concerted activity.[132] The Court of Appeals for the Fifth Circuit agreed, noting that the employee had previously joined with other employees to complain about an agreement between the employer and the union, and subsequently complained individually to the company about activities of the union president.[133] Thus, his statement about his fear of termination was "either a continuation of earlier concerted activities or a logical outgrowth of concerted activity" and therefore protected.[134]

Employees who support the efforts of other employees to improve working conditions are also engaged in concerted activity, even where they act individually. In *KPRS Broadcasting Corp.*,[135]

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127. *Id.* at *2.

128. *Id.* at *1.

129. *Id.* at *2.

130. *Id.* at *2 & n.4; *see also* Spartan Equip. Co., 297 N.L.R.B. 19, 19 (1989) (finding concerted, individual employee's filing of criminal charge against employer because he was attempting to further his efforts to act as union spokesperson without intimidation by the employer); Pete O'Dell & Sons Steel Erectors, 277 N.L.R.B. 1358, 1359 (1985) (finding concerted employee cooperation with investigation of Davis-Bacon Act complaint filed by the union because the employee acted to assist the union), *enforced*, 803 F.2d 1181 (4th Cir. 1986).

131. 325 N.L.R.B. 176 (1997), *enforced*, 200 F.3d 230 (5th Cir. 1999).

132. *Id.* at 177-79; *see also* Mike Yurosek & Son, Inc., 306 N.L.R.B. 1037, 1038 (1992) (finding individual refusals to work overtime, which followed concerns over a schedule change expressed by the group, to be logical outgrowth of concerted activity), *enforced*, 53 F.3d 261 (9th Cir. 1995).

133. Mobil Exploration & Producing U.S., Inc. v. NLRB, 200 F.3d 230, 235 (5th Cir. 1999).

134. *Id.* at 241.

135. 181 N.L.R.B. 535 (1970).

for example, the Board found that an employee who expressed support for a resolution introduced at a stockholders meeting seeking reinstatement of an employee who had tried to improve working conditions was engaged in protected concerted activity.[136] Accordingly, even under the narrower Board interpretation of *Meyers Industries*, there is much individual activity that is protected as concerted.

B. Mutual Aid and Protection

In *Eastex, Inc. v. NLRB*,[137] the Supreme Court addressed the scope of the statutory protection for concerted activity for "mutual aid and protection."[138] In *Eastex*, the employer denied the union permission to distribute a leaflet to the employees, and the union alleged that the employer interfered with the employees' Section 7 rights in violation of Section 8(a)(1).[139] The court described the contents of the leaflet as follows:

> The first and fourth sections [of the leaflet] urged employees to support and participate in the union and, more generally, extolled the benefits of union solidarity. The second section encouraged employees to write their legislators to oppose incorporation of the state "right-to-work" statute into a revised state constitution then under consideration, warning that incorporation would "weake[n] Unions and improv[e] the edge business has at the bargaining table." The third section noted that the President recently had vetoed a bill to increase the federal minimum wage from $1.60 to $2.00 per hour, compared this action to the increase of prices and profits in the oil industry under administration policies, and admonished: "As working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today."[140]

The Court first rejected the employer's argument that the protection of Section 7 was limited to activities relating to the employees' employment relationship, noting that it was contrary to the language and longstanding interpretation of the Act as

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136. *Id.* at 535-36; *see also* Hotel & Rest. Employees & Bartenders Union, Local 28, 252 N.L.R.B. 1124, 1124 (1980) (stating that employee statements in support of employee who protested her lower pay, as compared to male employees, were protected).

137. 437 U.S. 556 (1978).

138. *Id.* at 556.

139. *Id.* at 558.

140. *Id.* at 559-60 (second and third alterations in the original) (quoting the News Bulletin to Local 801 Members, *reprinted in id.* at 576-78, app. 1).

protecting activity in support of employees of other employers.[141] The Court then addressed the contention that the use of "channels outside the immediate employer-employee relationship" was not protected under the statute.[142] The Court stated:

> The 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of "mutual aid or protection" as well as for the narrower purposes of "self-organization" and "collective bargaining." Thus, it has been held that the "mutual aid or protection" clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause. To hold that activity of this nature is entirely unprotected—irrespective of location or the means employed—would leave employees open to retaliation for much legitimate activity that could improve their lot as employees. As this could "frustrate the policy of the Act to protect the right of workers to act together to better their working conditions," . . . we do not think that Congress could have intended the protection of § 7 to be as narrow as petitioner insists.[143]

The Court went on to find the distribution of the leaflet to be protected, including both the section relating to the right to work law and the section relating to the minimum wage, noting that both could have an impact on the interests of the employees.[144] Thus, in accord with *Eastex*, judicial and administrative actions relating to terms and conditions of employment are protected, and the Board has so held.[145] The subjects of the legal actions at issue in mandatory arbitration cases are most often discrimination claims, but could also relate to health and safety, minimum wage and overtime pay or leave under the Family Medical Leave Act ("FMLA"), for example. Each of these constitute subjects that relate directly to the employees' working conditions.

Traditionally the Board has addressed issues of discrimination on the basis of race, gender, and ethnicity under the NLRA. Early on, both the Board and the courts read Section

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141. *Id.* at 564.

142. *Id.* at 565.

143. *Id.* at 565-67 (quoting NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14 (1962)).

144. *Id.* at 570.

145. *See infra* notes 151-61.

8(b)(1)(A) to encompass a duty of fair representation which precludes unions from discriminating in negotiations and the handling of grievances on the basis of race.[146] The duty subsequently was extended to encompass discrimination on the basis of gender and ethnicity.[147] Dissenters have argued, to no avail, that the statute, and therefore, the duty of fair representation, was directed to discrimination on the basis of union activity, not other considerations.[148] The Board and courts have also held that elections may be set aside where employers or unions impermissibly interject racial or ethnic issues into the organizing campaign in a way designed to inflame passions and preclude rational choice.[149] These

146. *See infra* note 148.

147. *See* NLRB v. Local No. 106, Glass Bottle Blowers Ass'n, 520 F.2d 693, 694-95 (6th Cir. 1975) (upholding Board's decision requiring two local unions segregated on basis of sex to merge and discontinue practice of segregating the handling of grievances based on sex, as it violated Section 8(b)(1)(A)); NLRB v. Int'l Longshoremen's Ass'n, Local No. 1581, 489 F.2d 635, 635-36 (5th Cir. 1974) (upholding Board's decision that union practice of negotiating preferences in hiring based on citizenship and residence of prospective employee's family violated Section 8(b)(1)(A)); Agosto v. Corr. Officers Benevolent Ass'n, 107 F. Supp. 2d 294, 305-06 (S.D.N.Y. 2000) (denying summary judgment to union which offered no explanation for refusal to process sexual harassment claim, demonstrating that union may have committed sex discrimination in violation of Title VII and thereby breached its duty of fair representation); Seep v. Commercial Motor Freight, Inc., 575 F. Supp. 1097, 1104 (S.D. Ohio 1983) (stating that sex discrimination which violates Title VII may also breach the duty of fair representation, but finding no such discrimination in the case).

148. *See* Indep. Metal Workers Union, Local No. 1, 147 N.L.R.B. 1573, 1588-89 (1964) (McCulloch, Chairman, dissenting) (arguing that the Act bars only discrimination based on union activity, not race); Miranda Fuel Co., 140 N.L.R.B. 181, 201 (1962) (arguing that the majority's wide interpretation of the scope of Section 8(b)(1)(A) was broader than the legislature intended), *enforcement denied,* 326 F.2d 172, 175 (2d Cir. 1963) (adopting view of Board dissent). Although enforcement was denied in *Miranda Fuel Co.*, the courts have since upheld the Board majority's interpretation of Section 8(b)(1(A). *See* 2 THE DEVELOPING LABOR LAW 1886 (Patrick Hardin & John E. Higgens, Jr. eds., 4th ed. 2001) (explaining that since *Miranda Fuel Co.*, courts have enforced the Board's interpretation of Section 8(b)(1)(A) as imposing a duty of fair representation); *see also* Bekins Moving & Storage Co., 211 N.L.R.B. 138, 145-46 (1974) (Fanning and Penello, Members, dissenting) (arguing that withholding certification from a union based on the union's racial discrimination frustrated the purposes of the Act and that other statutory remedies for such discrimination, such as the Civil Rights Act, existed), *overruled sub nom.* Handy Andy, Inc., 228 N.L.R.B. 447, 448 (1977). The Board later reversed the policy announced in *Bekins Moving & Storage Co. See Handy Andy, Inc.*, 228 N.L.R.B. at 448 (concluding that the purposes of the NLRA were better effectuated when discrimination allegations were considered in unfair labor practices, rather than representation proceedings).

149. *See* NLRB v. Katz, 701 F.2d 703, 709 (7th Cir. 1983) (denying

cases establish that the Board has viewed its statutory charter to protect the rights of employees broadly.

Nondiscrimination clauses are mandatory subjects of bargaining[150] and employee efforts to eliminate discrimination in the workplace have long been considered protected concerted activity.[151]

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enforcement of NLRB order to bargain where union campaign inflamed prejudice by focusing on religious and ethnic slurs and, thus, election should have been overturned); Sewell Mfg. Co., 138 N.L.R.B. 66, 72 (1962) (setting aside election where employer used racial propaganda, including photos of a white union official dancing with a black woman and news articles connecting labor unions with integration and communism, in order to inflame the racial feelings of voters). *But cf.* Case Farms, Inc. v. NLRB, 128 F.3d 841, 842-43 (4th Cir. 1997) (upholding Board decision ordering employer to bargain, and rejecting employer's objections based on union flyer accusing employer of firing Amish work force and hiring Latino work force because Latinos could be treated worse and paid less, as leaflet did not appeal to racial prejudice and therefore taint the election); NLRB v. Bancroft Mfg. Co., 516 F.2d 436, 440, 443-44 (5th Cir. 1975) (enforcing Board order that company bargain with union despite union campaign appealing to racial solidarity of African-American workers).

150. *See* Harris-Teeter Super Mkts., Inc., 293 N.L.R.B. 743, 744 (1989) (mandating Union must be afforded opportunity to negotiate internal sexual harassment policy), *enforced*, 905 F.2d 1530 (4th Cir. 1990); Jubilee Mfg. Co., 202 N.L.R.B. 272, 273-74 (1973) (affirming that employers must bargain in good faith concerning discrimination clauses, while finding that the employer did not resist bargaining in this case), *aff'd sub nom.* United Steelworkers v. NLRB, 504 F.2d 271, 271 (D.C. Cir. 1974).

151. *See* Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 66 (1975) (emphasizing that while collective bargaining to prevent discriminatory practice is a protected activity, employees may not circumvent the Union and engage in their own individual negotiating tactics to achieve non-discriminatory results); Gatliff Coal Co. v. NLRB, 953 F.2d 247, 251 (6th Cir. 1992) (affirming Board decision that two employees were unlawfully terminated for their concerted protest against gender-related harassment); United Packinghouse v. NLRB, 416 F.2d 1126, 1135 (D.C. Cir. 1969) (stating that workers have a right to engage in concerted activity to obtain "racially integrated working conditions"); Dearborn Big Boy No. 3, Inc., 328 N.L.R.B. 705, 710 (1999) (finding employees who urged another employee to file a lawsuit challenging the employer's refusal to hire her daughter as racially discriminatory engaged in protected concerted activity); Franklin Iron & Metal Corp., 315 N.L.R.B. 819, 822 (1994) (finding employees who, after consultation with one another, separately approached employer about racially discriminatory wages and then went together to file separate charges with state anti-discrimination agency engaged in protected concerted activity), *enforced*, 83 F.3d 156 (6th Cir. 1996); Vought Corp., 273 N.L.R.B. 1290, 1294 (1984) (finding employee's discussion of rumor that white employee would be promoted over black employee was protected concerted activity), *enforced,* 788 F.2d 1378 (8th Cir. 1986); King Soopers, Inc., 222 N.L.R.B. 1011, 1018 (1976) (finding employee's filing of charges with the EEOC and the state civil rights agency protected); Tanner Motor Livery, Ltd., 148 N.L.R.B. 1402, 1402, 1411 (1964) (protecting concerted activity of employees protesting racially discriminatory hiring practices),

And, as noted above, the employees' activity need not be limited to dealing directly with the employer in order to be protected. Litigation in both administrative and judicial forums is protected as well.[152] Employees may lose protection, however, where the means chosen conflict with other provisions of the statute. In *Emporium Capwell Co. v. Western Addition Community Organization*,[153] the employees were not protected from termination for their concerted efforts to eliminate discrimination where they sought to do so by pressuring the employer to bypass the union representative and the negotiated grievance procedure, and bargain directly with the employees.[154]

Judicial and administrative action relating to other subjects has similarly been found protected.[155] In *Trinity Trucking & Materials Corp.*,[156] employees who filed a breach of contract lawsuit against their employer, seeking actual and punitive damages, were engaged in protected activity.[157] In that case, the Board noted that filing a lawsuit is protected unless it was filed in bad faith, even where it is later found to be baseless.[158] Concerted employee complaints to

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enforced in relevant part, 349 F.2d 1, 5 (9th Cir. 1965).

152. Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978); *see also Franklin Iron & Metal Corp.*, 315 N.L.R.B. at 822 (finding employees who went together to file separate charges with state anti-discrimination agency were engaged in protected concerted activity); *King Soopers, Inc.*, 222 N.L.R.B. at 1018 (finding employee's filing of charges with the EEOC and the state civil rights agency protected).

153. 420 U.S. 50 (1975).

154. *Id.* at 52.

155. *See, e.g.*, Altex Ready Mixed Concrete Corp. v. NLRB, 542 F.2d 295, 296-97 (5th Cir. 1976) (finding two employees protected from termination for providing affidavits in connection with union's injunction action seeking to enforce collective bargaining agreement provision relating to loading of red dye into trucks); Tradesmen Int'l, Inc., 332 N.L.R.B. No. 107, at *2 (Oct. 31, 2000) (finding protected employee testimony before city board regarding payment of surety bond, since union was trying to level the playing field by insuring that nonunion companies did not compete unfairly with union companies by not complying with legal requirements), *enforcement denied*, 275 F.3d 1137 (D.C. Cir. 2002); Health Enters. of Am., Inc., 282 N.L.R.B. 214, 215 (1986) (finding filing of invasion of privacy lawsuit by group of employees against employer for alleged use of listening device in workplace to be protected concerted activity); Sarkes Tarzian, Inc., 149 N.L.R.B. 147, 153 (1964) (finding filing of libel suit against employer protected).

156. Trinity Trucking & Materials Corp., 221 N.L.R.B. 364 (1975), *supplemented*, 227 N.L.R.B. 792 (1977), *enforced without opinion*, 567 F.2d 391 (7th Cir. 1977).

157. *Id.* at 365-66.

158. *Id.* at 365; *see also* Garage Mgt. Corp., 334 N.L.R.B. No. 116, at *12 (Aug. 3, 2001) (noting that complaints and grievances are protected regardless of merit so long as they are not filed in bad faith or with malice).

administrative agencies regarding health and safety issues have been found protected,[159] as have complaints to the Department of Labor, and legal actions relating to wage claims under the Fair Labor Standards Act and the Davis-Bacon Act.[160]

From the above discussion, it is clear that legal action, whether administrative or judicial, designed to redress complaints about wages, hours, or working conditions is for purposes of mutual aid and protection.[161] Thus, concerted legal action is protected by the Act. The next section will examine the case law relating to employer and union requirements that employees waive their Section 7 rights.

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159. *See Garage Mgt. Corp.*, 334 N.L.R.B. No. 116, at *12 (finding employee's filing of complaint with OSHA and notice of intent to cooperate with OSHA protected); Sys. with Reliability, Inc., 322 N.L.R.B. 757, 760 (1996) (finding protected employees' efforts to improve health and safety, including threat to contact OSHA); Wray Elec. Contracting, Inc., 210 N.L.R.B. 757, 762 (1974) (finding protected employee's filing of complaint with OSHA); Socony Mobil Oil Co., 153 N.L.R.B. 1244, 1248 (1965) (finding protected union official's complaint to the United States Coast Guard regarding unsafe operation of ship), *enforced,* 357 F.2d 662 (2d Cir. 1966); Walls Mfg. Co., Inc., 137 N.L.R.B. 1317, 1318 (1962) (finding employee's letter to health department complaining of unsanitary conditions in employer's restroom protected), *enforced,* 321 F.2d 753 (D.C. Cir. 1963).

160. *See* Salt River Valley Water Users' Ass'n v. NLRB, 206 F.2d 325, 328 (9th Cir. 1953) (upholding Board conclusion that circulating petition giving employee power of attorney to represent employees in negotiation or legal action to recover pay due under Fair Labor Standards Act was protected); 52nd St. Hotel Assoc., 321 N.L.R.B. 624, 633 (1996) (stating that employees who "join together to seek legal redress for their wage claims" are engaged in protected concerted activity, citing a number of cases so holding); Triangle Tool & Eng'g, Inc., 226 N.L.R.B. 1354, 1357 (1976) (finding protected employee complaint to the Wage and Hour Division of the Department of Labor regarding overtime pay); *see also* Fredericksburg Glass and Mirror, Inc., 323 N.L.R.B. 165, 179 (1997) (finding protected employee cooperation with governmental investigation regarding employer compliance with the Davis-Bacon Act requirement of payment of prevailing wages on federally funded projects); Williams Contracting, Inc., 309 N.L.R.B. 433, 438 (1992) (finding protected employee threats to complain to the Indiana Department of Commerce in order to obtain appropriate wages); G.V.R., Inc., 201 N.L.R.B. 147, 153 (1973) (finding concerted and protected employee complaints about wages to Department of Labor and United States Army, with whom employer had contract requiring payment of certain wage rates).

161. While most of the discussion herein has focused on federal employment laws, state employment laws relating to wages, hours, health and safety, leave, discrimination, and other terms and conditions of employment also may be the subject of concerted activity. Judicial action may be limited by arbitration agreements as well. *See supra* note 17 and accompanying text.

V. THE PROHIBITION ON CONDITIONING EMPLOYMENT ON WAIVER OF SECTION 7 RIGHTS

Although some Section 7 rights can be waived, at least by the union,[162] the NLRB has long held that it is unlawful to condition employment on the waiver of employees' Section 7 rights. In *Retlaw Broadcasting Co.*,[163] the employer, after terminating an employee, offered him reinstatement conditioned on waiver of his rights to file a grievance or seek union representation under the collective bargaining agreement to challenge any future termination.[164] The Board adopted the administrative law judge's conclusion that this action violated Section 8(a)(1).[165] In a number of similar cases, the Board, frequently affirmed by the courts, has found it unlawful to condition employment or reemployment on waiver of Section 7 rights.[166] Even where an employee is "partially responsible for

162. *See* Metro. Edison Co. v. NLRB, 460 U.S. 693, 707-08 (1983) (noting that the Supreme Court has long held that a union may waive statutory rights such as the right to strike). A waiver of a statutory right will not be lightly implied, however. *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 283-84 (1956). Such waivers are premised on the free choice of collective bargaining representative and the duty of fair representation. NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974).

163. 310 N.L.R.B. 984 (1993), *enforced*, 53 F.3d 1002 (9th Cir. 1995).

164. *Id.* at 984.

165. *Id.* at 984, 993.

166. *See* Teamsters Local Union No. 171 v. NLRB, 863 F.2d 946, 953 (D.C. Cir. 1988) (enforcing NLRB's decision that it was unlawful to condition reinstatement on the waiver of the right to strike in the future); Am. Cyanamid Co. v. NLRB, 592 F.2d 356, 364 (7th Cir. 1979) (enforcing NLRB's decision that it is unlawful to condition reinstatement on waiver of right to file unfair labor practice charges to challenge termination); Contractor Servs., Inc., 324 N.L.R.B. 1254, 1255 (1997) (finding employer violated Act by requiring applicants to obtain union waiver of right to engage in protected union activity as a condition of employment); Great Lakes Chem. Corp., 298 N.L.R.B. 615, 624 (1990) (finding violation of Sections 8(a)(4) and (1) where employer conditioned employment on signing of a waiver of the legal right to bring any action against the company in the event of layoff or termination), *enforced*, 967 F.2d 624 (D.C. Cir. 1992); Prince, 283 N.L.R.B. 806, 808 (1987) (finding violation of Section 8(a)(1) where employer conditioned recall of laid off employees on dropping of grievances under the collective bargaining agreement); A & D Davenport Transp., Inc., 256 N.L.R.B. 463, 463 n.2, 467 (1981) (finding violation where employer required employees to sign letter waiving Section 7 right to challenge their termination for concerted activity as a condition of reemployment), *enforced*, 688 F.2d 844 (7th Cir. 1982); Columbia Univ., 236 N.L.R.B. 793, 796 (1978) (finding constructive discharge where employer unlawfully "conditioned [employee's] continued employment on her abstention from concerted activities . . ."); John C. Mandel Sec. Bureau, Inc., 202 N.L.R.B. 117, 119 (1973) (finding violation where employee's reinstatement to job from which he was transferred was conditioned on withdrawal of unfair labor practice charges and

instigating" an agreement to waive the right to engage in concerted activity as a condition of reinstatement, employer action is not privileged since "future rights of employees as well as the rights of the public may not be traded away in this manner."[167] Where the matter involves reinstatement after termination, the Board has rejected employer arguments that conditions on reemployment are part of settlements of legal disputes.[168] In a very recent case, the Board held that an employer that conditioned severance pay on an employee's agreement not to assist or communicate with the Board in the investigation and litigation of unfair labor practices violated the law, even though the employee was not otherwise entitled to severance pay.[169]

The Board also has found unlawful employer policies which require employees to bring complaints to the employer before discussing them with others, including enforcement organizations and agencies, and unions.[170] Similarly, employer rules which prohibit complaints regarding working conditions to third parties are unlawful.[171] Thus, if the employer conditions employment on a

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agreement to refrain from future charges and from concerted activity, even where employee was "partially responsible for instigating this deal"); *cf.* Halle Enters. Inc., v. NLRB, 247 F.3d 268, 273 (D.C. Cir. 2001) (finding offer of reinstatement after unlawful termination conditioned on waiver of right to participate in legal action against company did not toll back pay obligation); Oregon-Columbia Chapter of Nat'l Elec. Contractors Ass'n, Nos. 36-CA-7461, 36-CA-7466, 36-CB-1962, 36-CB-1963, 2000 NLRB LEXIS 248, at *19-20 (Apr. 21, 2000) (administrative law judge decision finding employer and union violated Sections 8(a)(1) and 8(b)(1)(A) respectively by maintaining a provision that required any employee/member who lost a legal proceeding brought against the employer or the union to pay the prevailing party's legal fees, since deterrent effect similar to waiver).

167. *John C. Mandel Sec. Bureau*, 202 N.L.R.B. at 119.

168. *See Retlaw Broad. Co.*, 53 F.3d at 1007; *see also Am. Cyanamid Co.*, 592 F.2d at 363-64 (finding employer could not lawfully condition employees' return to work after unfair labor practice strike on signing settlement agreement waiving Section 7 rights).

169. Metro Networks, Inc., 336 N.L.R.B. No. 3, at *5 (Sept. 28, 2001). Although the Board relied primarily on Section 8(a)(4), it noted that "[s]uch conduct unlawfully chills the Section 7 rights of all the employees." *Id.* Chairman Hurtgen concurred on the basis that the provision required the waiver of the employee's Section 7 right to assist other employees. *Id.* at *5 n.20.

170. *See* Kinder-Care Learning Ctrs., Inc., 299 N.L.R.B. 1171, 1171 (1990) (finding employer requirement that employees make complaints to the employer before approaching any other organization or agency with the complaint violated Section 8(a)(1)).

171. *See* Compuware Corp. v. NLRB, 134 F.3d 1285, 1291 (6th Cir. 1998) (finding unlawful rule prohibiting employees from complaining to clients about working conditions). The court left open, however, the possibility that the

waiver of Section 7 rights, the employer violates Section 8(a)(1).[172]

In addition to these precedents, the Supreme Court long ago held that individual contracts which purport to waive statutory rights are unlawful and unenforceable by the employer.[173] In *National Licorice Co. v. NLRB*,[174] the employer negotiated agreements with a committee representing the employees which gave the employees a raise in exchange for their agreement not to insist on a closed shop or a collective bargaining agreement and waived any right to arbitrate discharge claims.[175] Instead, the agreement, which was between the individual employee and the employer, provided an appeal to the employer of any discharge.[176] The Court upheld the Board's invalidation of the agreements because they restricted employee statutory rights, even though the waiver was made in negotiations and the employees received some benefit in exchange.[177] Specifically, with respect to the discharge issue, the Court stated: "The effect of this clause was to discourage, if not forbid, any presentation of the discharged employee's grievances to appellant through a labor organization or his chosen representatives, or in any way except personally."[178]

Having examined these precedents, it is now possible to analyze how the Board and the courts should apply the law in the context of employment conditioned on agreement to arbitrate statutory claims.

VI. APPLICATION OF BOARD LAW TO COMPULSORY ARBITRATION AGREEMENTS

The above discussed precedents clearly establish a statutory right to engage in concerted activity to eliminate discrimination in the workplace or to redress other violations of workplace rights.[179] It

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employer might establish a justifiable need to protect employer interests that outweighed the ancillary interference with concerted activity. *Id.*

172. If the waiver restricts access to the Board, it also violates Section 8(a)(4). *See* Great Lakes Chem. Corp., 298 N.L.R.B. 615, 622 (1990), *enforced*, 967 F.2d 624 (D.C. Cir. 1992).

173. Nat'l. Licorice Co. v. NLRB, 309 U.S. 350, 350 (1940).

174. 309 U.S. 350.

175. *Id.* at 360.

176. *Id.*

177. *Id.* at 359-60.

178. *Id.* at 360.

179. While the primary focus of the discussion here is on statutory discrimination claims since most cases have arisen in that context, the analysis would apply to other statutory rights as well, such as the right to be paid the minimum wage and overtime pay, the right to leave under the FMLA, and the right to file health and safety complaints with government agencies. *See* Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2000); Family Medical Leave Act, *id.* §§ 2601-2654 (2000); Occupational Safety and Health Act, *id.* §§ 651-678

is well-settled that administrative complaints and judicial action to enforce workplace statutory rights come within the definition of mutual aid and protection. The scope of concerted activity is more open to question, however. While the General Counsel in *O'Charley's* broadly suggested that the arbitration agreement there did not interfere with the right to engage in concerted activity, a more searching examination of arbitration agreements is necessary to ascertain their impact on concerted action. The sections that follow will analyze the impact of arbitration agreements on possible concerted activity.

A. Class Actions

A class action lawsuit easily comes within the existing interpretation of concerted activity. Class actions are available under most federal employment law statutes. The class action, which enables litigation of multiple claims involving similar or identical questions of law in one forum, serves several purposes. It promotes judicial economy and efficiency by obviating the need to adjudicate the same issue repeatedly.[180] In addition, the class action operates to afford a remedy to individuals where it is not economically feasible to obtain relief through an individual action, because each claim involves a small loss.[181] A group of plaintiffs can combine their resources to litigate against a defendant with significant legal and financial resources.[182] From the defendant's perspective, by allowing litigation of multiple claims in a single action, the class action both conserves resources and prevents inconsistent adjudications.[183]

Federal employment statutes provide two different models of class actions. Class actions under Title VII and several other statutes proceed under Rule 23 of the Federal Rules of Civil

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(2000).

180. *See* Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989) (noting judicial economy of class action in ADEA claims); Sternlight, *supra* note 3, at 29-30.

181. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (stating that "[e]conomic reality dictates that petitioner's suit proceed as a class action or not at all").

182. *See Hoffmann-La Roche Inc.*, 493 U.S. at 170 (stating that "[a] collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources"); David T. Wiley, *If You Can't Fight 'Em, Join 'Em: Class Actions Under Title I of the Americans with Disabilities Act*, 13 LAB. LAW. 197, 204 (1997) (noting use of class actions under Title VII to combine resources to combat a defendant with greater resources).

183. Ryan Patrick Phair, *Resolving the "Choice-of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835, 837 (2000).

Procedure.[184] Rule 23 class actions are representative, allowing one or more individuals to bring the claim on behalf of all others, even where those class members have not filed charges with the administrative agency.[185] Individual class members who do not opt out of the class action after notice are bound by the decision.[186] The Fair Labor Standards Act ("FLSA") sets forth a different structure for class claims, which also applies to class actions under the Equal Pay Act, the ADEA, and the FMLA.[187] Under the FLSA, the requirements for certification are less stringent and no individual becomes a plaintiff without opting into the class, whereupon full party status is granted.[188]

As noted above, some businesses impose arbitration agreements to eliminate the potential for class actions. The number of

184. FED. R. CIV. P. 23. Claims under Title VII, the Americans with Disabilities Act ("ADA"), Section 1981, the Employee Retirement Income Security Act ("ERISA"), and the Worker Adjustment and Retraining Notification Act ("WARN"), all proceed under Rule 23. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 414-16 (1975) (recognizing class action for back pay under Title VII); Devine v. Combustion Eng'g, Inc., 760 F. Supp. 989, 994-96 (D. Conn. 1991) (applying Rule 23 in ERISA claim); Cruz v. Robert Abbey, Inc., 778 F. Supp. 605, 610-13 (E.D.N.Y. 1991) (applying Rule 23 in WARN Act claim), *aff'd in part, rev'd in part*, 34 F.3d 1148 (2d Cir. 1994); Morgan v. Laborers Pension Trust Fund, 81 F.R.D. 669, 675-82 (N.D. Cal. 1979) (applying Rule 23 in ERISA claim); HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 4.9 (2001) (discussing Title VII actions in federal courts).

185. LEWIS & NORMAN, *supra* note 184, § 4.9. The Supreme Court has strictly applied the Rule 23 requirements for class certification. *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 157, 161 (1982). For certification, Rule 23 requires numerosity, commonality of questions of law or fact, representative claims typical of class claims, and fair and adequate representation by named plaintiffs. FED. R. CIV. P. 23(a).

186. Rule 23(b)(3) specifically allows plaintiffs to opt out, while actions under Rules 23(b)(1) and (2) are mandatory. *See* FED. R. CIV. P. 23(b); *see also* FED. R. CIV. P. 23(c)(2)-(3). Nevertheless, courts have permitted class members to opt out of Rule 23(b)(1) and 23(b)(2) classes under limited circumstances. LEWIS & NORMAN, *supra* note 184, § 12.30.

187. 29 U.S.C. § 216(b) (2000) (FLSA provision); *id.* § 206(d) (Equal Pay Act provision); *id.* § 626(b) (ADEA provision); *id.* § 2617(a)(2) (FMLA provision); *see also* C. Geoffrey Weirich & Barbara Berish Brown, *Defending a Class Action*, *in* 1 29TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 303, 306 (2000) (discussing opt-in statutory class actions).

188. *See* 29 U.S.C. § 216(b); LEWIS & NORMAN, *supra* note 184, § 4.9. In addition, Section 216(b) claims involve a two-step certification process, with conditional certification for purposes of notice to prospective plaintiffs and discovery, followed by a reevaluation of class certification after discovery for trial purposes. Sudbury et al., *Collective Actions*, *supra* note 3, at 49-50. Rule 23 class action certifications are completed in a single step. *Id.* at 49.

employment discrimination class actions filed has increased progressively since the passage of the 1991 Civil Rights Act, which provides for damages in cases involving intentional discrimination.[189] In addition, class actions are increasing under the FLSA[190] and ERISA.[191] Class actions require expensive investigation

189. William L. Kandel, *An Appellate Boost for Employment Discrimination Class Actions*, 25 EMPLOYEE REL. L.J. 79, 92 n.1 (2000) (noting an increase in new class action filings by private actors from thirty in 1992 to eighty-five in 1998 and the fact that thirty to forty percent of EEOC lawsuits in recent years have been class actions); Candis A. McGowan, *The ABC's of Title VII Class and Age Discrimination Collective Actions*, 25 AM. J. TRIAL ADVOC. 257, 257 (2001) (noting "small scale" resurgence in class actions). The Second Circuit has recently determined that a class that seeks compensatory damages in addition to injunctive relief may be certified under Rule 23(b)(2), which may increase the number of class actions. *See* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001). The court also determined that partial class certification is a possibility. *Id.* at 167-69. This decision creates a circuit split on these issues. *See Claimants Who Seek Damages as Well as Injunctive Relief Are Not Necessarily Barred from Maintaining Class Action*, 168 BNA LAB. REL. REP. 193, 200, 202-03 (2001).

190. *See Conference Report: Attorneys Discuss Strategies for Bringing, Defending FLSA Collective Action Lawsuits,* DAILY LAB. REP. No. 156, at C-1 (Aug. 13, 2002) (citing "recent proliferation of collective actions" spurring discussion about litigation strategy at ABA Annual Meeting); *As Overtime Lawsuits Renew FLSA Debate, Attorneys Advise Learning the Wage Law*, 170 BNA LAB. REL. REP. 145, 152 (2002) (discussing increase in FLSA lawsuits, particularly class actions, and noting several multi-million dollar settlements in class cases); *'Huge Upsurge' Seen in Wage-Hour Class Actions, Enforcement of FLSA Has Become a 'Major Component' in Organizing*, 166 BNA LAB. REL. REP 417, 442 (2001); *Wage-Hour Class Actions Beat EEO in Federal Courts Last Year*, 169 BNA LAB. REL. REP. 273, 285 (2002) (citing analysis showing seventy-nine new class action filings in 2001 as compared to seventy-seven new EEO class actions); Sudbury et al., *Collective Actions*, *supra* note 3, at 45.

191. *See* Ronald M. Green, *Class Actions in Equal Employment Matters*, *in* LITIGATING EMPLOYMENT DISCRIMINATION CASES 303, 311 (2001); *Retirees Granted Partial Class Certification in Their Challenge to Plan Terminations*, DAILY LAB. REP. No. 210, at A-6 (Oct. 30, 2002) (discussing decision by United States District Court for the Northern District of Georgia to certify class in retirees' claims alleging violation of the terms of the ERISA plans and breach of contract, but denying class status for promissory estoppel claims under ERISA). Class action lawsuits against managed care companies are increasing substantially, some under ERISA and others under various state laws. *See* Ardyth J. Eisenberg, *When HMO Patients Can't Get No Satisfaction,* 4 DEPAUL J. HEALTH CARE L. 367, 387-89 (2001); Laurie McGinley & Milo Geyelin, *Attorneys Prepare Suits Against HMOs: Class-Action Strategy Used Against Tobacco Industry Is Readied for New Push,* WALL ST. J., Sept. 30, 1999, at A3. The suits against managed care companies most likely would not be affected by an arbitration agreement with the employer unless an employment agreement included an agreement to arbitrate claims against the provider of health insurance through the employer.

and analysis by attorneys and experts, as well as time-consuming and costly discovery, even prior to a determination of whether the class should be certified.[192] Because of these costs, there is substantial pressure on companies to settle class claims.[193] Mediation is frequently used as a settlement technique, which may increase the costs.[194] Class actions may attract media attention, harming the company's reputation and even affecting stock value.[195] It is little wonder that class actions are feared by companies and valued by plaintiffs and their counsel.

The class action typically is filed by an individual or individuals on behalf of a similarly situated class of employees. It might be argued that the filing of a class claim is an individual rather than a concerted act, because it requires no authorization from other employees to speak on their behalf and no prior consultation with potential class members. Regardless of whether the action is filed under Rule 23 or Section 216 of the FLSA, however, the employee is seeking to initiate concerted activity, and thus, is protected by the current Board interpretation of concerted activity.[196] Like the employee who contacts fellow employees for support or approaches the union to begin an organizing campaign, the class plaintiff is invoking a Section 7 right.[197] If the class is certified, other employees will either opt into the class or be given notice and the opportunity to opt out.[198] If they do not opt out in Rule 23 class actions, they become a part of the class covered by the lawsuit.[199] In either event, a group action results. So long as the complaint is filed under a statute that addresses terms and conditions of employment, e.g., discrimination, wages, hours, leave, or other benefits, the filing

192. Sudbury et al., *Keeping the Monster in the Closet*, *supra* note 3, at 20.

193. *Id.* at 6, 22-23.

194. *Id.* at 20-21.

195. *Id.* at 21.

196. *See supra* notes 112-17 and accompanying text. If there are multiple class plaintiffs, the action is even more clearly concerted, as it involves two or more employees acting jointly to address a workplace complaint. For examples of class actions brought by two or more employees, see *Saur v. Snappy Apple Farms, Inc.*, 203 F.R.D. 281, 284, 290 (W.D. Mich. 2001) (certifying class action under Fair Labor Standards Act brought by two farm workers); Allen v. City of Chi., No. 98 C 7673, 2001 WL 1548966, at *1, 4 (N.D. Ill. Apr. 23, 2001) (certifying class action under Title VII brought by group of minority police officers).

197. *See supra* notes 73, 112-17 and accompanying text; *see also* 29 U.S.C. § 157 (2000) (specifying that joining and assisting labor organizations are protected concerted activities).

198. *See supra* notes 184-88 and accompanying text.

199. *See supra* note 186 and accompanying text. In many Rule 23 cases, opting out is not permissible. *See supra* note 186.

of a class action lawsuit should be considered protected concerted activity.

Long ago, the Board correctly recognized that solicitation of representation rights from fellow employees for a legal claim under the FLSA is protected concerted activity.[200] In that case, the Board and the enforcing court expressly rejected the employer's argument that the action was individual, and thus, not concerted.[201] The court's decision reflects quite directly that the Act's protection encompasses collective legal actions, which combine resources of the plaintiffs for purposes of financing litigation and consolidating power to combat more effectively the employer's greater resources.

> By soliciting signatures to the petition, Sturdivant was seeking to obtain such solidarity among the zanjeros as would enable the exertion of group pressure upon the Association in regard to possible negotiation and settlement of the zanjeros' claims. If suit were filed, such solidarity might enable more effective financing of the expenses involved. Thus, in a real sense, circulation of the petition was for the purpose of "mutual aid or protection." The Association argues that any legal rights to backpay on the part of the zanjeros were individual rights and that therefore there could be no "mutual" aid or protection. But the Association ignores the fact that "concerted activity for the purpose of * * * mutual aid or protection" is often an effective weapon for obtaining that to which the participants, as individuals, are already "legally" entitled.[202]

As indicated by this quoted passage, the fundamental purpose of protecting concerted activity is to enable the precise sort of collective activity that a class action entails—the banding together of employees to assert rights against a more powerful employer.[203]

In determining whether conditioning employment on waiver of the right to litigate violates the Act, one must consider whether it is the right to litigate in court that is protected or the right to a hearing on the claim regardless of the forum. If it is the latter, then the employment is not conditioned on waiver of the right to engage

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200. Salt River Valley Water Users' Ass'n, 99 N.L.R.B. 849, 853-54 (1952), *enforced*, 206 F.2d 325, 328 (9th Cir. 1953).

201. *Salt River Valley Water Users' Ass'n*, 206 F.2d at 328; *Salt River Valley Water Users' Ass'n*, 99 N.L.R.B. at 853-54.

202. *Salt River Valley Water Users' Ass'n*, 206 F.2d at 328.

203. Section 1 of the Wagner Act incorporates the congressional findings that the inequality of bargaining power between employees and employers adversely impacts commerce and prolongs business depressions. 29 U.S.C. § 151 (2000). Congress intended for the protection of employee rights to associate and organize to help correct that inequality. *Id.*

in concerted activity.[204] In reviewing the law regarding class actions and arbitration, it becomes evident that mandatory arbitration will often preclude class action, and thus concerted activity altogether.

Because arbitration is often used to avoid class actions, some arbitration provisions specifically preclude class claims.[205] Others are silent as to whether class-wide arbitrations are permissible.[206] Analysis of the case law to date demonstrates that arbitration has successfully precluded class action litigation in many cases and class action arbitration has not been substituted. In a thorough review of the law relating to class actions and arbitration published in 2000, Professor Jean Sternlight found that few courts had ordered class arbitrations.[207] Subsequent cases have continued the trend.[208] Most courts are unwilling to hold that an arbitration agreement is unenforceable because it precludes class litigation.[209] Furthermore,

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204. This issue is discussed *infra* Part VI.B.

205. *See supra* note 3 and accompanying text.

206. Sternlight, *supra* note 3, at 62. Sternlight's article looked at class action and arbitration generally and was not restricted to employment cases.

207. *Id.* at 38.

208. *See, e.g.*, Randolph v. Green Tree Fin. Corp., 244 F.3d 814, 819 (11th Cir. 2001) (holding that arbitration agreement is enforceable although it precludes the plaintiff from using class action procedures); Johnson v. W. Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000) (same), *cert. denied sub nom.* Johnson v. Tele-Cash, Inc., 531 U.S. 1145 (2001); Adkins v. Labor Ready, Inc., 185 F. Supp. 2d 628, 645-46 (S.D. W. Va. 2001) (same), *aff'd*, 303 F.3d 496 (4th Cir. 2002); Arriaga v. Cross Country Bank, 163 F. Supp. 2d 1189, 1195 (S.D. Cal. 2001) (same).

209. *Randolph*, 244 F.3d at 815, 819; *Arriaga*, 163 F. Supp. 2d at 1195, 1202 (granting motion to compel arbitration despite arbitral preclusion of class actions); Hale v. First USA Bank, No. 00 Civ. 5406, 2001 U.S. Dist. LEXIS 8045, at *20-23 (S.D.N.Y. June 12, 2001) (finding that unavailability of class action does not render TILA claim inarbitrable); Pyburn v. Bill Heard Chevrolet, 63 S.W.3d 351, 364-65 (Tenn. Ct. App. 2001) (finding that trial court erred in refusing to enforce agreement to arbitrate claims under the Tennessee Consumer Protection Act and related common law claims based on the unavailability of a class action where no class was certified); Sternlight, *supra* note 3, at 58-62 and cases cited therein. In *Green Tree Financial Corp. v. Randolph*, the Supreme Court declined to address Randolph's argument that the arbitration agreement was unenforceable because it precluded class actions, as the court below did not address that contention. 531 U.S. 79, 92 n.7 (2000). Justice Ginsburg, in dissent, read the majority opinion as permitting the plaintiff to seek a determination of that issue by the Eleventh Circuit. *Id.* at 97 n.4 (Ginsburg, J., dissenting). On remand, the Eleventh Circuit held that the agreement was enforceable even if it precluded class claims, because class claims are waivable. *Randolph*, 244 F.3d at 818. The court declined to interpret the silent arbitration agreement to permit class claims since Randolph had not made that argument initially, but suggested that based on prior circuit precedent, it would not interpret the agreement to allow class actions without

many courts have interpreted silent agreements to preclude arbitral class actions.[210] Where the agreement expressly prohibits class claims, a few courts have permitted litigation of class claims while requiring arbitration of individual claims, while most have required individual arbitration without permitting class litigation.[211]

Thus far most of the litigation relating to arbitration and class claims has involved consumer claims.[212] In *Gilmer v.*

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an explicit provision. *Id.* at 815-16. The recently revised Uniform Arbitration Act does not address class actions. Janet Hill, *The Revised Uniform Arbitration Act: Third Leg of Modern Arbitration Law, II. Employee Perspective*, *in* ARBITRATION 2001: ARBITRATING IN AN EVOLVING LEGAL ENVIRONMENT, PROCEEDINGS OF THE FIFTY-FOURTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 118 (Jay E. Grenig & Steven Briggs eds., 2002).

210. Sternlight, *supra* note 3, at 69-71 and cases cited therein; *see also Randolph*, 244 F.3d at 815-16, 818 (declining to interpret the silent arbitration agreement to permit class claims in arbitration since Randolph had not made that argument initially, but suggesting that based on prior circuit precedent, it would not interpret the agreement to allow class actions without an explicit provision); Gray v. Conseco, Inc., No. SA CV 00-322-DOC(EEx), 2001 U.S. Dist. LEXIS 21696, at *8 (C.D. Cal. Sept. 6, 2001) (refusing to order class arbitration where agreement did not address class arbitration).

211. *Johnson*, 225 F.3d at 369 (holding that agreement to arbitrate Truth in Lending Act claims and Electronic Fund Transfer Act claims is enforceable despite the fact that it removes the right to pursue class action, as right may be waived); Vigil v. Sears Nat'l Bank, 205 F. Supp. 2d 566, 572-73 (E.D. La. 2002) (rejecting plaintiff's argument that arbitration agreement that precluded class actions involving small consumer claims unconscionable); Furgason v. McKenzie Check Advance, Inc., No. IP00-121-CH/G, 2001 WL 238129, at *11-12 (S.D. Ind. Jan. 3, 2001) (enforcing the arbitration agreement and denying the plaintiff the right to arbitrate class claims under RICO and state usury statutes based on the agreement's provision barring class arbitration); *In re* Managed Care Litig., 132 F. Supp. 2d 989, 999 (S.D. Fla. 2000) (holding class allegations involving claims under RICO and ERISA, and other state and federal statutory and common law claims do not preclude enforcement of arbitration agreements), *aff'd sub nom. In re* Humana Inc. Managed Care Litig., 285 F.3d 971 (11th Cir. 2002), *cert. granted on other grounds sub. nom.* Pacificare Health Sys. Inc. v. Book, 123 S. Ct. 409 (2002); Sternlight, *supra* note 3, at 62-63, 72-74 and cases cited therein; *cf.* Acorn v. Household, Int'l, Inc., 211 F. Supp. 2d 1160, 1170-72 (N.D. Cal. 2002) (refusing to order arbitration where class actions precluded, finding agreement unconscionable); Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000) (refusing to enforce arbitration agreement because it precluded class claims under the Truth in Lending Act and the Michigan Consumer Protection Act); Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867-68 (Cal. Ct. App. 2002) (directing lower court to strike provision prohibiting class actions from arbitration clause as unconscionable and against public policy); State v. Berger, 567 S.E.2d 265 (W. Va. 2002) (granting writ of prohibition against lower court which had ordered arbitration of consumer claim, finding unconscionable the provisions limiting punitive damages and class actions).

212. Since many consumer disputes involve very small losses on the part of each individual but significant amounts when aggregated and, thus, would never be litigated except on a class basis, this is not surprising.

Interstate/Johnson Lane Corp., however, the plaintiff argued that enforcing his arbitration agreement was inconsistent with the ADEA because class and broad injunctive relief were unavailable.[213] The Court rejected the argument, noting that injunctive relief was available and stating "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."[214] Notably, however, *Gilmer* did not involve a class claim. At most, the Court was stating that the plaintiff's argument regarding class relief was unavailing where his claim was individual.[215]

An arbitration agreement was used to contest class certification in the race discrimination case of *Wright v. Circuit City Stores, Inc.*[216] The court dismissed the claims of plaintiffs who had agreed to arbitrate claims arising out of their employment[217] and Circuit City argued with respect to the class certification motion of the remaining plaintiffs that the class was not sufficiently numerous because of the number of employees who had arbitration agreements.[218] While the court denied certification on other grounds, this case suggests the possibility that a mandatory arbitration agreement that is applied only to some employees might bar class claims of other employees not bound.[219]

Several courts have addressed the effect of arbitration agreements on collective action claims under the FLSA.[220] In *Adkins*

213. 500 U.S. 20, 32 (1991).

214. *Id.* (quoting Nicholson v. CPC Int'l Inc., 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)).

215. *Gilmer* did not consider the National Labor Relations Act's concerted activity provisions.

216. No. CV 97-B-0776-S, 2001 WL 867399, at *11 (N.D. Ala. Aug. 1, 2001).

217. *Id.* at *1 n.1.

218. *Id.* at *11. When Circuit City introduced its arbitration program, it was optional for current employees, but mandatory for any new employees. *Id.* at *2. Thus, some employees had agreements and others did not. *Id.*

219. In another case involving Circuit City's employment arbitration agreement, the California Court of Appeals, which found the agreement unconscionable on other grounds, noted that it was "suspect" because of its limitations on class actions as well. Ramirez v. Circuit City Stores, Inc., 90 Cal. Rptr. 2d 916, 920 (Cal. Ct. App. 1999). Review was subsequently granted, deferred, and then dismissed by the California Supreme Court and the case was remanded to the appellate court. Ramirez v. Circuit City Stores, Inc., 995 P.2d 137 (Cal. 2000) (en banc) (granting review and deferring, pending the court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), which was decided August 24, 2000); Ramirez v. Circuit City Stores, Inc., 11 P.3d 955 (Cal. 2000) (dismissing review and remanding).

220. Like consumer claims, FLSA claims may involve a number of employees

v. Labor Ready, Inc.,[221] the plaintiff filed a class action claim seeking payment for call time, travel time, training time, and overtime.[222] The district court granted the employer's motion to compel arbitration despite the conclusion that a class action could not proceed in arbitration.[223] Relying on *Gilmer* and the Truth in Lending Act ("TILA") case of *Johnson v. West Suburban Bank*,[224] the court found that the FLSA did not preclude waivers of the right to file a collective action and that by entering the arbitration agreement the plaintiff had waived that right.[225] The court reasoned that the same remedies would be available in litigation and arbitration and in response to the argument that plaintiffs with small claims would not be able to vindicate their claims effectively without the class action device, the court stated:

> While legal representation for individual claims with small amounts at stake in the arbitral forum may lack the vigor of legal representation for large class actions proceeding in a judicial forum, attorneys should nevertheless not be dissuaded from bringing individual FLSA claims of a small monetary value within the arbitration forum, particularly when, as here, there are a large number of related cases.[226]

With less analysis, the Court of Appeals for the Fourth Circuit affirmed.[227] Because Adkins made no showing as to the cost of arbitration, the amount of money at stake for each employee or the financial status of the class members, the court found the "complaint about the inability to bring a class action moot."[228] Further, the court asserted that Adkins made no showing that the right to bring a class action under the FLSA could not be waived, so the

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with small claims that may never be litigated individually.

221. 185 F. Supp. 2d 628 (S.D. W. Va. 2001), *aff'd*, 303 F.3d 496 (4th Cir. 2002).

222. *Id.* at 630-31.

223. *Id.* at 646-47; *see also* Marzek v. Mori Milk & Ice Cream Co., No. 01 C 6561, 2002 WL 226761, at *3 (N.D. Ill. Feb. 13, 2002) (ordering arbitration of FLSA claim, noting that nothing in arbitration agreement precluded class claims but also suggesting that if class action were not available agreement would still be enforceable).

224. 225 F.3d 366 (3d Cir. 2000).

225. *Adkins*, 185 F. Supp. 2d at 645-46 (citing *Johnson*, 225 F.3d 366). The District Court of Oregon reached a similar conclusion in *Horenstein v. Mortgage Market, Inc.*, No. Civ. 98-1104-AA, 1999 U.S. Dist. LEXIS 22995, at *1 (D. Or. July 23, 1999). That decision was affirmed by the Ninth Circuit in an unpublished opinion. Horenstein v. Mortgage Mkt., Inc., No. 99-36125, 2001 U.S. App. LEXIS 9267 (9th Cir. 2001).

226. *Adkins*, 185 F. Supp. 2d at 646.

227. Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002).

228. *Id.* at 503.

unavailability of a class action, without more, did not invalidate the agreement.[229]

By way of contrast, the United States District Court for the District of Minnesota denied a motion to dismiss and compel arbitration in a class action claim for overtime under the FLSA.[230] Relying on *Gilmer,* the employer argued that the collective action provision in the FLSA was a procedural right and that denial of the right did not prevent vindication of plaintiffs' claims.[231] The court disagreed, finding that the deprivation of procedural rights can have a:

> real and detrimental impact on an individual's ability to effectively vindicate his or her substantive statutory rights. This is no more true than under the particularized facts of this case. As plaintiffs emphasize, the size of each individual plaintiff's claim for overtime wages is relatively small. Absent the procedural safeguards guaranteed by Congress, most, if not all, the plaintiffs will likely forego pursuing their claims.[232]

Based on the denial of the right to proceed collectively, along with other invalid provisions of the agreement, the court refused to force the plaintiffs to arbitrate their claims.[233]

While the law regarding class action and arbitration is not extensively developed, it seems fair to conclude that there is at least

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229. *Id.*

230. Bailey v. Ameriquest Mortgage Co., No. CIV. 01-545(JRTFLN), 2002 WL 100391, at *9 (D. Minn. Jan. 23, 2002).

231. *Id.* at *6-7. The employer also relied on *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000). *Id.* Although the agreement was silent as to whether the claims could proceed collectively in arbitration, the employer clearly took the position that they could not, a position the court accepted. *Id.*

232. *Id.* Similar problems exist under the Worker Adjustment and Retraining Notification Act. *See* Cruz v. Robert Abbey, Inc., 778 F. Supp. 605, 612 (E.D.N.Y. 1991) (noting in certifying class that many individuals would be unlikely to pursue claims in the absence of class certification), *remanded sub nom.* Cruz v. Local No. 3, IBEW, 34 F.3d 1148 (2d Cir. 1994).

233. *Bailey*, 2002 WL 100391, at *6-9. Among the other provisions the court found problematic were a reduced statute of limitations that limited the plaintiffs' damage recovery, a fee splitting provision, and a requirement that plaintiffs travel to California to arbitrate their claims. *Id.* at *7. *Bailey* invalidated the agreement because of the inconsistency of the deprivation of the right to proceed collectively with the statute. *Id.* Other courts have evaluated the deprivation of class action on unconscionability grounds. *See, e.g.*, Vigil v. Sears Nat'l Bank, 205 F. Supp. 2d 566, 573 (E.D. La. 2002) (rejecting plaintiff's argument that arbitration agreement that precluded class actions involving small consumer claims was unconscionable); Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 862 (Cal. Ct. App. 2002) (finding prohibition on class action unconscionable and thus, invalid).

a substantial risk that an arbitration agreement will preclude class action claims altogether, unless it specifically provides for class arbitration.[234] Accordingly, at a minimum, employer imposition of an arbitration agreement that does not expressly permit class arbitration should be found to violate the NLRA because it interferes with employees' Section 7 rights.[235] This interpretation is not only consistent with the law relating to class arbitration; it also comports with Board law which invalidates ambiguous employer rules that might be interpreted to restrict concerted activity, construing them against the drafting employer.[236] Moreover, as demonstrated by the case of *Wright v. Circuit City Stores, Inc.*, discussed above, imposition of an arbitration agreement on some employees may deprive other employees of their right to engage in the concerted activity of a class action.[237]

Such a holding is consistent with the goals and purposes of the Act, which was designed to encourage employees to act concertedly

234. As this Article neared publication, the Supreme Court granted certiorari in *Green Tree Financial Corp. v. Bazzle*, to decide the question of whether Section 4 of the Federal Arbitration Act bars class arbitration where the arbitration agreement is silent. 123 S. Ct. 817 (2003) (mem.). The decision in *Bazzle* may resolve some of the uncertainty about the availability of class and consolidated arbitration. Since some courts have relied on Section 4 to find class and consolidated arbitration unavailable where the agreement is silent, those courts might alter their view if the Supreme Court rules that Section 4 does not mandate such a conclusion. *See, e.g.*, Champ v. Siegel Trading Co., 55 F.3d 269, 275 (7th Cir. 1995); Gray v. Conseco, Inc., No. SA CV 00-0322-DOC(Eex), 2001 U.S. Dist. LEXIS 21696, at *6-7 (C.D. Cal. Sept. 6, 2001). If the Court holds in *Bazzle* that Section 4 prohibits class or consolidated arbitration where not expressly authorized by the agreement, then the NLRB and the courts should conclude that an arbitration agreement without such authorization is void as violative of Section 7 rights. *See infra* notes 235-54 and accompanying text. If the Court finds to the contrary, the presumption of illegality should still apply in NLRB proceedings absent express authorization of class or consolidated arbitration, at least until it is clear that courts are overwhelmingly interpreting silent agreements to permit class and consolidated proceedings in arbitration. *See id.* As discussed *infra* note 343, a court considering the issue on a motion to dismiss a statutory claim based on the arbitration agreement could interpret a silent agreement to permit class arbitration to avoid the adverse impact on Section 7 rights.

235. *See, e.g.*, Salt River Valley Water Users' Ass'n v. NLRB, 206 F.2d 325, 328 (9th Cir. 1953) (upholding the Board's conclusion that circulating petition giving employee power of attorney to represent employees in negotiation or legal action under Fair Labor Standards Act, to recover pay due, was protected); Frierson Bldg. Supply Co., 328 N.L.R.B. 1023, 1026 (1999) (finding concerted activity where one employee acted with authorization from other employees); Alchris Corp., 301 N.L.R.B. 182, 190 (1991) (same); "The Loft," 277 N.L.R.B. 1444, 1457 (1986) (same).

236. *See infra* notes 279-81 and accompanying text.

237. *See supra* notes 216-19 and accompanying text.

in order to counter the power of the employer.[238]

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.[239]

Class actions bring the power of the group to bear on the employer accused of discrimination or other violations of employee rights. The employees, combining their resources, are better able to combat unlawful actions by the more powerful employer. And as the Supreme Court has repeatedly recognized, in many situations the claims will only be viable if brought collectively. Thus, denial of the collective proceeding prevents the employees from using concerted activity to vindicate their rights.

It might be argued, as the employer claimed in *Bailey*, that the right to proceed as a class is a procedural right that attaches to the forum of choice.[240] In *Gilmer*, the Court indicated that an arbitration agreement was a forum choice, not a waiver of substantive rights, and rejected the plaintiff's argument that the consequent waiver of procedural rights warranted invalidation of the agreement absent a showing that he could not effectively vindicate his statutory rights in arbitration as a result.[241] Similarly, the argument goes, the choice of arbitration (even by adhesion contract) can waive the class action procedure. In this respect, there might be a difference between Rule 23 class actions, which result from a rule of civil procedure, and Section 216(b) collective actions, which result from a statutory provision in the FLSA. The FLSA, along with the EPA, ADEA, and FMLA which adopt its collective action provisions, might be viewed as providing a substantive right to proceed collectively.[242] If that is

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238. *See* 29 U.S.C. § 151 (2000).

239. *Id.*

240. Bailey v. Ameriquest Mortgage Co., No. CIV. 01-545(JRTFLN), 2002 WL 100391, at *6 (D. Minn. 2002). For an argument that compulsory arbitration does not affect concerted activity because it does not affect substantive rights, see RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 68 (1997). Professor Bales, however, premises his argument on retention of the right to bring a class action or attain class-wide injunctive relief from the arbitrator. *Id.*

241. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 30-33 (1991).

242. For a discussion of Section 216(b) claims and arbitration, see Matthew W. Finkin, *Employee Representation Outside the Labor Act: Thoughts on*

the case, employees could lawfully be deprived of the right to proceed as a class by arbitration agreements applying to claims under Title VII, the ADA, and ERISA because class actions exist solely by virtue of a procedural rule, but not under the FLSA, EPA, ADEA, and the FMLA where there is a statutory right to collective action. In addition, because claims under the FLSA and perhaps the EPA are more likely to involve smaller amounts, such as pay differentials or overtime, deprivation of the class remedy may well prevent effective vindication of the claims.

While Rule 23 is procedural,[243] the *Bailey* court and others have noted that the deprivation of a procedural right can have substantive effects.[244] One of the objectives of class actions is to afford judicial access to plaintiffs with small claims that would otherwise be uneconomical to bring.[245] In addition, class actions have an "*enforcement* or *deterrence*" objective, as they serve a private attorney general function, bringing collective power to bear on the defendant and thus enhancing the government's regulatory enforcement resources.[246] This notion of collective power is precisely what underlies Section 7.[247] This power is the source of much resistance to class actions[248] and the efforts to use arbitration to

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Arbitral Representation, Group Arbitration and Workplace Committees, 5 U. PA. J. LAB. & EMP. L. 75 (2002). Professor Finkin suggests that it would "deny fundamental fairness" to allow an employer to preclude both class litigation and aggregation of claims in arbitration. *Id.* at 85. He further argues that 216(b) collective claims, requiring opt-in rather than opt-out, could be effectively managed in arbitration. *Id.* at 84.

243. Differentiating between Rule 23 classes and 216(b) classes is appealing because of the distinctive source of the rights. Both have the same purposes and effects, however, and both have a direct relationship to the effective use of Section 7 rights.

244. *See supra* note 232 and accompanying text. In their 2000 book about class actions, Professor Hensler and her co-authors note that all of the controversy about class actions is at bottom a "*dispute about* what kinds of lawsuits and what kinds of resolutions of lawsuits *the legal system should enable*," a recognition of the substantive nature of the issues. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 50 (2000).

245. HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 1.06, at 1-18 (3d ed. 1992).

246. *Id.* at 1-19 & n.72 (noting that the Supreme Court recognized these effects of class actions in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972)). There is, however, some debate about this regulatory intent of class litigation. *See* HENSLER ET AL., *supra* note 244, at 69-71.

247. Indeed, class actions derived from the long English tradition of using representative actions to address collective harms. HENSLER ET AL., *supra* note 244, at 10.

248. Class action critics argue that class actions are used as a hammer to

eliminate class actions.[249] Cases involving civil rights, including employment discrimination, have long been a prominent part of class action litigation and reform efforts.[250] Thus, the class action device is not merely a procedure of the forum, but rather a device that impacts the effectiveness of the cause of action itself.

Even more important, the right that is being violated here is the substantive Section 7 right to concerted activity which is being effectuated through the class action device. Forcing the employee to forgo the judicial forum eliminates the vehicle for exercise of the Section 7 right, and therefore, deprives the employee of the right itself. While Congress could eliminate Rule 23, which would deprive employees of their right to file class action discrimination claims under Title VII, inter alia, that does not mean that the employer can restrict that right. Congress could eliminate the EEOC as a vehicle for statutory enforcement, which would also limit a vehicle for concerted activity, but the NLRB has held that an employer cannot maintain a rule preventing employees from contacting government agencies and forcing them to use an internal grievance procedure instead, because it interferes with Section 7 rights.[251] The availability of one vehicle for the exercise of Section 7 rights does not justify an employer's restriction of another.[252]

In many cases, the class action may be the only effective means of effectuating the Section 7 right. Employees with relatively small individual claims for overtime pay under the FLSA may be unable to afford the cost of arbitration, which will often exceed the value of the claim. Where an employer has a discriminatory practice, it may continue indefinitely and repeatedly, affecting many other employees if it is challenged only through individual arbitrations, which provide only individual remedies. Each subsequently affected employee would have to bring an individual case and relitigate the issue, with the risk of loss, the absence of precedential effect of prior decisions, and the costs of litigation. There would be little incentive for the recalcitrant employer to eliminate the practice. While

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force businesses into settling nonmeritorious cases to the benefit of the lawyers rather than the ostensible plaintiffs. *See In re* Rhone-Pollenc Rorer, Inc., 51 F.3d 1294, 1299, 1304 (7th Cir. 1995) (granting mandamus petition and directing district court to decertify class citing, inter alia, various authorities relating to pressure to settle class actions); HENSLER ET AL., *supra* note 244, at 15, 18, 33; Eric D. Green, *Advancing Individual Rights Through Group Justice*, 30 U.C. DAVIS L. REV. 791, 801-02 (1997).

249. *See supra* note 3 and accompanying text.

250. *See* HENSLER ET AL., *supra* note 244, at 12, 54, 57, 59.

251. *See infra* note 274 and accompanying text.

252. This argument is further developed in the next section. *See infra* notes 274-76 and accompanying text.

employees would still be free to discuss the problems of overtime pay or discrimination with one another, to approach the employer as a group seeking a change in the practice, and to encourage one another to arbitrate claims, they would be deprived of the only effective way to address the problem—combining their resources as a class to utilize their collective power to force the employer to end the discrimination—the precise purpose of Section 7.

Finally, if class arbitration proves as unworkable as its critics suggest,[253] then litigation may be the only available vehicle for class claims. In that event, the compulsory arbitration agreement cannot be upheld even if it permits class arbitration.

B. Class Arbitration

The arbitration agreement that does not expressly permit class claims is the easiest case.[254] Concerted activity is stifled where there is no forum for collective claims. Where the agreement permits class claims in arbitration,[255] the Board or court must determine whether precluding class litigation, while permitting class arbitration, chills concerted activity. In addition, employees presumably retain the right to bring such class claims concertedly to the appropriate enforcement agency,[256] where one exists.[257]

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253. For a thorough discussion of the criticisms, see Sternlight, *supra* note 3, at 44-53. Among the difficulties cited are the need for an ongoing judicial role to insure protection of the interests of class members, including due process rights; logistical difficulties in coordination between the arbitrator and the court; and determination as to who selects the arbitrator for the plaintiff class members. *Id.* at 33, 49-53; *see also* Sara Adler, *Employment Class Actions and Alternative Dispute Resolution,* 53 LAB. L.J. 133, 133, 137 (2002) (pointing out that arbitration is currently used for remedial issues in some employment class actions and suggesting that use for liability determinations will grow despite the complexity and need for continuing court or agency supervision).

254. Because of the uncertainty about the availability of class arbitration, see *supra* notes 205-37 and accompanying text, the NLRB and the courts should find mandatory arbitration agreements that do not expressly permit class actions violative of Section 8(a)(1).

255. This assumes that arbitration proves to be a workable method of adjudicating class claims.

256. In *Gilmer*, the Court indicated that the employee could still file a charge with the EEOC despite the arbitration agreement. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991). And in *EEOC v. Waffle House, Inc.*, the Supreme Court ruled that the EEOC could seek individual relief for employees who signed arbitration agreements. 534 U.S. 279, 306-07 (2002). Any arbitration agreement that precluded the employee from filing an administrative charge should, thus, be found unlawful under *Gilmer*. It should also be found unlawful under the NLRA as barring concerted activity. *See infra* notes 277-81 and accompanying text.

257. Not all statutes have an agency with independent enforcement

Certainly the right to engage in concerted activity is not unlimited, and the Board has long held that some concerted activity is not protected by the Act. Where employees engage in concerted activity that is unlawful, indefensible, or contrary to the statutory purpose, they may lose statutory protection.[258] In addition, the employer can maintain rules that interfere with some concerted activity if the employer interest outweighs that of the employees under the Act.[259]

Filing a lawsuit against the company is not unlawful or

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authority. For example, the Worker Adjustment and Retraining Notification Act ("WARN" Act) requires judicial enforcement by affected employees or their representative. 29 U.S.C. § 2104(a)(5) (2000). Because individual WARN Act damages are small, at most sixty days pay and lost benefits, and plaintiffs have lost their employment, effective enforcement requires either class actions or representative actions filed by unions. *See id.* § 2104(a)(1)-(2) (setting forth damages); Louise Sadowsky Brock, *Overcoming Collective Action Problems: Enforcement of Worker Rights*, 30 U. MICH. J.L. REFORM 781, 802-03 (1997) (discussing cases noting the amenability of WARN to class actions and the unlikelihood of individual enforcement); Richard W. McHugh, *Fair Warning or Foul? An Analysis of the Worker Adjustment and Retraining Notification (WARN) Act in Practice*, 14 BERKELEY J. EMP. & LAB. L. 1, 60-61 (1993) (discussing lack of enforcement and reasons therefore). Requiring arbitration of WARN Act claims without permitting class actions would effectively doom enforcement where there was no union representative to arbitrate the claim on behalf of the employees. Brock, *supra*, at 802; McHugh, *supra*, at 61 (noting the high percentage of cases brought by unions relative to their percentage in the work force). In addition, some state discrimination laws require enforcement action by the employee rather than the agency. *See, e.g.*, NEV. REV. STAT. ANN. § 613.405 (Michie 2000) (providing that any person aggrieved by illegal discrimination can file a claim with the Nevada Employment Commission; the rules governing the Nevada Equal Rights Commission make no provision for a complaint to be filed by the Commission, see NEV. ADMIN. CODE ch. 233–230, § 002 (2002)); *see, e.g.*, WIS. STAT. ANN. § 111.39 (West 2002) (making no provision for the Commission or member thereof to file a complaint or act on behalf of the complainant in any manner); WYO. STAT. ANN. § 27-9-106 (Michie 2001) (filing of complaint and request for hearing to be made by aggrieved party).

258. *See, e.g.*, NLRB v. Local 1229, IBEW, 346 U.S. 464, 477-78 (1953) (holding discharge of picketing employees lawful where their conduct in disparaging the employer's product was disloyal); S. S.S. Co. v. NLRB, 316 U.S. 31, 32-33, 48 (1942) (holding NLRB abused its discretion by reinstating employees who engaged in a work stoppage in violation of the mutiny provisions of federal law); NLRB v. Marshall Car Wheel & Foundry Co., 218 F.2d 409, 411, 416-17 (5th Cir. 1955) (finding employee walkout unprotected where molten iron would cause costly damage to machinery if it were allowed to harden); Elk Lumber Co., 91 N.L.R.B. 333, 337-39 (1950) (finding slowdown unprotected because means unlawful); *supra* notes 153-54 and accompanying text (discussing *Emporium Capwell*).

259. *See infra* notes 263-81 and accompanying text.

indefensible, nor is it contrary to the purpose of the NLRA.[260] That the employees potentially would retain a forum for adjudicating complaints (the arbitration procedure) does not privilege employer insistence that employees waive the right to bring a class action lawsuit. The right to engage in concerted activity is an employee right. Absent conduct which justifies loss of protection, the employer should not be able to penalize employees for engaging in concerted activity or condition employment on waiving the right to participate in particular types of concerted activity. The employer unquestionably cannot promote one union over another, thereby interfering with the employees' choice of representative.[261] Nor should the employer be permitted to interfere with employee choice as to the form of protest against the employer's discriminatory or otherwise unlawful working conditions, for the employer is still limiting the employee's statutory right.[262]

The Board has permitted employers to restrict Section 7 rights where an employer interest outweighs that of the employees. For example, an employer's property interest allows it to exclude union activity by nonemployees on site unless the employees are otherwise inaccessible.[263] An employer's interest in productivity permits restriction of union solicitation on work time.[264] In *Desert Palace, Inc.*,[265] despite the restriction on concerted activity, an employer lawfully maintained and enforced a confidentiality rule during an investigation of illegal drug activity in order to protect witnesses from danger and prevent destruction of evidence and fabrication of testimony.[266] The burden is on the employer, however, to justify its

260. The only exception is where the lawsuit is filed in bad faith. *See supra* note 158 and accompanying text.

261. *See* 29 U.S.C. § 158(a)(2) (2000); NLRB v. Keller Ladders S., Inc., 405 F.2d 663, 667 (5th Cir. 1968) (employer violated Act by aiding union in organizing employees); Windsor Place Corp., 276 N.L.R.B. 445, 449 (1985) (finding unlawful employer assistance to union in soliciting authorization cards); *cf.* RCA del Caribe, Inc., 262 N.L.R.B. 963, 965-68 (1982) (finding it lawful for employer to continue bargaining with incumbent union despite filing of petition by rival union, noting that any action by employer could be perceived as favoring one union over another); Bruckner Nursing Home, 262 N.L.R.B. 955, 957-58 (1982) (permitting employer in rival union situation to recognize majority union before filing of petition, but finding post-petition recognition to be unlawful influence over employees' free choice).

262. While the limits on employee choice of representative derive from Section 8(a)(2), it is consistent with that interpretation and with the purpose of the Act to read Section 8(a)(1) as prohibiting interference with the employee's choice as to the form his or her concerted activity should take.

263. Lechmere, Inc. v. NLRB, 502 U.S. 527, 531-32 (1992).

264. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 794-95, 804-05 (1945).

265. Desert Palace, Inc., 336 N.L.R.B. No. 19 (Sept. 28, 2001).

266. *Id.* at *2; *cf.* Phoenix Transit Sys., 337 N.L.R.B. No. 78, at *1 (May 10,

curtailment of employee Section 7 rights.[267] In *Desert Palace, Inc.*, the confidentiality requirement was justified based on allegations of a management cover-up of the drug use and threats of retaliation and violence against witnesses.[268] However, in another case, an employer could not justify a confidentiality rule that prohibited employees from discussing sexual harassment complaints among themselves and with third parties.[269]

To justify restriction to the arbitral forum, the employer might argue that it must require all employees to arbitrate in order to establish an effective arbitration system.[270] If employees could opt out, then the system would not be cost effective for the employer to create. In addition, the employer might suggest that arbitration provided a benefit to the employees as a whole, by providing a quicker, cheaper forum for dispute resolution,[271] which warrants restriction on the Section 7 rights of those who want to escape the arbitral system. Thus, the employer (and employee) interest in establishing the system justifies the limitation on Section 7 rights. It seems unlikely that this argument would merit restricting either class or consolidated claims altogether because the legitimate interests of the employer could be satisfied by permitting such claims to proceed in arbitration.[272] The employer interest in establishing an arbitration system could be satisfied by offering it to managers and supervisors not covered by the Act, and by persuading enough employees to agree to arbitration voluntarily to make the system cost effective.[273] Relying on the employer's assertion of the employee interest is a questionable method. If the employer cannot convince enough employees of the value of the system to obtain voluntary agreement without threat of loss of employment, then the burden on Section 7 rights is not justifiable.

2002) (finding rule requiring confidentiality of sexual harassment complaints overly broad and unlawful).

267. *Desert Palace, Inc.*, 336 N.L.R.B. No. 19, at *5.

268. *Id.* at *2.

269. *Phoenix Transit Sys.*, 337 N.L.R.B. No. 78, at *1. At the time of enforcement, the investigation was complete although the employees had not been so informed. *Id.* at *3-4.

270. *See* Estreicher, *Predispute Agreements, supra* note 20, at 1358-59.

271. *See* Estreicher, *Saturns for Rickshaws, supra* note 5, at 563-64; St. Antoine, *supra* note 5, at 91-93.

272. The interest in avoiding class actions that employers frequently assert is not an interest that should be given any weight. *See supra* note 3 and accompanying text.

273. Employees have a right under Section 7 to refrain from concerted activity. 29 U.S.C. § 157 (2000). Accordingly, any employee could agree to arbitrate individually rather then participating in a concerted class claim so long as such agreement was not coerced by threat of deprivation of employment.

Although the Supreme Court has suggested that agreement to arbitration is merely agreement to an alternative forum, the Board has not permitted employers or unions to cabin employees' choice of forum for vindicating statutory rights. The employer cannot lawfully insist to impasse in negotiations on a contractual provision that bars processing of a grievance where the employee files a statutory claim.[274] The employer cannot refuse to discuss grievances where the employee has filed a statutory claim.[275] Nor can the union insist that employees exhaust internal union remedies before filing unfair labor practice charges, unless purely internal union matters are involved.[276] This is so despite the fact that employees retain the right to pursue their claim in one forum. Following these precedents, the employer should not be able to insist that the employee limit forum choice for concerted activity by conditioning employment on such a waiver. A strong employer could force employees (or unions) to agree to pursue claims in the forum least likely to vindicate the employee rights.

Furthermore, although the arbitration agreement may not expressly preclude the employees from filing administrative charges with an agency such as the EEOC, it may discourage such charges because the employees may perceive the agreement as limiting them to the arbitral forum. As the Board noted in *Reichhold Chemicals*:[277]

> Notwithstanding that the literal scope of the proposed waiver is narrow, we find merit in the General Counsel's contention that the waiver could have an improper chilling effect on the filing of charges in situations where the purported waiver would be ineffective .... [E]mployees likely would read the waiver as foreclosing all recourse to the Board concerning discipline linked to the no-strike clause, and thus there is a strong probability that employees would not even make such an inquiry [to the Board regarding the scope of the waiver].[278]

As in *Reichhold*, employees might be chilled from filing charges concertedly with the EEOC by an arbitration agreement, even if such action were not barred. Thus, the retention of that right does not save the employer who conditions employment on the waiver of litigation.

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274. *See* Kolman/Athey, 303 N.L.R.B. 92, 96 (1991); *see also* Kinder-Care Learning Ctrs., 299 N.L.R.B. 1171, 1171 (1990) (finding employer requirement that employees make complaints to the employer before approaching any other organization or agency with the complaint violated Section 8(a)(1)).

275. *See* Cal. Pie Co., 329 N.L.R.B. 968, 975 (1999).

276. *See* NLRB v. Indus. Union of Marine & Shipbuilding Workers of Am., 391 U.S. 418, 424-25 (1968).

277. 288 N.L.R.B. 69 (1988).

278. *Id.* at 72.

The Board historically has evinced concern with overly broad employer rules that have the potential to chill protected employee conduct.[279] Where a rule is ambiguous and can be read to prohibit statutorily protected activity, the ambiguity has been construed against the employer as drafter of the rule, rendering the rule unlawful on its face.[280] Consistent with this precedent, an arbitration agreement which can be read to preclude any protected activity such as filing an EEOC charge or initiating a class action, is invalid on its face even if the employer did not intend to bar such action.[281]

C. *Individual and Multiple Employee Claims*

The class action is the clearest, but not the only form of concerted activity involved in adjudicating employment law claims. A mandatory arbitration agreement also interferes with protected activity because it bars two or more employees from acting together to litigate statutory discrimination claims. Such joint litigation would certainly be protected as concerted[282] and is not uncommon.[283]

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279. *See, e.g.*, Republic Aviation Corp. v. NLRB, 324 U.S. 793, 795-96, 803 (1945) (upholding Board decision striking down, as overly broad, a rule prohibiting solicitation on non-work time); IRIS U.S.A., Inc., 336 N.L.R.B. No. 98, at *1 (Nov. 9, 2001) (finding unlawful maintenance of a rule requiring employees to keep information about employees confidential despite lack of evidence of enforcement); Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998) (applying standard that invalidates rules that would "reasonably tend to chill employees in the exercise of their Section 7 rights" even in the absence of enforcement); Am. Cast Iron Pipe Co., 234 N.L.R.B. 1126, 1133-34 (1978), *enforced*, 600 F.2d 132 (8th Cir. 1979) (invalidating rule that prohibited false statements, rather than maliciously false statements, as overbroad).

280. *Lafayette Park Hotel*, 326 N.L.R.B. at 828; James E. Stanford, Inc., 249 N.L.R.B. 623, 624 (1980) (stating that:

> [i]t is well settled that the reasonably foreseeable effects of the wording of a no-solicitation rule on the conduct of employees will determine its legality, and that where the language is ambiguous and may be misinterpreted by the employees in such a way as to cause them to refrain from exercising their statutory rights, then the rule is invalid even if interpreted lawfully by the employer in practice).

281. While a court deciding a motion to compel arbitration in lieu of litigation might read an arbitration agreement to omit unlawful provisions and thereby find it enforceable, see *infra* note 343, the Board should invalidate an arbitration provision that is susceptible of an interpretation that limits concerted activity because of the chilling effect on employee rights. The employer can then redraft the agreement to comply with the law.

282. *See, e.g.*, Franklin Iron & Metal Corp., 315 N.L.R.B. 819, 822 (1994) (finding that two employees who agreed to file anti-discrimination charges and went to the agency together but filed separate charges alleging racial discrimination in their wages were engaged in concerted activity); *see also* Mohave Elec. Coop., Inc. v. NLRB, 206 F.3d 1183, 1187, 1189 (D.C. Cir. 2000)

Similarly, it would bar litigation by an employee seeking injunctive relief which would benefit all employees, with the support and/or authorization of at least one of those employees.[284] And finally it might be construed to prohibit litigation by one employee supported by others who have agreed to serve as witnesses for the employee who sues.[285] If the mandatory arbitration agreement does not permit joint arbitration or broad injunctive relief benefiting a class even where the arbitration is initiated by one employee, then it clearly inhibits concerted activity in violation of the Act. Furthermore, if litigation preclusion alone violates the Act, as argued above, then employment could not lawfully be conditioned on an arbitration agreement that bars litigation.

1. Joint or Consolidated Claims

While the Federal Rules of Civil Procedure are generous in allowing the federal courts to consolidate claims in one case and to join additional parties,[286] arbitral consolidation is more

(finding two employees who filed petitions for injunctions in municipal court in an effort to protect themselves from physical harassment by management after meeting with other employees who supported and encouraged the filing, were discharged for engaging in protected concerted activity).

283. *See, e.g.*, Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1241-42 (7th Cir. 1992) (two employees filed suit jointly under ADEA challenging their terminations); Lockart v. Westinghouse Credit Corp., 879 F.2d 43, 46 (3d Cir. 1989) (multiple former employees filed age discrimination claims); Curtis v. Airborne Freight Corp., 87 F. Supp. 2d 234, 235-36 (S.D.N.Y. 2000) (claim by African-American and Hispanic employees alleging racial discrimination under Title VII); Vonderohe v. B & S of Fort Wayne, Inc., 36 F. Supp. 2d 1079, 1080 (N.D. Ind. 1999) (four female employees filed a sexual harassment claim against the corporation); McCleland v. Montgomery Ward & Co., No. 95C237, 1995 WL 374185, at *1 (N.D. Ill. June 21, 1995) (three female employees filed Title VII sexual harassment claim against their employer).

284. *See, e.g.*, Criswell v. W. Airlines, Inc., 709 F.2d 544, 546, 547 & n.2, 558 (9th Cir. 1983) (affirming district court's injunctive relief against system-wide application of age-based retirement policy although no class action filed), *aff'd*, 472 U.S. 400 (1985).

285. *See, e.g.*, Boese Hilburn Elec. Serv. Co., 313 N.L.R.B. 372, 372-73 (1993) (finding employee who orally supported another employee's claim that failure to provide her with maternity leave was unfair was engaged in concerted activity); Yellow Freight Sys., Inc., 297 N.L.R.B. 322, 322-23, 327 (1989) (finding employee engaged in concerted activity when he intervened with employer on behalf of employee who was being sexually harassed and then took her to antidiscrimination agency to file charges about the harassment), *enforced*, 930 F.2d 316 (3d Cir. 1991). An arbitration agreement would interfere with concerted activity in these circumstances only if the argument that limiting plaintiffs to a particular forum for concerted activity is unlawful is accepted. *See supra* notes 258-81 and accompanying text.

286. *See* FED. R. CIV. P. 42(a) (stating that:

problematic.[287] The federal courts commonly permit employment law claims of multiple employees to be joined for purposes of litigation where there is a common question of law or fact, broadly interpreted.[288] It is not uncommon for arbitration agreements to ban consolidation of claims.[289] Further, as in the case of class actions, a number of courts have refused to order consolidated arbitration where the agreement does not expressly permit consolidation.[290]

> [w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay);

FED. R. CIV. P. 19 (addressing joinder of persons needed for just adjudication); FED. R. CIV. P. 20(a) (stating that:

> [a]ll persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action);

FED. R. CIV. P. 24 (addressing both permissive intervention and intervention as of right).

287. *See* Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989); Sternlight, *supra* note 3, at 70-71, 84-85 and cases cited therein. For a thorough discussion of the consolidation issue, see Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473 (1987).

288. Alexander v. Fulton County, 207 F.3d 1303, 1322-24 (11th Cir. 2000) (finding that multiple discrimination claims were properly tried together under Rule 20); King v. Ralston Purina Co., 97 F.R.D. 477, 478-79, 481 (W.D.N.C. 1983) (refusing to sever age discrimination claims of three employees who worked in different locations and different divisions where they alleged company wide policy of discrimination); King v. Pepsi Cola Metro. Bottling Co., 86 F.R.D. 4, 5-6 (E.D. Pa. 1979) (refusing to sever claims by six employees alleging race discrimination, finding that allegations of a policy of discrimination constituted a common question of fact sufficient to justify joinder).

289. *See* Fields v. Howe, No. IP-01-1036-C-B/S, 2002 U.S. Dist. LEXIS 4515, at *9 (S.D. Ind. Mar. 14, 2002); Pick v. Discover Fin. Servs., Inc., No. 00-935-SLR, 2001 U.S. Dist. LEXIS 15777, at *6 (D. Del. Sept. 28, 2001); Flores v. Transamerica HomeFirst, Inc., 113 Cal. Rptr. 2d 376, 379 (Cal. Ct. App. 2001).

290. *See* Clarendon Nat'l Ins. Co. v. John Hancock Life Ins. Co., No. 00 Civ. 9222, 2001 U.S. Dist. LEXIS 13736, at *7 (S.D.N.Y. Sept. 4, 2001); Dominium Austin Partners, L.L.C. v. Lindquist, No. C5-00-2010, 2001 Minn. App. LEXIS 943, at *26-28 (Minn. Ct. App. Aug. 21, 2001) (citing Eighth Circuit's interpretation of FAA to preclude consolidation where agreement is silent, and distinguishing Minnesota Supreme Court case permitting consolidation); Sternlight, *supra* note 3, at 70-71, 84-85 and cases cited therein; *cf.* Northeast Concrete Prods. v. U.S. Fid. & Guar. Co., No. 99-6377, 2002 R.I. Super. LEXIS 58, at *7-8 (R.I. Super. Ct. Apr. 23, 2002) (noting the general trend against consolidation without party consent, but ordering consolidation in case where the parties and issues were intertwined and neither party could demonstrate

Indeed, many of the cases denying class arbitration rely on the lack of authority to consolidate claims where the agreement does not expressly provide for consolidation.[291] For purposes of the issue here then, the result should be the same. If the agreement or arbitral law does not expressly permit joint arbitration,[292] the agreement should be invalidated, as it interferes with the employees' rights to file concerted claims against the employer.

2. Broad Injunctive Relief

Under the employment discrimination laws, where unlawful conduct is found that affects individuals other than the plaintiffs, courts can enjoin the practice for the benefit of those affected even if no class action was filed.[293] This is true even if the court finds that the plaintiff is not entitled to relief, so long as there is a discriminatory practice.[294] 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.[295] Traditionally,

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prejudice from consolidation).

291. *See* Iowa Grain Co. v. Brown, 171 F.3d 504, 509 (7th Cir. 1999); Champ v. Siegel Trading Co., Inc., 55 F.3d 269, 274-75 (7th Cir. 1995); Gray v. Conseco, Inc., No. SA CV 00-0322-DOC(EEx), 2001 U.S. Dist. LEXIS 21696, at *6-7 (C.D. Cal., Sept. 6, 2001).

292. The Revised Uniform Arbitration Act, completed in 2000, recognized the trend of cases under the FAA against consolidation, and provided for consolidation of related claims unless barred by the arbitration agreement. *See* National Conference of Commissioners on Uniform State Laws, Revised Uniform Arbitration Act § 10 and comments, *available at* http://www.law.upenn.edu/bll/ulc/uarba/arbpso500.pdf (last visited July 1, 2002). Under California law, consolidation is expressly permitted by statute and arbitral class actions are permissible. *See* Victoria E. Brieant & William N. Hebert, *Developing Legal Issues and Effective Practice Techniques in Mediation and Arbitration,* ALI-ABA SE28 (Vol. II 1999) (citing Civ. Proc. Code § 1281.3 and *Keating v. Superior Court*, 183 Cal. Rptr. 360 (Cal. 1982)).

293. 2 EMPLOYMENT DISCRIMINATION LAW 1749 (Barbara Lindemann & Paul Grossman eds., 3d ed. 1996).

294. 2 *id.* at 1750.

295. The Federal Arbitration Act does not expressly address injunctive relief, or indeed, the arbitrator's remedial authority in general. The Revised Uniform Arbitration Act contains a catchall remedial provision authorizing "such remedies as the arbitrator considers just and appropriate." *See* Stephen L. Hayford, *The Revised Uniform Arbitration Act: Third Leg of Modern Arbitration Law, I. Presenter, in* ARBITRATION 2001: ARBITRATING IN AN EVOLVING LEGAL ENVIRONMENT, PROCEEDINGS OF THE FIFTY-FOURTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, *supra* note 209, at 100. Some courts have refused to order arbitration of statutory claims where the arbitrator does not have the authority to award all remedies that would be available in litigation, while other courts have severed remedial limitations and ordered

arbitral injunctive relief was rarely awarded.[296] As arbitration has expanded in scope, however, arbitral injunctive relief has become more common.[297] Nevertheless, at least one court has declined to order arbitration of claims for broad injunctive relief.

In *Broughton v. Cigna Healthplans*,[298] the California Supreme Court declined to order arbitration of the request for public injunctive relief against the defendant's alleged deceptive practices.[299] The court articulated two related concerns about arbitration of such claims. First, the purpose of the request for relief is to benefit the public, not the private litigant.[300] Second, because subsequent arbitrators are generally not bound by the decisions of prior arbitrators, even in the same case, there are problems with the ongoing supervision and enforcement of any permanent injunction.[301] A member of the public desirous of enforcing the injunction would have to initiate another action and might obtain a different result.[302] Accordingly, the court construed the statute at issue to deny arbitration of claims for public

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arbitration. *See* 2 LABOR AND EMPLOYMENT ARBITRATION § 45.04[5] (Tim Bornstein et al. eds., 2d ed. 2002) and cases cited therein. Still other courts have refused to invalidate arbitration agreements based on damage limitations. *Id.*; *see also supra* note 26 and accompanying text.

296. *See* ELKOURI & ELKOURI: HOW ARBITRATION WORKS 397 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) (referring to labor arbitration and noting that use of injunctive remedies is increasing); MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, REMEDIES IN ARBITRATION 309-10 (2d ed. 1991) (noting that "injunctive-type" relief is generally considered to be within the authority of the labor arbitrator, but that prohibitory injunctions are less common than mandatory injunctions).

297. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991) (noting that the agreement did not restrict the type of relief available and declining to deny enforcement of the arbitration agreement on the ground that broad equitable relief was not available); Vascular and Gen. Surgical Assocs., Ltd. v. Loiterman, 599 N.E. 2d 1246, 1251 (Ill. App. Ct. 1992) (finding that arbitrator had authority to issue injunction where employment agreement clearly contemplated injunctive relief without expressly limiting such relief to judicial actions and agreement incorporated American Arbitration Association rules which state that arbitrator has authority to grant equitable relief). *But see* Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1099-104 (W.D. Mich. 2000) (finding unconscionable and unenforceable arbitration agreement that did not expressly provide authority for injunctive relief and precluded class actions in claim under Truth in Lending Act).

298. Broughton v. Cigna Healthplans, 90 Cal. Rptr. 2d 334 (Cal. 1999).

299. *Id.* at 350. The court remanded the damages portion of the claim to the lower court for a determination of its arbitrability. *Id.*

300. *Id.* at 345 & n.5.

301. *Id.* at 345.

302. *Id.*

injunctive relief.[303] Other courts have disagreed with the California Supreme Court's decision in *Broughton*, however. For example, the Superior Court of Connecticut found that the Connecticut State Medical Society could not bring unfair trade practices claims on behalf of its members because the members had agreed to arbitrate.[304] The court refused to rely on *Broughton*, noting that there was no showing that an arbitrator could not enjoin any unfair practices.[305]

While the *Broughton* decision has had limited impact, it suggests some of the reasons that arbitrators may be reluctant to issue broad injunctive relief and points out the problems with enforcement of arbitral injunctions. In light of these concerns, if the agreement or the law does not expressly authorize broad injunctive relief, either directly or by incorporating the statutory remedies, the arbitration agreement should be found unlawful under the NLRA for it interferes with the right to engage in concerted activity.[306] Although an arbitrator might read an agreement to provide broad remedial authority, two principles justify invalidating agreements that do not specifically provide authority for broad injunctive relief. First, the ambiguous agreement should be construed against the drafter, the employer seeking to compel arbitration. Second, if the arbitrator exceeds his or her authority under the agreement by awarding unauthorized relief, the award can be set aside by a court.[307] Accordingly, in order for an agreement to pass muster under Section 7, it should specifically authorize broad injunctive relief if it would be available in court.[308]

3. Individual Claims for Statutory Violations

The most difficult case for concerted activity is the individual

303. *Id.* at 345-46; *accord* Gray v. Conseco, Inc., No. SA CV 00-322 DOC(EEx), 2000 U.S. Dist. LEXIS 14821, at *24-26 (C.D. Cal. Sept. 29, 2000) (refusing to order arbitration of plaintiffs' claim for injunctive relief against unfair business practices under the California Code).

304. Conn. State Medical Soc'y v. Oxford Health Plans, Inc., No. X01CV0165664S, 2001 Conn. Super. LEXIS 3555, at *22 (Conn. Super. Ct. Dec. 13, 2001).

305. *Id.* at *21-22.

306. *See* Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000) (finding unconscionable and unenforceable arbitration agreement that did not expressly provide authority for injunctive relief and precluded class actions in claim under Truth in Lending Act).

307. *See* 9 U.S.C. § 10(a)(4) (2000).

308. Although the Court in *Gilmer* refused to deny arbitration on the ground that broad injunctive relief was not available, it specifically found that the arbitration agreement at issue did not preclude such relief. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991).

action taken to improve terms and conditions of employment. It is argued above that the best reading of the Act is that such action is protected by Section 7. Should the Board so rule, then no nonsupervisory employee covered by the Act could be compelled to agree to arbitrate any claims. In most cases, this would involve enforcement of statutory claims, for employees may have no right to litigate many issues related to improvement of terms and conditions of employment. For example, Professors Gorman and Finkin offer several examples of individual activity by employees in nonunion companies relating to terms and conditions of employment.[309] One example is the employee who complains that he is underpaid because his job requires more skill than that of other employees paid at his rate.[310] Another is the employee who challenges denial of a promotion which she is entitled to by virtue of her seniority, where the employer traditionally follows seniority in promotions.[311] Requiring arbitration of these disputes would not deprive the employees of any right to engage in concerted activity unless they had a contractual right to the payment or promotion that was enforceable through litigation. An employee who could not litigate an individual claim that Title VII was violated in compensation or promotion, however, would be deprived of a Section 7 right by a compulsory arbitration agreement.

4. Summary

I have argued, thus far, that Section 7 should be construed to protect the individual filing of a lawsuit to enforce statutory or contractual rights. Such a conclusion would bar employers from imposing arbitration agreements unilaterally on employees covered by the Act, if the agreement would preclude litigation.[312] Even absent such a construction of Section 7, however, a mandatory arbitration agreement should be found unlawful if it does not expressly permit the unquestionably concerted activities of class actions, joint claims, and broad injunctive relief.[313] Because the case

309. *See* Gorman & Finkin, *supra* note 99, at 286.

310. *Id.*

311. *Id.*

312. So long as the agreement was imposed as a condition of employment, it would be unlawful under this analysis, regardless of whether it was a condition of hiring or of retaining employment.

313. Such an interpretation is compatible with the criticism of ADR as inconsistent with public rights, which posits that the courts are necessary instruments for defining the social and political values of a society. *See* THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 244-45 (1989). In the employment arena, the courts would be preserved as the litigation forum for class actions, consolidated claims,

law regarding employment arbitration and class actions is in a very early stage of development, there is substantial uncertainty regarding whether either class or joint arbitration is available. Accordingly, in determining whether a mandatory arbitration agreement is lawful and enforceable, the Board and the courts should assume that neither class nor joint arbitration is permissible unless the agreement expressly provides otherwise.[314] The context in which such decisions would be made is discussed below.

VII. THE CONTEXT OF DECISIONS

A. *The National Labor Relations Board*

Like many other issues in labor and employment law, the issue of the legality of a compulsory arbitration agreement under Section 8(a)(1) may potentially arise in two forums. An unfair labor practice charge could be filed alleging that such an agreement was unlawful.[315] The NLRB would then be required to decide the legality of the agreement. If the agreement was imposed as a condition of

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and actions seeking broad injunctive relief, which are more likely to implicate public values than purely individual claims under the employment laws. *See* McGowan, *supra* note 189, at 261 (noting that class actions can result in changes in unlawful policies and procedures that affect large numbers of employees, in addition to remedying prior discrimination and prohibiting future discrimination); Moohr, *supra* note 20, at 439 (arguing that "litigation is more effective than arbitration in achieving the long-term public policy goal of ending workplace discrimination"). Notably, the securities industry, long a user and proponent of arbitration, has preserved the right to litigate class actions. Sternlight, *supra* note 3, at 45-49. In approving the rules rejecting class arbitration and preserving the right to litigate, the Securities and Exchange Commission stated that class action litigation "protect[s] investors and the public interest." *Id.* at 47-48 (quoting Order Approving Proposed Rule Change by American Stock Exchange, Inc. Relating to Arbitration, 58 Fed. Reg. 48,681 (SEC Sept. 10, 1993)).

314. Assuming that the agreement does not permit such action unless it provides so expressly is not only consistent with the uncertainty of existing law, but also would encourage employers to include express provisions in the agreement in order to insure enforceability, thus preserving employee rights to concerted activity. As set forth below, however, a court considering the issue in the context of a motion to compel arbitration of a statutory claim could interpret that agreement to permit class or consolidated arbitration and broad injunctive relief, thereby avoiding the Section 7 issue. *See infra* note 343.

315. Such a claim could also arise before the NLRB as an objection to a representation election. *See, e.g.*, Freund Baking Co., 336 N.L.R.B. No. 75, at *1 (Oct. 1, 2001) (setting aside election based on employee handbook provision that barred employee disclosure of proprietary or confidential information which included "all information obtained by the employees during the course of their work").

employment and precludes employees from engaging in concerted activity, as defined above, the Board should find the agreement unlawful and unenforceable. The employer should be ordered to cease and desist from enforcing the agreement and from imposing it on employees. In addition, termination of, or refusal to hire, an employee who declined to waive Section 7 rights by agreeing to arbitration should be found to violate Section 8(a)(1).[316]

It might be argued that the Board should not be concerned with a compulsory agreement to arbitrate claims under other statutes by either union or nonunion employees. Instead, determination of the legality of such agreements should be left to the enforcement agencies and courts interpreting those statutes.[317] As noted by the General Counsel in the *Bentley's Luggage* memorandum, the consequences of an arbitration agreement are different for NLRB cases than for discrimination cases, since the NLRB can act only after the filing of a charge, while the EEOC can initiate its own action.[318] Accordingly, the compulsory arbitration agreement would not completely preclude statutory enforcement in the discrimination context.[319] Nevertheless, the EEOC rarely files suit, and may be

316. *See supra* notes 164-69 and accompanying text. For an argument that terminating or refusing to hire an employee based on that employee's refusal to sign such an agreement violates the anti-retaliation provisions of Title VII, see Sidney Charlotte Reynolds, *Closing a Discrimination Loophole: Using Title VII's Anti-Retaliation Provision to Prevent Employers from Requiring Unlawful Arbitration Agreements as Conditions of Continued Employment*, 76 WASH. L. REV. 957, 977-88 (2001). *But see* Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1315 (11th Cir. 2002) (holding employees did not have objectively reasonable belief that mandatory arbitration provision was unlawful and therefore their refusal to sign was not protected by Title VII's anti-retaliation provision).

317. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (stating that agreement to arbitrate statutory claim would be enforced unless Congress indicated in the statute an intent to preclude arbitration).

318. *See* Nash v. Fla. Indus. Comm'n, 389 U.S. 235, 238 n.3 (1967) (citing 29 U.S.C. §§ 10(a)-(b) (2000) and noting NLRB's limited authority); Regulations relating to Labor, 29 C.F.R. § 1601.11 (2002) (authorizing EEOC Commissioners to file charges with the agency); *see also* Fair Labor Standards Act, 29 U.S.C. § 216(c) (stating "[t]he Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages"); *cf. id.* § 2104(a)(5) (requiring judicial enforcement by affected parties under the WARN Act).

319. In *Gilmer*, the Court indicated that the employee could file a charge with the EEOC despite the arbitration agreement. 500 U.S. at 28. In *EEOC v. Waffle House, Inc.*, the Supreme Court held that the EEOC can litigate and recover individual relief on behalf of those who have signed arbitration agreements. 534 U.S. 279, 297-98 (2002). In the wake of *Waffle House*, the United States Department of Labor, which has enforcement authority under, inter alia, OSHA, FLSA, certain whistleblower statutes, the FMLA, and the

unaware of discrimination without the filing of a charge.[320] Yet, if the employee has agreed to arbitrate, he or she may never file a charge.[321] In addition, there are perils for the agency acting without evidence from a charging party or parties.[322] Thus the EEOC may never act in cases where employees are bound by an arbitration agreement. Moreover, as set forth above, the Board has long protected the right to engage in concerted activity to remedy violations of statutes other than the Act and to alter working conditions through enforcement of employer promises. Further, the Act specifically authorizes the Board to prevent unfair labor practices, despite the existence of other legal means to achieve the same goal.[323] As in *National Licorice,* the Board should order employers to cease enforcing or imposing agreements to arbitrate employment law claims.

B. Court Litigation of Statutory and Contractual Actions

The other way in which the issue of the validity of a compulsory arbitration agreement would arise is in a statutory or contractual enforcement action filed in court by an employee. In such a case, the employer would seek a stay or dismissal of the case based on the arbitration agreement. When the employee argued that the agreement was unenforceable because it violated Section 7, the court would be faced with an issue requiring it to interpret the

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Vietnam Era Veterans' Readjustment Assistance Act, issued a directive suggesting that deferral to arbitration by the agency often will not be appropriate in FLSA cases. *See* United States Department of Labor, Solicitor of Labor, *Memorandum for Regional Solicitors Associate Solicitors*, DAILY LAB. REP. (BNA) No. 156, at E-22 (Aug. 13, 2002). In addition, the directive specified that the issue of whether the employee retains any rights to proceed through collective action will be a factor in determining whether the agency will defer to arbitration. *See id.*

320. *See supra* note 5.

321. *See Waffle House, Inc.*, 534 U.S at 296 n.11 (noting that employees subject to arbitration agreements might never file charges with the EEOC if injunctive relief were the only possible remedy).

322. The case of *EEOC v. Sears, Roebuck & Co.* illustrates some of the difficulties of proceeding without a charge filed by an employee or applicant. 839 F.2d 302 (7th Cir. 1988). In *Sears*, the EEOC presented only statistical evidence supporting its allegations of discrimination, without anecdotal evidence of instances of discrimination. *Id.* at 310-11. While not fatal to the claim, the absence of such evidence was an important factor in the court's decision that the EEOC did not prove discrimination. *Id.* at 311-12.

323. 29 U.S.C. § 160(a) ("The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.").

NLRA. If the NLRB has already ruled on the legality of the particular agreement, the court can simply defer to the decision of the Board. Where it has not, there may be a question of whether the court can or should decide an issue within the primary jurisdiction of the NLRB.

When faced with motions to stay or dismiss lawsuits based on arbitration agreements in employment cases involving employees covered by the Act,[324] courts should decline to do so if the agreement was imposed on the employees as a condition of employment.[325] A contract or agreement to arbitrate that violates the NLRA is unenforceable under general principles of contract law, as well as the principles of arbitration. The Supreme Court has held that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements."[326] Further, the Court has repeatedly stated that contracts, including arbitration awards, in violation of law or public policy will not be enforced.[327] This is an application of the common

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324. Since the National Labor Relations Act does not cover supervisors and managers, inter alia, it would not violate the Act to compel such individuals to agree to arbitration. In addition, the Act does not cover railroad and airline employees. *See supra* notes 32-33 and accompanying text.

325. The task of the courts applying the National Labor Relations Act in these cases will be easier once the NLRB has addressed and decided the issue. Their task might be rendered easier still if the NLRB were to issue rules as to the legality of compulsory arbitration agreements. Given the Board's general reluctance to use rulemaking and the controversy generated when it has chosen to do so, however, rulemaking regarding arbitration agreements is unlikely. *See* Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 388-91 (1995) (discussing the Board's failure to use rulemaking and criticisms of the Board's choice to make rules by adjudication); Deborah Billings & Bernard Mower, *House Appropriations Markup Targets Labor Board for 15 Percent Funding Cut*, [1996] DAILY LAB. REP. (BNA) No. 114, at D-3 (June 13, 1996) (noting efforts to cut budget and attach appropriations rider barring action on proposed rule on single location bargaining units, based on business opposition to rule); Edward Silver & Joan McAvoy, *The National Labor Relations Act at the Crossroads*, 56 FORDHAM L. REV. 181, 196-99 (1987) (discussing the Board's failure to use rulemaking and criticisms of the Board's choice to make rules by adjudication); *NLRB Notice on Withdrawal of Proposed Rulemakings On Single Location Bargaining Units, Standardized Remedial Provision,* DAILY LAB. REP. (BNA), at D-24 (Feb. 23, 1998) (withdrawing rulemaking proposals and noting that Congressional riders had prohibited Board from issuing a final rule on single location bargaining units for three years).

326. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

327. *See* E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 62 (2000) (citing "the legal exception that makes unenforceable 'a collective-bargaining agreement that is contrary to public policy'" (quoting W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983))); United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987) (citing the "general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law

law doctrine, "derive[d] from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act."[328] Compelling arbitration where the agreement to arbitrate was imposed in violation of an employee's Section 7 rights would place the court in a position of enforcing an unlawful agreement. Moreover, forcing an employee to agree to arbitration in violation of Section 7 rights renders the agreement unconscionable. Thus, the court must determine the legality of the arbitration agreement.

In contract actions under Section 301 of the NLRA, the Supreme Court has held that the courts can determine the validity of a contract alleged to be unlawful under the NLRA where the court otherwise has jurisdiction of the action. In *Kaiser Steel Corp. v. Mullins*,[329] the Court found that the lower court had jurisdiction under Section 301 to adjudicate the employer's defense that the contract provision that formed the basis of the suit violated Section 8(e) of the Act.[330] Following *Kaiser Steel,* the First Circuit in *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*,[331] considered whether a contract provision violated Section 8(b)(3) of the Act, in deciding whether to enforce an arbitration award.[332] The court stated: "as the federal courts may not enforce a contractual provision that violates section 8 of the Act, they may be obliged at times, in the course of resolving a contract dispute, to decide whether or not such a violation exists."[333] Subsequently, in *Textron*

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or public policy"); *W.R. Grace*, 461 U.S. at 766 ("As with any contract, however, a court may not enforce a collective-bargaining agreement that is contrary to public policy."); Hurd v. Hodge, 334 U.S. 24 (1948) The *Hurd* court stated:

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

Id. at 34-35 (footnotes omitted); *cf.* Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867-68 (Cal. Ct. App. 2002) (invalidating arbitration agreement provision precluding class actions as substantively unconscionable and against public policy).

328. *United Paperworkers Int'l Union*, 484 U.S. at 42.

329. 455 U.S. 72 (1982).

330. *Id.* at 83. Section 8(e) makes hot cargo agreements unenforceable. *See* 29 U.S.C. § 158(e) (2000).

331. 702 F.2d 273 (1st Cir. 1983).

332. *Id.* at 276-77.

333. *Id.* at 276 n.6. *But see* Mo-Kan Teamsters Pension Fund v. Creason, 716 F.2d 772, 775 (10th Cir. 1983) (reading *Kaiser Steel* as limited to Section 8(e) defenses and refusing to permit employer to defend against Section 301 contract enforcement action on ground that contract violated NLRA because

Lycoming Reciprocating Engine Division v. United Automobile Workers,[334] the Supreme Court determined that there is no jurisdiction under Section 301 where the actual claim is not a breach of contract but rather an unfair labor practice.[335] Nevertheless, the Court stated:

> This does not mean that a federal court can never adjudicate the validity of a contract under § 301(a). That provision simply erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse . . . . But in these cases, the federal court's power to adjudicate the contract's validity is ancillary to, and not independent of, its power to adjudicate "[s]uits for violation of contracts."[336]

Similarly, courts determine unfair labor practice issues in Section 303 actions for damages for violation of Section 8(b)(4).[337] Under Section 303, the court must determine whether a violation of Section 8(b)(4) has occurred, since that is a predicate for damages, but no NLRB adjudication of the 8(b)(4) issue is required.[338] While most courts give NLRB decisions on underlying 8(b)(4) claims preclusive effect, the court can determine the 8(b)(4) issue in the absence of a Board decision.[339] And under antitrust law, the courts may also decide issues normally reserved to the NLRB for purposes of deciding whether the labor exemption to antitrust liability has been met.[340] In *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*,[341] the Supreme Court stated: "This Court has held, however, that the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws."[342]

Accordingly, where a legal action has been filed under an employment discrimination or other employment law statute, the court can determine whether there is a lawful agreement to arbitrate even if that determination requires interpretation of the

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union did not have a majority).

334. 523 U.S. 653 (1998).

335. *Id.* at 657.

336. *Id.* at 657-58.

337. 29 U.S.C. § 187 (2000).

338. Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237, 243-44 (1952).

339. 2 THE DEVELOPING LABOR LAW 1733-35 (Patrick Hardin & John E. Higgins, Jr., eds., 4th ed. 2001).

340. *See* Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 684-88 (1965).

341. 421 U.S. 616 (1975).

342. *Id.* at 626.

NLRA.[343] Once the NLRB has ruled on the legal issue, of course, its interpretation of the law will be entitled to deference from the courts.[344] In the *Circuit City* case mentioned above,[345] for example, the arbitration policy, imposed as a condition of employment,[346] had the potential for denying employees their right to engage in the concerted activity of a class action discrimination claim. Rather than dismiss the claims of those who agreed to arbitration, the court should have determined three issues. Did the arbitration procedure expressly permit class claims? If not, was the agreement imposed as a condition of employment? If so, were the employees in the class covered by the NLRA? If the answer to the latter question was yes, then the employees' claims should not have been dismissed and assuming all other class prerequisites were met, the case should have been permitted to proceed as a class action.[347] Even under this analysis of course, there is still the potential that a class action may be frustrated if a sufficient number of members of the potential class are supervisors and not covered by the Act. Analysis under Section 7 is necessary, however, to avoid depriving employees of their statutory rights to engage in concerted activity.

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343. Alternatively, the court could stay the action pending a decision by the NLRB on the legality of the arbitration agreement, if an unfair labor practice charge has been, or could be, timely filed. This course of action would cause substantial delay in the proceeding, however. A third possibility is to interpret the ambiguous arbitration agreement so that it is lawful. *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 (D.C. Cir. 1997) (interpreting silent agreement to require employer to pay arbitration fees to render agreement enforceable). Thus, if the agreement is unlawful only because it does not expressly permit class actions or consolidation of claims, the court could interpret the agreement to permit such claims in arbitration. The NLRB, however, should still invalidate such agreements because of their chilling effect on concerted activity. If the employee has already filed a lawsuit, the court might conclude, at least with respect to that employee, that there was no chilling effect.

344. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786-87 (1990) (citing the Board's primary responsibility for developing national labor policy and the necessary deference accorded by the courts so long as the Board's rules are "rational and consistent with the Act").

345. *See supra* notes 216-19 and accompanying text.

346. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122 (2001).

347. If only arbitration agreements that prevent class actions and consolidated claims are unlawful, employees may be encouraged to file such claims in inappropriate circumstances to avoid arbitration. If the court declines to certify the class or to consolidate the claims because the necessary prerequisites are not met, however, then a motion to stay or dismiss based on the arbitration agreement could be made and granted. If a court finds that the pleadings were filed for improper purposes, sanctions under Rule 11 could be assessed against the plaintiff(s) and attorney(s). FED. R. CIV. P. 11.

VIII. CONCLUSION

Arbitration agreements imposed on employees as a condition of employment violate Section 7 of the NLRA by requiring waiver of the right to engage in the concerted activity of filing a judicial claim for enforcement of statutory or contractual rights. Accordingly, such agreements should not be enforced. Even if this broad reading of concerted activity is not accepted, however, compulsory arbitration agreements that deny employees the right to bring class actions, joint claims, and claims for broad injunctive relief force employees to waive their Section 7 rights to obtain employment. Invalidation of such agreements is necessary to preserve the rights accorded to employees by Congress in the NLRA. Supporters of arbitration need not fear that arbitration will be eliminated by such an interpretation. The cadre of supervisors and managers unaffected by such a ruling will continue to provide fodder for the arbitration mill. In addition, employers can offer employees covered by the Act the opportunity to use arbitration after a dispute has arisen. If the arbitration system is of proven value, it will be used.