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In *Wright v. Universal Maritime Service Corp.*,[1] the Supreme Court held that a union waiver of an employee's right to a judicial forum for a statutory cause of action must be clear and unequivocal.[2] While I have argued that the

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[1] Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998).

[2] *Id.* at 80. While the requirement that a waiver be clear and unequivocal is a necessary prerequisite to precluding judicial litigation, it is not necessarily sufficient. A court might also require that the individual knowingly waive the right. *See* Jan William Sturner, *Arbitration, Labor Contracts, and the ADA: the Benefits of Pre-Dispute Arbitration Agreements and an Update on the Conflict Between the Duty to Accommodate and Seniority Rights*, 21 U. ARK. LITTLE ROCK L. REV. 455, 485 (1999). Some level of fairness and perhaps rough equivalence to the judicial process might also be required. *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999) (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." Among the unfair rules cited by the court were the requirement that the arbitrators be selected from a panel chosen exclusively by Hooters; a requirement that the employee, but not Hooters, give notice of the claim, its basis, all witnesses, and their testimony; and a provision that Hooters, but not the employee, could challenge the arbitration decision in court); Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1482 (D.C. Cir. 1997) (upholding agreement to arbitrate statutory claims because it provided for neutral arbitrators, more than minimal discovery, a written award, all of the types of relief that would otherwise be available in court, and employer payment of fees and costs. The court indicated that it would not enforce an agreement that required an employee to pay any of the costs of arbitration to vindicate a statutory claim). It is likely that the arbitration process under the collective bargaining agreement would meet most of the fairness or judicial equivalence requirements imposed by courts to date, with two possible exceptions. Generally, formal discovery is not available in labor arbitration, although the parties may exchange information voluntarily during the grievance process or obtain information through the right to information under the National Labor Relations Act. LAURA J. COOPER ET AL., ADR IN THE WORKPLACE 224–26 (2000). In some cases, the collective bargaining

union should not be permitted to waive the individual employees' rights to a judicial forum,[3] the Court declined to decide that issue, deeming it unnecessary for purposes of the case.[4] Prior to the *Wright* decision, only the Fourth Circuit had held that such a waiver was permissible; since *Wright*, the Fourth Circuit has maintained that position, providing guidance as to the contractual language that would constitute a clear and unequivocal waiver under *Wright*.[5]

Given employer interest in confining employees to the arbitral forum,[6] some unionized employers undoubtedly will seek to negotiate language in the collective bargaining agreement that requires employees to arbitrate their statutory claims. Alternatively, some unionized employers may seek to

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agreement may provide for some discovery or the arbitrator may order discovery. *Id.* at 225–27. In addition, labor arbitrators have been generally reluctant to award punitive damages and attorneys' fees. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 589, 592 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997). Indeed, the authority to award punitive damages is in some doubt in the absence of an express contractual provision authorizing such damages. *Id.* at 589–90 (noting that courts disagree regarding the power of arbitrators to award punitive damages in the absence of contractual authorization). While there has been little litigation of the adequacy of collectively bargained arbitration procedures for statutory claims, these issues may give some courts pause. On the other hand, the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), specifically sanctioned arbitration of a statutory claim in the nonunion context where discovery was more limited than in litigation. *Id.* at 31. The *Gilmer* Court also considered the damages limitation issue but decided that the arbitral rules at bar did not limit available relief. *Id.* at 32. For further discussion of these issues, see Martin H. Malin, *Privatizing Justice—But By How Much? Questions* Gilmer *Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589 (2001).

[3] *See* Ann C. Hodges, *Protecting Unionized Employees Against Discrimination: The Fourth Circuit's Misinterpretation of Supreme Court Precedent*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 123 (1998). Should that view ultimately prevail in the Supreme Court, a union waiver would almost certainly not be a mandatory subject of bargaining; it would be classified as a permissive or illegal subject. However, even if the union cannot waive the right, the issue of whether the employer could impose such a waiver on unionized employees would remain. In addition, the union might demand to bargain over the arbitration procedure for statutory claims. *See* Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc., 199 F.3d 477, 485 (D.C. Cir. 1999); Appellee/Cross-Appellant's Petition for Rehearing en banc, Air Line Pilots Ass'n, Int'l, 2000 U.S. App. LEXIS 3756 (Mar. 9. 2000) (Nos. 98-7196 & 98-7202), *available at* http://www.bna.com/bnabooks/ababna/annual/anker.pdf. The judgment in *Air Line Pilots Ass'n, Int'l* was vacated in response to a petition for rehearing en banc, but on rehearing the court reinstated the opinion as judgment and opinion of the court en banc. 211 F.3d 1312 (D.C. Cir. 2000).

[4] *Wright*, 525 U.S. at 82.

[5] Carson v. Giant Food, Inc., 175 F.3d 325, 331–32 (4th Cir. 1999).

[6] *See* RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 9 (1997).

impose waivers on unionized employees individually without bargaining with the union.[7] A crucial determinant in the success of such efforts will be whether the arbitration of statutory claims is found to be a mandatory subject of bargaining. The classification of a subject as mandatory or permissive determines whether the negotiating parties can insist to impasse on inclusion of a provision in the agreement and, in most cases, whether the party can implement the provision upon impasse. In addition, the classification significantly impacts the question of whether the employer can negotiate individually with employees about a subject.

This article analyzes the question of whether arbitration of statutory claims should be classified as a mandatory or permissive subject of bargaining under the National Labor Relations Act (NLRA).[8] First, this article reviews the post-*Wright* cases that hold that a union-negotiated waiver is permissible. Second, this article reviews the only decision to consider the issue of classification of the bargaining subject, *Air Line Pilots Ass'n, International v. Northwest Airlines, Inc.*,[9] a case arising in the United States Court of Appeals for the District of Columbia under the Railway Labor Act.[10] In that case, the court concluded that the matter was not a mandatory subject of bargaining because the union could not lawfully waive the employees' right to litigate.[11] The court went on to hold that the employer lawfully imposed the arbitration agreements on probationary pilots individually, rejecting the union's argument that bargaining with the union was required.[12] Because the D.C. Circuit's opinion was based on its conclusion that a union waiver is impermissible,[13] this article proceeds to consider the appropriate analysis under the NLRA if a union waiver is not prohibited. To answer this question, this article analyzes the case law under the NLRA on mandatory bargaining subjects. This article concludes that, although all aspects of the arbitration procedure are mandatory bargaining subjects, the waiver of the employee's right to a judicial forum is not. Having reached that conclusion, this article goes on to determine whether the employer, consistent with the NLRA, may impose arbitration agreements upon individual employees who are represented by a union, with or without negotiation with the employees. Since statutory arbitration is substantially intertwined with contractual arbitration due to overlap in the subjects to be

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[7] *See Air Line Pilots Ass'n, Int'l*, 199 F.3d at 485.

[8] 29 U.S.C. § 151–69 (1994)

[9] Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc., 199 F.3d 477 (D.C. Cir. 1999).

[10] 45 U.S.C. §§ 151–63, 181–88 (1994).

[11] *Air Line Pilots Ass'n, Int'l*, 199 F.3d at 485–86.

[12] *Id.* at 486.

[13] *Id.* at 485–86.

arbitrated, this article concludes that the employer cannot bypass the union and impose statutory arbitration on the employees directly. Nevertheless, there remains a role for statutory arbitration in the unionized workplace if the employer, employees, and union agree that it would be of mutual benefit.

I. ARBITRATION OF STATUTORY CLAIMS IN THE UNIONIZED WORKPLACE AFTER *WRIGHT*

Interpreting *Wright*, the Fourth Circuit has defined two methods by which a collective bargaining agreement can clearly and unequivocally waive the right to litigate a statutory claim.[14] The collective bargaining agreement's arbitration clause could provide specifically that employees agree to arbitrate all federal claims arising out of employment. Alternatively, where the arbitration clause applies to all disputes, or all disputes concerning the interpretation of the agreement, the statutory discrimination laws must be incorporated in the collective bargaining agreement in order to constitute a waiver. Neither a general antidiscrimination requirement[15] nor contractual language that "parallel[s], or even parrot[s]" the discrimination statutes is sufficient to establish a waiver in the Fourth Circuit.[16] In addition, an agreement not to discriminate in violation of the law is not an incorporation of the discrimination statutes "in their entirety" into the agreement.[17] Courts in other jurisdictions have followed the Fourth Circuit cases, and with a few exceptions, courts have declined to find waiver of the right to litigate in a judicial forum.[18] The *Wright* waiver standard has been applied to state discrimination law claims[19] and constitutional claims as well.[20]

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[14] Carson v. Giant Food, Inc., 175 F.3d 325, 331–32 (4th Cir. 1999). Several other circuits have concluded either initially, or by reaffirming previously adopted positions, that such waivers are impermissible as a matter of law. Rogers v. New York University, 220 F.3d 73, 75 (2d Cir. 2000); *Air Line Pilots Ass'n, Int'l*, 199 F.3d at 482.

[15] *Carson*, 175 F.3d at 332.

[16] Brown v. ABF Freight Sys., Inc., 183 F.3d 319, 322 (1999).

[17] *Id.*

[18] *See, e.g.*, Kennedy v. Superior Printing Co., 215 F.3d 650, 655 (6th Cir. 2000) (finding no waiver where collective bargaining agreement does not mention the statute and employee's grievance alleging discrimination does not waive right to litigate in judicial forum, even where arbitrator and employee discuss the statute); Quint v. A.E. Staley Mfg. Co., 172 F.3d 1 (1st Cir. 1999) (finding no waiver when no contractual mention of the statute).

[19] Vasquez v. Superior Court of Los Angeles County, 80 Cal. App. 4th 430, 434 (2000).

[20] Schumacher v. Souderton Area School Dist., No. CIV.A.99-1515, 2000 WL 72047 (E.D. Pa. Jan. 21, 2000).

Two districts courts, one in the Fourth Circuit and one in the Second,[21] have enforced agreements to arbitrate statutory claims based on language in collective bargaining agreements. The Middle District of North Carolina, in *Safrit v. Cone Mills*,[22] found a waiver based on *Carson*[23] and *Brown*.[24] While the language of the agreement is not quoted in the case, the court describes the language as containing an agreement "not to discriminate against any employee because of gender and to abide by Title VII of the Civil Rights Act of 1964. Section XX of the CBA requires that any grievance against Defendant for discrimination must be submitted to arbitration."[25] It is difficult to tell from the court's description of the language whether it met either of the requirements articulated in *Carson*.

A recent decision from the Eastern District of New York gave preclusive effect to an arbitrator's decision to deny a sexual harassment grievance, thereby granting summary judgment on the plaintiffs' Title VII and state law claims.[26] The court concluded that there was a clear and unmistakable agreement to arbitrate statutory claims based on a contractual commitment to end sexual harassment, which included a definition drawn in part from Supreme Court cases under Title VII, and language in the same provision stating that grievances under the clause will be handled with speed and confidentiality.[27]

These cases demonstrate that the issue of waivers is alive and well, despite the Supreme Court's lack of a decision on the issue of union authority or the fact that prior to the Supreme Court's decision in *Wright*, the Second, Third, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits had refused to bar employee lawsuits on the basis of arbitration agreements in collective bargaining contracts.[28]

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[21] Since the New York court's decision, however, the Second Circuit has ruled that union waivers of employee rights to litigate statutory claims are unenforceable. Rogers v. New York University, 220 F.3d 73, 75 (2d Cir. 2000).

[22] Safrit v. Cone Mills, No. 4:97CV00646, 1999 WL 1111516 (M.D.N.C. Nov. 9, 1999), *appeal docketed*, No. 99-2677 (4th Cir. Dec. 28, 1999).

[23] Carson v. Giant Food, Inc., 175 F.3d 325 (4th Cir. 1999)

[24] Brown v. ABF Freight Sys., Inc., 183 F.3d 319 (1999).

[25] *Safrit*, 1999 WL 1111516, at *1.

[26] *See* Clarke v. UFI, Inc., 98 F. Supp. 2d 320, 335 (E.D.N.Y. 2000).

[27] *Id.*

[28] *See, e.g.*, Martin v. Dana Corp., 135 F.3d 765 (3d Cir. 1997); Penny v. United Parcel Serv., 128 F.3d 408 (6th Cir. 1997); Pryner v. Tractor Supply Company, 109 F.3d 354 (7th Cir. 1997); Brisentine v. Stone & Weber Eng'g Corp., 117 F.3d 519 (11th Cir. 1997); Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997) (reaffirming on remand, 158 F.3d 1371, 1377 (10th Cir. 1998), its holding that the employee's failure to arbitrate under the collective bargaining agreement did not bar her Title VII claim);

II. THE *AIR LINE PILOTS ASS'N, INTERNATIONAL* DECISION[29]

Air Line Pilots Ass'n, International is the only reported case to consider the question of whether a union-negotiated waiver of a judicial forum for statutory claims is a mandatory subject of bargaining.[30] In that case, the employer required trainee pilots, who were not represented by the union until they completed their training, to agree to various conditions as a part of a contract for employment, including a clause that expressly required arbitration of statutory claims.[31] Air Line Pilots Association ("ALPA") filed suit, alleging that the airline violated the Railway Labor Act by unilaterally imposing on the pilots individual contracts concerning mandatory subjects of bargaining without first negotiating with the union.[32] The employer, disclaiming any intent to apply the individual agreements to contractual claims, contended that it had the right to insist on arbitration of statutory claims as a condition of employment.[33]

The District Court agreed with ALPA that the arbitration clause was a mandatory subject of bargaining and enjoined the employer from applying it to any employee represented by the union.[34] The court, which issued its decision prior to the Supreme Court's decision in *Wright*, concluded that the union did not have the authority to waive the individual's right to a judicial forum for statutory claims. However, the court disagreed with the employer's argument that lack of union authority to agree to a waiver necessarily determined that no bargaining with the union was required. The court agreed with ALPA that the arbitration agreement was a working condition and therefore the employer was required to obtain union consent before executing an individual contract with any union-represented employee. Since the arbitration provision imposed by the employer governed the rules or

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Varner v. Nat'l Super Markets, Inc., 94 F.3d 1209 (8th Cir. 1996); Bates v. Long Island R.R. Co., 997 F.2d 1028 (2d Cir 1993).

[29] Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc., 199 F.3d 477 (D.C. Cir. 1999).

[30] *Id.*

[31] *Id.* at 480.

[32] There has been relatively little litigation over the scope of bargaining under the Railway Labor Act. THE RAILWAY LABOR ACT 205 (Douglas L. Leslie, ed. 1995). Although some courts have applied the National Labor Relations Act (NLRA) concepts of mandatory and permissive subjects of bargaining under the Railway Labor Act, there has been little judicial development applying the concepts to specific subjects. *Id.* at 206.

[33] *Air Line Pilots Ass'n, Int'l*, 199 F.3d at 481.

[34] Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc., Civ. Action No. 97-1917, 1998 U.S. Dist. LEXIS 22739, at *29 (D.D.C. Sept. 23, 1998).

conditions of employment, like the arbitration provision in the collective bargaining agreement, it was a mandatory subject of bargaining.

The Court of Appeals for the District of Columbia Circuit reversed the District Court.[35] After extensively analyzing the Supreme Court's decisions relating to arbitration of statutory claims, including *Wright*, the court agreed with the circuits that have concluded that the union cannot waive the employee's right to a judicial forum for statutory claims. The court stated the following:

> Absent congressional intent to the contrary, a union may not use the employees' individual statutory right to a judicial forum as a bargaining chip to be exchanged for some benefit to the group; the statutory right "can form no part of the collective bargaining process." Applying this rule to the facts of the present case, ALPA could not lawfully agree to the Arbitration Clause because it would effect a waiver of the employees' right to a judicial forum for the vindication of their statutory claims of discrimination in employment.[36]

Rejecting ALPA's argument that the arbitration of employment claims was a mandatory bargaining subject even if the union could not waive the employees' right to a judicial forum, the court stated that no subject could be mandatory if either party did not have the authority to offer and agree to it. Furthermore, the court held that the union could not bargain for the procedures to be used in the arbitration as only the individual could determine those procedures.

Since the arbitration clause was not a mandatory subject, the employer could lawfully propose it to the individual employees directly, and impose it upon them, without violating the statute.[37] According to the court, the arbitration clause was consistent with the collective bargaining agreement,

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[35] *Air Line Pilots Ass'n, Int'l*, 199 F.3d at 487.

[36] *Id.* at 484–85 (citing Alexander v. Gardner-Denver, 415 U.S. 36, 51 (1974)).

[37] Imposition of an agreement to arbitrate statutory claims might be challenged on other grounds. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999); Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1190 (9th Cir. 1998) (holding that employees cannot be required as a condition of employment to arbitrate Title VII claims); Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1482 (D.C. Cir. 1997); Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994) (holding that claimants who do not "knowingly" agree cannot be required to submit Title VII claims to arbitration); EEOC v. River Oaks Imaging, No. CIV.A.H-95-755, 1995 WL 264003 (S.D. Tex. Apr. 19, 1995) (enjoining application of compulsory arbitration policy at EEOC request when policy was implemented after two employees had filed EEOC charges and employees were fired for refusing to sign the policy without consulting attorneys); *EEOC: Mandatory Arbitration of Employment Discrimination Disputes as A Condition of Employment*, 8 Lab. Rel. Rep. (BNA) 405:7511 (July 7, 1997) (setting forth EEOC opposition to mandatory arbitration).

and the employer was not attempting to affect the agreement or to avoid dealing with the union. Thus far, the *Air Line Pilots Ass'n, International* court is the only court to deal with the issue. The National Labor Relations Board (NLRB) has not yet considered the question.

As *Air Line Pilots Ass'n, International* illustrates, regardless of whether the employer seeks to confine statutory claims to the arbitral forum through collective bargaining or through individual agreements to arbitrate, in the unionized workplace, the determination of whether waiver of the right to a judicial forum for statutory claims is a mandatory subject of bargaining is crucial. If a subject is mandatory, the employer can insist to the point of impasse on its inclusion in a collective bargaining agreement.[38] Accordingly, a union whose members are not prepared to take economic action to preserve their right to litigate statutory discrimination claims might be forced to include a waiver in the agreement in order to obtain a collective bargaining agreement. If the subject is permissive rather than mandatory, the employer can seek such a clause in negotiations but cannot insist that it be a part of any agreement.[39] Thus a conclusion that the subject is permissive would enable a union to resist its inclusion in the agreement without taking economic action or trading other benefits to retain the right to litigate. There is another equally important consequence of the categorization, however, which is illustrated by the *Air Line Pilots Ass'n, International* case. If the subject is not mandatory, the employer may be free to negotiate individually with the employees for such a waiver so long as the individual negotiations do not interfere with or waive any collectively bargained rights or the employees' section 7 rights to organize and bargain collectively.[40] A further limitation is that the individual negotiations cannot be used to undermine the union.[41]

III. BARGAINING UNDER THE NLRA

The *Air Line Pilots Ass'n, International* decision provides one court's view of the issue in the context of the Railway Labor Act. The court based its decision on its conclusion that the union has no authority to waive the employees' right to a judicial forum. Were the issue to come before the NLRB, however, that determination, at least insofar as it arises from interpretation of the statutory discrimination laws, would not be within the

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[38] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958).

[39] *Id.* at 349.

[40] *See* 29 U.S.C. § 157 (1994); J. I. Case Co. v. NLRB, 321 U.S. 332, 337–39 (1944).

[41] *See* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944).

jurisdiction of the NLRB.[42] At present, with the issue of the legality of such waivers unresolved by the Supreme Court, and with a split in the circuits, the Board would have to decide the question of the status of the bargaining subject without definitive guidance on the legality of waivers.[43]

A. *Mandatory Bargaining Subjects Under the NLRA*

In determining how the NLRB might approach the issue,[44] analysis begins with a review of the statute and the Supreme Court cases regarding what constitutes a mandatory subject.[45] The statutory description of bargaining subjects is quite general. Sections 8(a)(5) and 8(b)(3)[46] make it an unfair labor practice to refuse to bargain collectively if the union is the representative of the employees subject to the provisions of section 9(a).[47] Section 9(a) specifies that representatives chosen by the majority of the employees are exclusive representatives for the purposes of bargaining collectively with respect to "rates of pay, wages, hours of employment, or other conditions of employment . . . ."[48] Section 8(d) defines collective bargaining as the obligation to "confer in good faith with respect to wages, hours and other terms and conditions of employment . . . ."[49] Arbitration of

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[42] However, the Board might decide that such a waiver is impermissible under the NLRA. *See infra* notes 143–57, 198.

[43] *See* United Elec. Workers v. NLRB, 409 F.2d 150, 158–59 (D.C. Cir. 1969) (finding no violation of section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1994), where the employer insisted to impasse on inclusion of a proposal to waive the union's right to remove from state court to federal court an action to enjoin a strike pending arbitration, noting that in good faith the company might have believed its proposal to be legally enforceable).

[44] While the analysis herein is focused on the NLRA, much of it would apply equally under the Railway Labor Act.

[45] Beginning with Justice Harlan's dissent in *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), there has been widespread criticism of the classification of subjects as mandatory or permissive. *Id.* at 351. As Justice Harlan and others have argued, limiting insistence to mandatory subjects restricts the flexibility of the parties and may prevent the evolution of collective bargaining as the workplace develops and changes. For further discussion of this issue, see Archibald Cox & John T. Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board,* 63 HARV. L. REV. 389, 391–401(1950) (suggesting even before *Borg-Warner* that the NLRA was not intended to give the Board the authority to determine the scope of collective bargaining); Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law,* 47 CATH. U. L. REV. 791, 806–09 (1998).

[46] 29 U.S.C. §§ 158(a)(5), (b)(3) (1994).

[47] 29 U.S.C. § 159(a) (1994).

[48] *Id.*

[49] 29 U.S.C. § 158(d) (1994).

statutory discrimination claims must fit within the definition of "terms and conditions of employment" to constitute a mandatory subject of bargaining.

In addressing the scope of mandatory bargaining in *NLRB v. Wooster Division of Borg-Warner Corp.*,[50] the Supreme Court considered whether bargaining was required over a ballot clause which bound the union to submit the employer's final offer to the employees before any strike. The Court found that the clause related to the relationship of the union and the employees, not of the employer and the employees, and therefore it was not a mandatory subject of bargaining. Moreover, it weakened the independence of the union and enabled the employer to deal directly with the employees rather than the union.

In 1971, the Court rejected the Board's determination that retiree health insurance benefits were a mandatory subject of bargaining.[51] With little deference to the Board, the Court held that retirees were not members of the active workforce and not encompassed within the statutory definition of employee. The Court reaffirmed its conclusion in *Borg-Warner* that bargaining is required only over subjects that "settle an aspect of the relationship between the employer and employees."[52]

In *Ford Motor Co. v. NLRB*,[53] the Court returned to its deferential posture vis-a-vis the Board's decisions regarding bargaining subjects, stating "if [the Board's] construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute."[54] Without positing a specific test for determining whether a subject is mandatory, the Court affirmed the Board's decision, noting that the availability and the price of food in the workplace were "plainly germane to the 'working environment.'"[55] The Court also relied on the industrial practice of bargaining about the subject, finding the practice relevant but not dispositive. In addition, the Court noted that prior decisions by the Board and Courts of Appeal had found other aspects of food service to be negotiable.

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[50] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

[51] Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 166 (1971).

[52] *Id.* at 178. In supporting this holding, the Court noted the potential for internal conflicts that would arise if retirees were considered a part of the bargaining unit, and articulated a fear that the union might favor active employees over retirees. *Id.* at 173. The Court held, relying on prior decisions, that bargaining over "third party concern[s]" may be mandatory, but only if it "vitally affects" the terms and conditions of employment of the bargaining unit employees. *Id.* at 179. Retiree health insurance benefits did not. *Id.*

[53] Ford Motor Co. v. NLRB, 441 U.S. 488 (1979).

[54] *Id.* at 497.

[55] *Id.* at 498 (citation omitted).

Food prices are not trivial, nor would bargaining be unduly disruptive.[56] Indeed, the Court reaffirmed the value of bargaining, citing Professor Cox's seminal article on the duty to bargain in good faith.[57]

Applying these decisions to the subject at issue here, an agreement to arbitrate statutory claims of employees, is the beginning point of the analysis. Arbitration of statutory claims involves the relationship of the employer and the employees, at least insofar as the statutory claim relates to the employer-employee relationship. Discrimination cases, which have generated most of the litigation challenging arbitration agreements, clearly relate to the employer-employee relationship. Nondiscrimination clauses are mandatory subjects of bargaining, and employee efforts to eliminate discrimination in the workplace have long been considered protected concerted activity.[58] Other statutory issues such as minimum wage and overtime pay claims under the Fair Labor Standards Act of 1938[59] and claims for leave under the Family Medical Leave Act[60] similarly relate to the relationship between the

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[56] The Court also noted that food prices did not affect the entrepreneurial interest of the employer. *Id.* Further, the Court reaffirmed that the "vitally affects" test of *Allied Chemical & Alkali Workers* applies only where the matter at issue does not involve the relationship of the employer and its employees. *Id.* at 501.

[57] "Participation in debate often produces changes in a seemingly fixed position either because new facts are brought to light or because the strengths and weaknesses of the several arguments become apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions. The cost is so slight that the potential gains easily justify legal compulsion to engage in the discussion." *Id.* at 502, citing Archibald Cox, *The Duty to Bargain in Good Faith,* 71 HARV. L. REV. 1401, 1412 (1958).

[58] Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975); 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 Workers 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"); 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, were engaged in protected concerted activity); Vought Corp.-MLRS Sys. Div., 273 N.L.R.B. 1290, 1299 (1984) (finding employee's discussion of rumor that white employee would be promoted over black employee was protected concerted activity); Tanner Motor Livery, Ltd., 148 N.L.R.B. 1402, 1405 (1964) (holding that concerted activity of employees to protest racially discriminatory hiring practices was protected by § 8(a)(1)), *enforced in relevant part,* 349 F.2d 1, 3 (9th Cir. 1965).

[59] 29 U.S.C. §§ 201–19 (1994 & Supp. 2000)

[60] 29 U.S.C. §§ 2601, 2611–19, 2631–36, 2651–54 (1994 & Supp. 2000); 5 U.S.C. §§ 6381–87 (1994 & Supp. 2000)

employer and employees.[61] The industrial practice regarding bargaining over arbitration of statutory claims is, at best, unclear. While a few courts have found language in collective bargaining agreements sufficient to require arbitration of statutory claims, most courts have found either that the language does not require arbitration or that the union cannot bind the employee to arbitrate such claims.[62] Given this disagreement, it would be difficult to reach any conclusion about the practice of bargaining over such issues.

Looking to related issues is somewhat more helpful. The two ways in which the courts have found that a union can agree to arbitrate statutory claims to the exclusion of litigation are by incorporation of statutory claims in the arbitration clause of the agreement, or by incorporation of the statutory provisions as a part of the agreement. The Board has long held that bargaining over arbitration provisions is required.[63] Indeed, arbitration is a central feature of national labor policy.[64] The Board has construed the statute to require bargaining over the structure of the arbitration process, including the subjects to be arbitrated or excluded from arbitration,[65] the method of

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[61] Arbitration of statutory claims does not implicate any entrepreneurial interest of the employer. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 666–67 (1981) ("bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.").

[62] Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997); Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519 (11th Cir. 1997); Wright v. Universal Maritime Serv. Corp., 121 F.3d 702 (4th Cir. 1997) (unpublished opinion) (requiring arbitration of statutory claim under collective bargaining agreement), *rev'd*, 525 U.S. 70 (1998) (finding no clear and unequivocal waiver of right to litigate rather than arbitrate); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996) (requiring arbitration of statutory claim under collective bargaining agreement). As noted *supra* notes 18–26 and accompanying text, few courts have found language sufficient to require arbitration of statutory claims since *Wright*. Moreover, it is not clear, even when the courts required arbitration, that the parties intended to negotiate language that required arbitration of statutory claims and waived the employees' right to litigate.

[63] Luden's Inc. v. Local Union No. 6, Bakery, Confectionary & Tobacco Workers' Int'l Union, 28 F.3d 347, 360 (3d Cir. 1994); NLRB v. Montgomery Ward & Co., 133 F.2d 676, 685 (9th Cir. 1943); NLRB v. Boss Mfg. Co., 118 F.2d 187, 189 (7th Cir. 1941).

[64] United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

[65] Mayes Bros., 145 N.L.R.B. 181, 187 (1963) (finding employer did not violate the NLRA by insisting that discipline and discharge be excluded from arbitration).

selecting the arbitrator,[66] methods of enforcement of the arbitration award,[67] and the utilization of a transcript of arbitration proceedings.[68] Virtually all collective bargaining agreements contain arbitration provisions.[69] Historically, however, the arbitration provisions at issue involved arbitration of contractual rather than statutory disputes. Similarly, the Board has long held that nondiscrimination provisions are mandatory subjects of bargaining,[70] and nondiscrimination provisions are commonly included in collective bargaining agreements.[71]

Arbitration of statutory claims deals directly with the scope of the arbitration clause. Prior Board decisions would suggest that bargaining over the subjects to be arbitrated is required. Similarly, bargaining over the scope of the contractual prohibition on discrimination seems encompassed by prior

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[66] Indep. Stave Co., 248 N.L.R.B. 219, 228 (1980) (finding employer violated Act by refusing to comply with the arbitrator selection clause in the agreement, thereby violating the duty to bargain).

[67] Star Expansion Indus. Corp., 164 N.L.R.B. 563, 583 (1967) (finding provision that allowed arbitrator to enjoin temporarily a strike or lockout violative of the no strike/no lockout clause after ex parte hearing, permitting enforcement of award in state court, and waiving right to remove enforcement action to federal court to be a mandatory subject of bargaining), *review denied sub nom.* United Elec. Workers v. NLRB, 409 F.2d 150 (D.C. Cir. 1969).

[68] Communications Workers of Am., 280 N.L.R.B. 78, 80–81 (1986) (finding union violated the Act by unilaterally refusing to agree to preparation, use, and cost-sharing of transcripts of arbitration hearings in accordance with past practice).

[69] COOPER, *supra* note 2, at 17 (stating that 99% of collective bargaining agreements provide for arbitration of some types of grievances (citing BASIC PATTERNS IN UNION CONTRACTS 37 (14th ed. 1995))).

[70] Jubilee Mfg. Co., 202 N.L.R.B. 272, 273 (1973), *aff'd sub nom.* United Steelworkers of Am. v. NLRB, 504 F.2d 271 (D.C. Cir. 1974); Farmers' Coop. Compress, 169 N.L.R.B. 290, 295 (1968) (finding employer violated section 8(a)(5) by failing to bargain meaningfully over elimination of discrimination in the plant), *aff'd sub nom.* United Packinghouse Workers Int'l Union v. NLRB, 416 F.2d 1126, 1133 (D.C. Cir. 1969). Because virtually all of the cases involving arbitration of legal claims in the collective bargaining context have involved discrimination cases, the focus here is on statutory discrimination claims. The analysis is not limited to such claims, however, as employers could seek agreements to arbitrate claims under the Fair Labor Standards Act, *e.g.*, Tran v. Tran, 54 F.3d 115 (2d Cir. 1995), the Family Medical Leave Act, other federal or state statutes or even common law claims such as tortious discharge in violation of public policy. *See* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) (finding that § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1994), does not preempt state claim for wrongful discharge in violation of public policy).

[71] N. PETER LAREAU, DRAFTING THE UNION CONTRACT: A HANDBOOK FOR THE MANAGEMENT NEGOTIATOR, § 5A-10 (1998) ("It has been estimated that 94% of all collective bargaining agreements contain a non-discrimination clause.").

board decisions that require bargaining over nondiscrimination clauses. This simple and straightforward analysis ignores the effect of the provisions at issue, however, which is to waive the employee's right to litigate statutory discrimination claims.

B. *Waiver as a Non-mandatory Bargaining Subject*

The Board has issued several decisions dealing with classification of waivers of various rights as bargaining subjects. In *Kolman/Athey Division of Athey Products Corp.*,[72] the Board majority affirmed the decision of the Administrative Law Judge that the employer violated section 8(a)(5) of the Act by insisting to impasse on a contractual provision that waived the employee's right to pursue a contractual grievance if the employee filed charges with any state or federal agency.[73] While the majority expressly stated no rationale, it disclaimed reliance on *Gardner-Denver*[74] and found it unnecessary to decide whether the proposal was permissive or illegal.[75] Member Stephens' concurrence contained a more extensive rationale.[76] He relied on cases which held that contract proposals relating to the grievance and arbitration procedure were not mandatory subjects of bargaining if they would have an adverse effect on the collective bargaining process.[77] Member Stephens then reasoned that the proposal which required election of remedies would have a "severe adverse impact on the Union's ability to engage in grievance discussions" and therefore was permissive.[78] Since employees could preempt the union's processing of a grievance by filing a charge with the NLRB or any other government agency, the union's ability to represent the employees was severely compromised.

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[72] Kolman/Athey Div. of Athey Prods. Corp., 303 N.L.R.B. 92 (1991).

[73] *Id.* at 92.

[74] In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), the Supreme Court held that an employee's claim that his discharge violated Title VII could proceed in court despite a prior arbitration under the collective bargaining agreement which upheld his termination. In *Wright*, the Court suggested some tension between *Gardner-Denver*, which stated that an employee's Title VII rights could not be waived prospectively, and *Gilmer*, which upheld a prospective waiver of a judicial forum for an ADEA claim, but found it unnecessary to decide whether a union's prospective waiver was valid. Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 76–77 (1998).

[75] *Kolman/Athey*, 303 N.L.R.B. at 92 n.2.

[76] *Id.* at 92–93.

[77] *Id.* at 93 (citing Communications Workers of Am., 280 N.L.R.B. 78 (1986), and cases cited therein).

[78] *Id.*

While the limited explanation by the majority provides little guidance, the more extensive rationale of Member Stephens focusing on the impact of the proposal on the collective bargaining process has relevance to waivers of the right to litigate statutory claims.[79] The Administrative Law Judge's (ALJ) analysis is also helpful. The ALJ concluded that insistence on the waiver of the right to litigate in multiple fora was unlawful, distinguishing such waivers from waivers of statutory collective rights such as the right to strike or the right to bargain during the term of the collective bargaining agreement.[80] The authority cited by the ALJ primarily includes cases where the Board found unlawful insistence to impasse on a waiver of employee and/or union rights to file unfair labor practice charges or grievances under the collective bargaining agreement.[81] In discussing the issue, however, the ALJ noted that a union attempt to enforce an arbitration award prohibiting gender, race, or national origin discrimination could be nullified by an employee statutory charge of discrimination filed with an agency.[82] He went on to cite *Gardner-Denver* and to note that the required election of remedies would prevent employees from using different "forums providing different remedies in the interests of differing public and private policies and goals for the sole reason similar facts give rise to their invocation."[83] The statutory waiver contemplated herein differs from the election of remedies provision discussed by the ALJ in *Kolman/Athey* only in that it makes the election for the employee, rather than making it dependent on the employee's decision to file a charge.[84] The ALJ's reliance on *Gardner-Denver*, however, casts some doubt on the survival of the analysis if *Gardner-Denver* no longer governs.[85]

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[79] *See infra* notes 99–110 and accompanying text.

[80] *Kolman/Athey*, 303 N.L.R.B. at 96.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] It might also be argued that the waiver of a judicial forum does not preclude the employee from filing an EEOC charge, but only from initiating a lawsuit. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991); EEOC v. Waffle House, 193 F.3d 805 (4th Cir. 1999) (permitting EEOC to proceed with lawsuit despite arbitration agreement because EEOC is vindicating the public interest in eradicating discrimination, but precluding EEOC from seeking relief for individual in the lawsuit). Given the small percentage of cases litigated by the EEOC, however, and the judicial decisions precluding individual relief in EEOC cases where the employee agreed to arbitration, this distinction makes little difference:

In *Reichhold Chemicals, Inc.*,[86] the Board directly addressed the issue of whether a waiver of the employee's right to seek redress from the Board for discipline related to violation of a no strike clause was a mandatory subject of bargaining.[87] The Board found insistence to impasse on such a waiver to be contrary to the policy of the statute and unrelated to terms and conditions of employment.[88] Accordingly, without finding whether the waiver was a permissive or illegal subject, the Board concluded that bargaining was not mandatory.[89] In so holding, the Board cited the importance of unimpeded access to the agency, relying on both Supreme Court and NLRB cases that find union constitutional provisions that limit Board access unlawful.[90] With less analysis, the Board found that, unlike a no-strike clause, the waiver did not regulate relations between the employer and employees or settle a term or condition of employment.[91]

Fiscal Year (FY)	No. of Charges	No. of Lawsuits
1995	87,529	373
1996	77,990	193
1997	80,680	338
1998	79,591	405
1999	77,444	465

THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CHARGE STATISTICS FY 1992 THROUGH FY 2000, *available at* http://www.eeoc.gov/stats/charges.html (last modified Jan. 18, 2001).

[85] While *Gardner-Denver* is still good law, the Court in *Wright* suggested that some tension exists between *Gardner-Denver* and the later *Gilmer* decision. Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 76–77 (1998). Were the Court to decide that a union-negotiated waiver of the right to litigate statutory claims was enforceable, *Gardner-Denver* would likely be overruled or at least limited. *See Wright*, 525 U.S. at 80 (suggesting that *Gardner-Denver* contains a "seemingly absolute prohibition of union waiver of employees' federal forum rights.").

[86] Reichhold Chems., Inc., 288 N.L.R.B. 69 (1988), *enforced in relevant part*, 906 F.2d 719, 723 (D.C. Cir. 1990).

[87] *Id.* at 72.

[88] *Id.* at 71.

[89] *Id.* at 72.

[90] *Id.* at 71–72 (citing NLRB v. Indus. Union of Marine & Shipbuilding Workers of Am., Local 22, 391 U.S. 418, 424 (1968); Int'l Union of Operating Eng'rs, Local 138, 148 N.L.R.B. 679, 684 (1964) (finding union violated the NLRA by fining union member for filing NLRB charges without first exhausting internal remedies); Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 277 N.L.R.B. 1071, 1072 (1985) (finding union violated section 8(b)(1)(A) by disciplining union official who filed NLRB charges, even where union was pursuing legitimate union interests, because discipline interfered with access to the Board).

[91] *Reichhold Chemicals, Inc.*, 288 N.L.R.B. at 72; *see also* Bryant & Stratton Bus. Inst., 327 N.L.R.B. 1135 (1999) (holding that demand that union waive its right to file

Perhaps closer in fact to the waiver of judicial forum at issue here is *Borden, Inc.*[92] In *Borden,* the employer, negotiating over the effects of a plant closing, insisted that employees, who elected severance pay, sign a general release of "claims for wages, employment, reemployment, reinstatement, and 'any and all causes of action whatsoever' which an employee might have against Respondent as a result of his employment."[93] The union indicated a willingness to agree to a release limited to contractual rights and rights relating to termination of employment, but expressed particular concern over releasing rights to file health and safety claims relating to exposure to a carcinogenic substance used in the workplace.[94] The Board adopted the ALJ's finding that a general release is not a mandatory subject of bargaining. The ALJ determined that the classification of a waiver of a future legal right was dependent on the nature of the right extinguished by the waiver. He concluded that a general release of all future claims arising out of previous employment "is too attenuated from the actual terms and conditions of that employment to be a mandatory subject of bargaining."[95]

The Board has also held that the issue of whether to maintain a lawsuit or unfair labor practice charge, or to settle such a charge, is not a mandatory subject of bargaining.[96] Accordingly, insistence on an agreement not to file, or to settle, violates the duty to bargain in good faith.[97]

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unfair labor practice charges as a condition of granting a wage increase was a non-mandatory subject of bargaining).

[92] Borden, Inc., 279 N.L.R.B. 396 (1986).

[93] *Id.* at 398.

[94] *Id.*

[95] *Id.* at 399 n.5.

[96] *See, e.g.*, Bryant & Stratton Bus. Inst., 327 N.L.R.B. at 1135; Laredo Packing Co., 254 N.L.R.B. 1 (1981) (finding settlement of dispute over back pay liability and withdrawal of breach of contract lawsuit and unfair labor practice charges to be non-mandatory subjects of bargaining); Peerless Food Products, Inc., 231 N.L.R.B. 530, 534 (1977) (finding unlawful an employer's conditioning of agreement upon withdrawal of lawsuit that sought contributions to pension trust); Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1037 (8th Cir. 1976) (finding that conditioning bargaining on withdrawal of unfair labor practice charge violates section 8(a)(5)); NLRB v. United Bhd. of Carpenters, 447 F.2d 643, 646 (2d Cir. 1971) (finding that union insistence that contractors' association drop litigation over trust fund management as a condition of bargaining violated section 8(b)(3) as subject non-mandatory).

[97] *See supra* note 96.

C. *Application of the Law to Forum Waivers*

The analysis in *Borden*[98] and the other cases holding that settlement or maintenance of lawsuits or unfair labor practice charges is a non-mandatory subject supports an argument that waiver of a judicial forum is also a non-mandatory subject. Like the general release that incorporates waivers of health and safety claims, it may be too attenuated from terms and conditions of employment to constitute a mandatory subject of bargaining. Yet it relates to nondiscrimination obligations and the forum in which they will be litigated, subjects that seem intimately related to terms and conditions of employment. Only if statutory rights are viewed as distinct from terms and conditions of employment does the rationale make sense. *Borden* does suggest that the nature of the right extinguished by the waiver determines whether the subject is mandatory. Waivers of the right to strike and the right to bargain have been held to be mandatory subjects.[99] Waivers of the right to file or maintain unfair labor practice charges or lawsuits are not. Although the cases cited above involve unfair labor practice charges or lawsuits directly related to the collective bargaining agreement or protected union activity, such as breach of contract claims or suits relating to employee benefit trust funds, the rationale may be even stronger for lawsuits involving individual employee rights.[100]

While the rationale for finding settlement or withdrawal of lawsuits or charges to be non-mandatory subjects is not clearly articulated in many cases, the argument of an attenuated relationship to terms and conditions of employment is not particularly persuasive. The lawsuits and unfair labor practice charges at issue in many of the Board's cases related directly to terms and conditions of employment, although not perhaps to negotiation of those terms. Better rationales for finding waivers and settlements to be non-mandatory are the need to preserve access to the Board and the courts, and the reluctance to allow employers or unions to condition access to statutory rights, such as the right to bargain, on waiver of other rights, such as the right to litigate under statutes designed to protect the public interest. For the same

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[98] *Borden*, 279 N.L.R.B. at 396.

[99] NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 409 (1952) (finding no per se violation where the employer bargained for a management functions clause that gave unilateral control to the employer over matters such as promotion and discipline); *In re* Shell Oil Co., 77 N.L.R.B. 1306, 1350 (1948) (finding no bad faith bargaining where parties reached impasse on no strike clause). It has been argued, however, that interpreting the Act to permit such waivers weakens the statutory protection for workers. *See generally* Peter Phillips, *The Contractual Waiver of Individual Rights Under the National Labor Relations Act*, 31 N.Y.L. SCH. L. REV. 793 (1986).

[100] *See infra* notes 111–15 and accompanying text.

reason that unions cannot penalize members for exercising their right to file charges with the NLRB, employers should not be permitted to condition collective bargaining on the union's agreement to waive employees' rights to file lawsuits to vindicate their statutory rights. If a union or an employer cannot be forced to settle, drop, or prospectively waive litigation over a benefits trust or breach of a collective bargaining agreement in order to obtain a collective bargaining agreement (and thereby labor peace), then that same entity cannot be forced to sacrifice employee rights, particularly where such rights are infused with the public interest. Since there may be a greater willingness to sacrifice rights that do not belong to the union in the first place, the Board should be more vigilant to insure that the waiver is not used as a club in collective bargaining.

If the Board were to find that waivers of individual employee rights were mandatory subjects of bargaining, the employer could condition bargaining over wages, hours, and terms and conditions of employment on employee waivers of their right to enforce various employee protective statutes.[101] An

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[101] This assumes, of course, that such waivers are permissible under the statute or common law giving rise to the right. Forcing an employee to sacrifice the right to litigate in order to obtain a collective bargaining agreement is analogous to forcing an employee to give up a statutory right to retain employment. Courts in many states have found it violative of public policy to terminate employees for asserting statutory rights, even where the statutes have no retaliation protection. *E.g.*, Raykovitz v. K Mart Corp., 665 A.2d 833, 834–35 (Pa. Super. 1995) (finding wrongful discharge where employee was terminated for seeking unemployment benefits because public policy clearly provided for such benefits); Griess v. Consolidated Freightways Corp., 776 P. 2d 752, 754 (Wyo. 1989) (finding employees could bring retaliatory discharge action when terminated for filing workers' compensation claims); Coleman v. Safeway Stores, Inc., 752 P.2d 645, 652 (Kan. 1988) (extending to employees covered by a collective bargaining agreement the right to bring retaliatory discharge action based on filing for workers' compensation benefits, based on public policy in the Workers' Compensation Act); Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270, 276 (W. Va. 1978) (finding employee could file claim for wrongful discharge based on retaliation for attempting to force employer to comply with state and federal statutes protecting credit consumers). The rationale for these cases is that if the employee has a statutory right, termination of the employee for asserting that right is against public policy. The Supreme Court's decision in *Livadas v. Bradshaw*, 512 U.S. 107 (1994), further supports the conclusion that the waiver is not a mandatory subject of bargaining. The Court there found state law preempted when it penalized employees who exercised their statutory right to bargaining collectively by exempting them from the state law. *Id.* at 135. The Court stated: "A state rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose." *Id.* at 116. So too does an employer requirement that the exercise of collective bargaining rights be conditioned on waiver of judicial litigation of other statutory claims. *See also* Nash v. Florida Indus. Comm., 389 U.S. 235, 239 (1967) (preempting Florida law disqualifying employee from receiving unemployment compensation benefits because she filed unfair labor practice charge,

employer could obtain a waiver of employee rights to file workers' compensation claims, enforce health and safety statutes, enforce pension rights under ERISA, litigate claims of retaliatory discharge for reporting statutory violations,[102] and so on. If unions resisted employer attempts to obtain waivers, it would frustrate the primary goal of the statute—encouraging collective bargaining to promote labor peace. While courts and other enforcement agencies might find such waivers ineffective under the statute being enforced, the chilling effect of the waiver might preclude many claims from ever reaching the enforcement agency. Moreover, the lack of certainty about the validity of the waiver would lead to union resistance and thereby interfere with the goal of peaceful settlement of labor disputes.

The Board has a long history of regulation designed to preserve the process of collective bargaining because of its centrality to the statutory purpose. Thus, although the Board is generally precluded from regulating economic weapons in order to balance bargaining power because it intrudes on the bargaining process,[103] the Board may do so where the conduct frustrates or substantially interferes with the bargaining process.[104] Recently, the Board crafted an exception to the policy that unilateral implementation of contract proposals is permissible once the parties have bargained to impasse.[105] The Board's rationale, approved by the United States Court of Appeals for the District of Columbia, was that the merit pay proposal at issue would adversely impact the collective bargaining process.[106] Because the proposal gave the employer standardless discretion, it would detrimentally affect future negotiations by ensuring that the union could not bargain

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analogizing state action to coercive employer actions which frustrate Congressional purpose of leaving employees free to file charges).

[102] While in many cases prospective waivers of the right to file claims implicate the public interest, wrongful discharge claims in which the employee is terminated for reporting unlawful or dangerous employer conduct pose particular risk, for employees will be dissuaded from reporting conduct that may harm the public, and individuals other than employees may be unaware of such conduct. *E.g.*, Green v. Ralee Eng'g Co., 960 P.2d 1046, 1056 (Cal. 1998) (citing public policy favoring air line safety in upholding reversal of summary judgment in favor of employer that terminated employee for objecting to shipping of defective parts to airline manufacturers); Norris v. Hawaiian Airlines, Inc., 74 Haw. 235, 842 P.2d 634, 644–45 (Haw. 1992) (upholding employee's wrongful discharge claim where he was fired for reporting discrepancies in airline's maintenance records).

[103] NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 496 (1960).

[104] *See* NLRB v. Katz, 369 U.S. 736, 747 (1962); Charles D. Bonanno Linen Service v. NLRB, 454 U.S. 404, 419 (1982).

[105] *See* McClatchy Newspapers, Inc., 321 N.L.R.B. 1386 (1996), *enforced*, 131 F.2d 1026 (D.C. Cir. 1997).

[106] *Id.* at 1388.

knowledgeably over wages, an issue central to the collective bargaining process.[107] Similarly here, the conclusion that the waiver is a mandatory subject of bargaining would detrimentally affect the process of collective bargaining by making it dependent upon an agreement to waive the statutory rights of individual employees. Bargaining rights could be held hostage to obtain agreements to arbitrate statutory claims, entangling the statutorily-mandated bargaining process with employer efforts to minimize litigation costs and perhaps with enforcement efforts relating to other employment statutes.[108]

Moreover, as noted by Member Stephens, those contract proposals relating to the grievance and arbitration procedure that would adversely impact the collective bargaining process are not mandatory.[109] Forcing all statutory claims into the arbitration process may adversely affect the union's ability to process and handle grievances due to the increased volume of cases. In addition for reasons set forth more fully below, mandatory arbitration of statutory claims will impact arbitration of contractual claims due to the frequent overlap of the claims.[110] Thus, for this reason also, the waiver should be a non-mandatory subject of bargaining.

The Supreme Court has evinced a concern with allowing a union to waive employee rights where the union's interests may conflict with that of the employees. In *NLRB v. Magnavox Co.*,[111] the Supreme Court noted that the ability of the union to waive employee rights such as the right to strike, was premised on fair representation by the union and on the employee's right to choose his or her bargaining representative freely.[112] In *Magnavox,* the Supreme Court held that the union could not lawfully waive the right to distribute literature on company premises because of the interference with employee rights, which might conflict with the union's self interest in preventing employees supportive of other unions from distributing literature.[113] Even where no conflict is apparent, the Board should not find the subject mandatory because the union may be less vigilant about

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[107] *Id.* at 1390–91.

[108] For a discussion of the way in which employers might utilize arbitration agreements to contract out of their statutory nondiscrimination obligations, see Malin, *supra* note 2, at 601–22.

[109] *See supra* notes 75–78 and accompanying text.

[110] *See infra* notes 186–215 and accompanying text.

[111] NLRB v. Magnavox Co., 415 U.S. 322 (1974).

[112] *Id.* at 324.

[113] *Id.* For discussion of possible conflicts between union and employee interests, see Hodges, *supra* note 3, at 143–45; Ronald Turner, *Employment Discrimination Labor and Employment Arbitration and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 EMORY L. J. 135, 201 (2000).

protecting the employee right, and quick to waive such a right to obtain benefits for the members of the bargaining unit.[114] Union resistance may be particularly difficult where there is strong employee pressure to obtain an agreement with immediate benefits, such as wage increases and pension and insurance benefits. While the waiver may adversely affect bargaining unit members eventually, the employees are not likely to value highly the right to litigate at the time of negotiations.[115] Thus, the importance of finding such a waiver non-mandatory rivals that of a settlement of unfair labor practice charges or a lawsuit filed by the union, a subject in which the union may see a much more direct interest.

It might be argued that the waiver at issue here is a mandatory subject of bargaining because the only waiver is of the forum, rather than the claim. The claim can still be litigated, albeit in the arbitral rather than the judicial forum. The Board in *Kolman/Athey*, however, found the waiver of the forum only to be non-mandatory.[116] A further difficulty with this argument is that, while assuming arguendo that individual arbitration is a mere substitution of a different forum, arbitration under a collective bargaining agreement is not.[117] Under a collective bargaining agreement, the union, not the employee, controls the decision about whether to arbitrate and how to arbitrate, including who serves as arbitrator, what arguments to make, and who represents the union in the arbitration.[118] Indeed the agreement to waive a judicial forum may result in an employee's discrimination claim receiving no hearing at all, despite the desires of the employee.[119] In fact then, the waiver is more substantive than a mere forum waiver. Even assuming the union can lawfully waive the right, the employer should not be able to force such a waiver by conditioning collective bargaining on it.

In the latter sense, the waiver is analogous to settlement as a bargaining subject. The union (or the employer) can lawfully drop or settle an unfair labor practice or lawsuit, and indeed our legal system encourages settlement.

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[114] For reasons set forth in my earlier work, unions should be reluctant to agree to such a waiver. *See* Hodges, *supra* note 3, at 157–59. Nevertheless, employees may be unwilling to strike over the issue because of the lack of immediate relevance as contrasted with wages, thereby pressuring the union to agree to a waiver. *Id.* at 162.

[115] Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. & EMP. L.J. 1, 29 (1996).

[116] *See supra* notes 72–85 and accompanying text.

[117] For a thorough discussion of the reasons, see Hodges, *supra* note 3, at 154–55.

[118] *See id.* at 145–50.

[119] *E.g.*, Moore v. Duke Power Co., 971 F. Supp. 978, 983 (W.D.N.C. 1997) (finding litigation of the employee's disability discrimination claim precluded by an arbitration agreement even though union in arbitration never raised the issue of disability discrimination).

Nevertheless, collective bargaining cannot be conditioned on settlement or withdrawal of a charge or lawsuit.[120] Nor should it be conditioned on agreement to waive the employees' statutory right to a judicial forum.

An additional argument that a waiver of the right to a judicial forum is not a mandatory subject of bargaining posits that agreement to such a waiver would violate the union's duty of fair representation. In *Southwestern Pipe*,[121] the Board held that it was unlawful for an employer to insist that an agreement include a nondiscrimination clause that would require the union to breach its duty of fair representation.[122] The Board adopted the Trial Examiner's decision, which found that the provision insisted upon by the employer would prevent the union from grieving on behalf of an African-American employee who received a lower rate of pay for doing the same work as a white employee despite equal seniority, skill, and productivity. The Trial Examiner concluded that agreement to such a provision would breach the union's duty of fair representation and subject it to liability under Title VII. Although the Fifth Circuit denied enforcement, the basis for the denial was not the principle upon which the Board relied, but rather the conclusion that the language proffered by the employer should not be interpreted to preclude the union from challenging employer discrimination.[123] Following *Southwestern Pipe*, it might be argued that insistence by the employer on a waiver violates section 8(a)(5) by requiring the union to agree to breach its duty of fair representation.

That argument, however, presupposes that agreement to a waiver breaches the duty of fair representation. If the Supreme Court ultimately concludes that such a waiver is impermissible, then it seems clear that insistence on a union waiver would be a non-mandatory subject, based on this rationale among others. However, if such a waiver is permissible under discrimination law, as the Fourth Circuit has currently held, then it is difficult to conclude that the mere agreement to a waiver would violate the duty of fair representation. Were other circumstances present, such as evidence that the union's agreement was motivated by a desire to limit the rights of a

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[120] *See supra* notes 95–97 and accompanying text.

[121] Southwestern Pipe, Inc., 179 N.L.R.B. 364 (1969), *enforcement denied in relevant part*, 44 F.2d 340 (5th Cir. 1971).

[122] *Id.* at 376. As noted *supra* notes 111–14 and accompanying text, the Supreme Court in *NLRB v. Magnavox, Co.*, 415 U.S. 322, 324 (1974), found that a permissible waiver is premised on fair representation. Where the premise is missing, the waiver should be impermissible.

[123] The Board subsequently reaffirmed the principle in *Graphic Arts Int'l Union, Local 280*, 235 N.L.R.B. 1084, 1084 (1978).

disfavored group, a breach of the duty would likely be found.[124] But in such a situation, the case facing the Board would be an allegation of a section 8(b)(1)(A) violation, not a complaint of employer insistence on a non-mandatory subject.[125]

One might also argue that a union breaches its duty of fair representation by agreeing to limit judicial rights knowing that the union does not have the resources to represent employees with statutory claims effectively in the grievance procedure. Such an action may not be discriminatory, absent specific discriminatory intent, for it affects all employees in the bargaining unit who have potential claims, but might be arbitrary or in bad faith.[126] Again, however, the focus is on fair representation, not the status of the

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[124] Vaca v. Sipes, 386 U.S. 171, 177 (1967) (finding that the statutory duty of fair representation that originated in a line of cases focusing on racial discrimination requires that "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve interests of all members without hostility or discrimination."); Steele v. Louisville & N.R. Co., 323 U.S. 192, 201 (1944) (holding that where a statute provides for a representative to be chosen by a class of employees, that representative is under a duty to represent all members of the class equally regardless of race); United Rubber, Cork, Linoleum & Plastic Workers of Am., Local 12, 150 N.L.R.B. 312, 317 (1964) (finding violation of section 8(b)(1)(A) where union refused to process grievances of African-American workers because of race and finding reliance on racially discriminatory contract terms no defense); Int'l Longshoremen's Ass'n, Local 1367, 148 NLRB 897, 897–98 (1964) (finding "that (1) by maintaining and enforcing the 75-25 percent work distribution between Locals 1367 and 1368, respectively, based upon race and union membership, in successive collective-bargaining agreements . . . Respondents have failed to comply with their duty as exclusive bargaining representative to represent all employees in the bargaining unit fairly and impartially, and thereby violated section 8(b)(1)(A) of the Act."); Indep. Metal Workers Union, Local 1, 147 N.L.R.B. 1573, 1574 (1964) (finding that union violated section 8(b)(1)(A) by refusing to process grievance based on the grievant's race and stating that although issue of validity of racially discriminatory contract terms was not raised by the complaint, majority did not disagree with the charging party that negotiation of such terms by union violates section 8(b)(1)(A)).

[125] If evidence of the union's discriminatory motive were available, it might be used to defeat an employer's motion for dismissal of a judicial claim on the basis of the arbitration agreement. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999) (refusing to compel employee to arbitrate when agreement was so egregiously unfair as to breach the company's duty to establish fair arbitration rules under the agreement); Cole v. Burns Int'l Sec. Serv., (D.C. Cir. 1997) (upholding arbitration agreement only when certain requirements were met, and noting that an employee could not be compelled to arbitrate a statutory claim under an agreement that was a condition of employment when the employee was required to pay any of the costs of arbitration). A requirement that the employee utilize an arbitration procedure with representation hostile to the employee's interests would seem to be equally unfair.

[126] Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 67 (1991) (setting forth this standard for duty of fair representation cases).

bargaining subject. Taking the argument a step further, an employer that insists on waiver of a judicial forum for statutory claims may violate section 8(a)(5) if it knows that the union cannot effectively handle the statutory claims in the grievance procedure.[127] Such an argument makes the classification of the bargaining subject turn on the employer's knowledge or motivation. Setting aside the difficulties of proof,[128] the classification of bargaining subjects has not traditionally turned on motivation. Rather, motivation has been an element of good faith bargaining. Thus, one could argue that insistence on such an agreement does not violate section 8(a)(5) because it is a nonmandatory subject of bargaining, but rather because the employer is bargaining in bad faith by insisting on a proposal that is legal, but predictably unacceptable since it effectively eliminates employee statutory rights and, therefore, causes the union to breach its duty of fair representation.[129] However, the Board is traditionally reluctant to find surface bargaining based on the employer's position on one issue if the employer appears to be bargaining in good faith on other subjects.[130] If it appears, in a given case, that the employer is using the waiver to frustrate

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[127] *Cf.* Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 759 (3d Cir. 1977) (holding employer may be joined in duty of fair representation claim if employer has knowledge of union's breach).

[128] The union might submit proof of the number of discrimination complaints and the limits on its resources, but it is not clear whether that would be sufficient evidence or whether employer knowledge of those facts and motivation could be established. In addition, a union would likely be reluctant to argue further its own ineffectiveness, even if the benefits were greater than appears here.

[129] *See, e.g.*, Josten Concrete Prods. Co., 295 N.L.R.B. 1029, 1032 (1989) (finding "unpalatable" wage proposal and proposal for waiver of statutory rights designed to frustrate bargaining); E. Tex. Steel Castings Co., 154 N.L.R.B. 1080, 1081–82 (1965) (finding employer proposals on management rights and limited arbitration so predictably unacceptable that requisite intent to reach agreement absent).

[130] *E.g.*, John S. Swift Co., 124 N.L.R.B. 394, 395 (1959), *enforced in part and denied in part*, 277 F.2d 641 (7th Cir. 1960); The Proctor & Gamble Mfg. Co., 160 N.L.R.B. 334, 341 (1966). Moreover, effectively remedying such a violation is notoriously difficult. *See* H.K. Porter v. NLRB, 397 U.S. 99 (1970); Andrew Strom, *Rethinking the NLRB's Approach to Union Recognition Agreements*, 15 BERKELEY J. EMP. & LAB L. 50, 56 (1994) (relating *H.K. Porter*'s limitations on bargaining remedies to the lack of meaningful remedies for employer refusals to recognize and bargain with unions selected by a majority of their employees); *The Supreme Court, 1969 Term—NLRB Remedial Power to Impose Contract Terms*, 84 HARV. L. REV. 202 (1970) (discussing limits on the remedial powers of the Board); Note, *NLRB Power to Award Damages in Unfair Labor Practice Cases*, 84 HARV. L. REV. 1670, 1688–93 (1971) (distinguishing between remedies that award damages and the remedial imposition of contract terms).

bargaining, the Board might find a violation without determining that the waiver is not a mandatory subject of bargaining.[131]

Although the above analysis concludes that the waiver is not a mandatory bargaining subject, all other aspects of arbitration of statutory claims come within the definition of mandatory bargaining subjects. Thus the employer and union must bargain, upon request, about the scope of the grievance and arbitration procedures and the process by which statutory grievances are arbitrated, if they are included in any arbitration procedure. In addition, the employer and union must bargain, upon request, about the existence and scope of a nondiscrimination clause.

The practical result of this conclusion is that the employer and union may bargain, and insist to the point of impasse, on all aspects of arbitration and nondiscrimination clauses except for language that waives the employees' right to litigate claims. Accordingly, neither can insist to the point of impasse that the arbitration procedure expressly cover statutory claims or that any nondiscrimination law be expressly incorporated into the agreement.[132] An express waiver of the right to litigate such claims would be similarly off limits.

A conclusion that waiver of the right to litigate statutory claims is not a mandatory bargaining subject does not preclude the employer and the union from agreeing to such a waiver, nor does it prohibit the union and employer from soliciting employee waivers should they decide to provide for arbitration of statutory claims.[133] It merely prevents either party from insisting to the point of impasse that such a provision be included in the collective bargaining agreement. As many commentators have suggested, arbitration may be an appropriate forum for litigation of some or all statutory claims.[134] The presence of the union may eliminate some of the identified drawbacks of individual arbitration of statutory claims.[135] The experienced

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[131] H.K. Porter Co., 153 N.L.R.B. 1370, 1372 (1965), *enforced*, 363 F.2d 272 (D.C. Cir. 1966) (finding employer's intransigent position on dues checkoff clause violated duty to bargain in good faith because it was a "device to frustrate agreement.")

[132] *See supra* notes 14–17 and accompanying text.

[133] Of course, the union could agree only if a union waiver was legally permissible. Currently, such waivers are permissible in at least the Fourth Circuit.

[134] *See* BALES, *supra* note 6, at 9–10; Turner, *supra* note 113, at 202; Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 29–30, 63 (1998); Samuel Estreicher, *Predispute Agreements To Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997); Roberto L. Corrada, *Claiming Private Law for the Left: Exploring* Gilmer's *Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1066–70 (1996); R. Theodore Clark, Jr., *A Management View of Nonunion Employee Arbitration Procedures*, *in* LABOR ARBITRATION UNDER FIRE 176–77 (James L. Stern & Joyce M. Najita, eds. 1997).

[135] *See* Hodges, *supra* note 3, at 168–69.

union can assist employees with arbitration, provide information to employees that will help prove the claim, and balance the power of the employer as a repeat player in the arbitration process.[136] However, it should be the choice of the union and the employees it represents, rather than of the employer alone, whether and how to incorporate statutory claims in the collectively-bargained grievance and arbitration procedure. Furthermore, unions, employees, and employers could agree to a voluntary procedure to arbitrate statutory claims either before or after they arise,[137] utilizing either the collectively bargained procedure or a separate arbitration procedure. To the extent that there are benefits from arbitrating statutory claims, they will be arbitrated voluntarily and a Board decision that prevents insistence on a waiver will not preclude arbitration.

IV. UNILATERAL IMPLEMENTATION OF COLLECTIVELY BARGAINED WAIVERS

Despite the arguments above, the Board or the courts may determine that a provision for mandatory and exclusive arbitration of statutory claims relates to the scope of the arbitration procedure and thus constitutes a mandatory subject of bargaining. While in most cases, classification of a subject as mandatory carries with it the right to implement unilaterally when bargaining impasse is reached, there are exceptions. For several reasons, the employer could not implement a proposal to arbitrate statutory claims over the union's objection. First, because arbitration requires consent, it cannot be unilaterally imposed at impasse.[138] Second, where, as here, a proposed provision constitutes a waiver, it cannot be imposed unilaterally, for a waiver requires consent as well.[139] Like the right to strike, the right to litigate cannot

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[136] Carrie Menkel-Meadow, *Do the "Haves" Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. DISP. RESOL. 19, 41 (1999); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 242 (1998); Lisa B. Bingham, *Employment Arbitration: Differences between Repeat Player and Nonrepeat Player Outcomes*, *in* PROCEEDINGS OF THE FORTY-NINTH ANNUAL MEETING, INDUS. RELATIONS RESEARCH ASS'N 201, 202, 207 (1997).

[137] Voluntary post-dispute arbitration of individual statutory claims does not sufficiently implicate mandatory subjects of bargaining to require union participation in negotiation of such agreements. *See infra* notes 233–34 and accompanying text.

[138] *See* Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 199–200 (1991); McClatchy Newspapers v. NLRB, 131 F.3d 1026, 1030 (D.C. Cir. 1997); NLRB v. McClatchy Newspapers, 964 F.2d 1153, 1171 (D.C. Cir. 1992) (Edwards, J., concurring).

[139] *See McClatchy Newspapers*, 131 F.3d at 1031 (indicating that an employer could not impose a no-strike provision because the strike is a fundamental right which requires a specific contractual waiver).

be waived by the union except by a clear and unequivocal waiver.[140] Thus, even if deemed a mandatory bargaining subject, the waiver cannot be accomplished by unilateral imposition of a contract provision after impasse.

The inability of the employer to implement an exclusive statutory arbitration system after impasse does not, however, eliminate the adverse impact on the bargaining process that would be caused by finding a waiver to be a mandatory subject of bargaining. Although implementation would be prohibited, the employer could still insist to impasse that such a waiver be included in any contract, and the union would be forced to agree, take economic action, or continue without any agreement. The employees would still be deprived of the benefits of a collective bargaining agreement unless they waived their right to litigate statutory claims. While the waiver could not be unilaterally imposed, the employees would either have to live with no agreement or strike. Thus, the collective bargaining process and labor peace would still be frustrated by the injection of the statutory waiver into negotiations.

V. BARGAINING FOR INDIVIDUAL WAIVERS

In the *ALPA* case, the court of appeals, after concluding that arbitration of statutory claims was not a mandatory subject of bargaining, upheld the employer's right to impose arbitration on individual employees.[141] The district court, however, found the subject mandatory and prohibited employer imposition of the arbitration requirement. Regardless of the classification of waivers as a bargaining subject, the question of whether the National Labor Relations Act permits the employer to bypass the union and impose waivers on the employees that the union represents must be answered. While the EEOC has taken the position that such agreements are inconsistent with discrimination laws,[142] many courts have upheld them,[143] and the NLRB has not directly ruled on the question.

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[140] *See* Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 80 (1998).

[141] Air Line Pilots Ass'n, Int'l v. Northwest Airlines, 199 F.3d 477, 485–86 (1999).

[142] The EEOC opposes imposition of such waivers as a condition of employment. EEOC v. River Oaks Imaging, No. CIV.A.H-95-755, 1995 WL 264003 (S.D. Tex. Apr. 19, 1995); *EEOC: Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment*, 8 Lab. Rel. Rep. (BNA) 405:7511 (July 7, 1997) (setting forth EEOC opposition to mandatory arbitration). The EEOC has participated as amicus in cases raising the issue, arguing that employees cannot be compelled to enter into predispute arbitration agreements. *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 937 (4th Cir. 1999).

[143] *E.g.*, Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1482 (D.C. Cir. 1997); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700 (11th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 312 (6th Cir. 1991).

A. *The NLRB General Counsel's Position on Compulsory Arbitration*

In 1995, the NLRB General Counsel, in response to a request for advice from an NLRB Regional Director, took the position that mandatory arbitration agreements in the nonunion context violate the Act.[144] The issue submitted for advice in *Bentley's Luggage Corp.* was whether the employer violated the statute by requiring employees to agree to arbitrate employment claims before seeking redress in any other forum, and by firing the charging party for refusal to sign the agreement.[145] Since the employees in *Bentley's* were not represented by a union, the issue addressed was not whether the agreement was a mandatory subject of bargaining, but rather whether it could be lawfully imposed on nonunion employees under threat of termination.[146] The General Counsel authorized a complaint, absent settlement, alleging that the action violated sections 8(a)(1) and (4) because it required the employees to waive their statutory right to file charges with the Board. The memorandum relied upon the early Supreme Court decision in *National Licorice Co. v. NLRB*,[147] holding that contracts used to frustrate statutory rights are unlawful.[148] The memorandum went on to note 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.[149] Although the arbitration agreement at issue could be broadly read to waive the right to pursue any statutory claim without first arbitrating, 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.[150] The General Counsel reasoned that the provision

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[144] Bentley's Luggage Corp., [1996–1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) ¶ 34208, at 212 (Aug. 21, 1995), *available at* 1995 N.L.R.B. GCM LEXIS 92 (1995).

[145] *Id.*, *available at* 1995 N.L.R.B. GCM LEXIS 92, at *1.

[146] *Id.*

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

[148] *Bentley's Luggage*, [1996–1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 213, *available at* 1995 N.L.R.B. GCM LEXIS 92, at *6–7.

[149] *Id.*, *available at* 1995 N.L.R.B. GCM LEXIS 92, at *7–8 (citing, inter alia, Kolman/Athey Div. of Athey Prods. Corp., 303 N.L.R.B. 92 (1991) and Vazquez, 265 N.L.R.B. 602 (1982)).

[150] 29 U.S.C. § 158(a)(4); *Bentley's Luggage*, [1996–1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 213, *available at* 1995 N.L.R.B. GCM LEXIS 92, at *9.

was enacted to protect employee rights to report unfair labor practices and the arbitration agreement interfered with that purpose.[151]

The employer argued that the *Gilmer* case[152] privileged the agreement, but the General Counsel found the case inapplicable.[153] First, *Gilmer* permits enforceable arbitration agreements for statutory claims only where the statute does not evidence an intent to preclude waiver of judicial remedies.[154] The General Counsel read the Act as giving enforcement authority to the Board regardless of other remedies available.[155] 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.[156] Thus a waiver by the employee precludes enforcement of the statute.[157] While the rationale in *Bentley's* supports a conclusion that insistence on a waiver of the right to file NLRB charges would violate the Act, the General Counsel's specific reliance on the National Labor Relations Act provides little guidance with respect to waivers of other statutory claims.[158]

Arguably, the Board should not be concerned with waiver of a judicial forum for claims under other statutes by either union or nonunion employees. Instead, determination of the legality of such waivers should be left to the

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[151] *Bentley's Luggage*, [1996–1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 213, *available at* 1995 N.L.R.B. GCM LEXIS 92, at *9–10.

[152] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[153] *Bentley's Luggage*, [1996–1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 213, *available at* 1995 N.L.R.B. GCM LEXIS 92, at *11.

[154] *Bentley's Luggage*, [1996–1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 213–14, *available at* 1995 N.L.R.B. GCM LEXIS 92, at *13 (citing *Gilmer*, 500 U.S. at 29).

[155] *Bentley's Luggage*, [1996–1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 214, *available at* 1995 N.L.R.B. GCM LEXIS 92, at *13. 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.*, *available at* 1995 N.L.R.B. GCM LEXIS 92, at *14.

[156] *Id.*, *available at* 1995 N.L.R.B. GCM LEXIS 92, at *14.

[157] The Memorandum also noted that since employees were at-will, the arbitration agreement did not clearly provide a basis to challenge a termination proscribed by the statute. *Id.*, *available at* 1995 N.L.R.B. GCM LEXIS 92, at *15. In addition, the General Counsel rejected the employer's claim that the agreement did not bar unfair labor practice charges, noting that the right to file charges after arbitration was illusory, given the six-month statute of limitations and the requirement that employees not only refrain from initiating actions, but dismiss actions already commenced. *Id.*, *available at* 1995 N.L.R.B. GCM LEXIS 92, at *15–18.

[158] Of course, the Advice Memorandum is not a decision of the Board and thus does not have the force of law in any event. The *Bentley's* case settled prior to litigation. Bentley's Luggage Corp., 96 Daily Lab. Rep. (BNA) 15 (May 17, 1996).

enforcement agencies and courts interpreting those statutes. Further, as noted by the General Counsel, with respect to at least the discrimination statutes the consequences of such a waiver are different, since the NLRB can act only after filing of a charge, while the EEOC can initiate its own charges.[159] Accordingly, the waiver would not completely preclude statutory enforcement in the discrimination context. Nevertheless, as noted earlier, the EEOC rarely files suit and there are perils to acting without evidence from a charging party or parties.[160] An additional difference is that the EEOC may be able to litigate a claim after filing of a charge, even if the employee who filed the charge is precluded from litigating in the judicial forum.[161] Since the individual has no right to litigate under the NLRA under any circumstance, if an arbitration agreement did not preclude the filing of a charge or litigation by the agency, then it would have no effect.[162]

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[159] *See* Fair Labor Standards Act, 29 U.S.C. § 216(c) (1994) ("The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages."); Procedure for the Prevention of Unlawful Employment Practices, 29 C.F.R. § 1601.11 (2000) (authorizing EEOC Commissioners to file charges with the agency); Nash v. Florida Indus. Comm'n, 389 U.S. 235, 238 n.3 (1967) (citing 29 U.S.C. §§ 160(a)–(b) (1994), which notes the NLRB's limited authority).

[160] *See supra* note 84 and accompanying text. The case of *EEOC v. Sears Roebuck Co.*, 839 F.2d 302 (7th Cir. 1988), illustrates some of the difficulties of proceeding without a charge filed by an employee or applicant. In *Sears*, the EEOC presented only statistical evidence supporting its claim of discrimination, without anecdotal evidence of instances of discrimination. *Id.* at 310–12. 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.

[161] In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), the Court indicated that the employee could still file a charge with the EEOC despite the arbitration agreement. Several circuit courts have permitted the EEOC to litigate cases despite the employee's arbitration agreement, although some have restricted the relief available in such cases. *See* EEOC v. Waffle House, Inc., 193 F.3d 805, 813 (4th Cir. 1999) (permitting EEOC to proceed despite arbitration agreement, but precluding relief for individual employee who signed arbitration agreement); EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 468 (6th Cir. 1999) (holding that EEOC could litigate despite employee's arbitration agreement with no limit on relief available).

[162] The NLRB has not decided the effect of such individual arbitration agreements, as the *Bentley's Luggage* case settled. However, the Board does defer to arbitration under collective bargaining agreements in which 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 (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. However, the deferral is discretionary.

> 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

These distinctions, however, may not warrant differential treatment of NLRA claims and discrimination claims in the context of compulsory arbitration of statutory claims. Depending on the language used, the arbitration agreement may discourage employees from filing charges under either statute based on the belief that the only recourse is arbitration. And the very low rate of EEOC litigation provides no realistic opportunity for a judicial forum for discrimination claims in which an arbitration agreement has been executed. In contrast, the NLRB finds merit in about one-third of the charges filed with the agency.[163] While many are not litigated, once a determination of merit is made, the cases are either litigated or settled with relief for the charging party.[164]

B. *The Impact on Mandatory Bargaining Subjects Requires Negotiation*

While the argument that classification as a permissive subject leaves the employer free to negotiate and implement a waiver individually has some persuasive force, a closer examination of the issue leads to the opposite conclusion. A brief review of the law relating to individual bargaining is instructive. In *J.I. Case Co. v. NLRB*,[165] the Court held that individual contracts could not be used to defeat collective bargaining.[166] While the employer is free to hire employees, the terms of employment are set by the collective bargaining agreement.[167]

> 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 Manufacturing Company, 112 N.L.R.B. 1080 (1955). "Clearly, 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." *Id* at 1090 (quoting NLRB v. Walt Disney, 146 F.2d 44, 48 (1945)). 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.

[163] *Fact Sheet on the National Labor Relations Board* (Jan. 8, 2001), *at* http://www.nlrb.gov/facts.html (stating that about one-third of charges filed are found to have merit).

[164] *Id.* (stating over 90% of meritorious cases are settled).

[165] J.I. Case Co. v. NLRB, 321 U.S. 322 (1944).

[166] *Id.* at 341–42.

[167] *Id.* at 335–36.

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. "The Board asserts a public right vested in it as a public body charged in the public interest with the duty of preventing unfair labor practices." Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.[168]

The employer is prohibited from bypassing the union and negotiating directly with the employees, even where employees consent, because it subverts the statutory purpose of encouraging collective bargaining.[169] The *J.I. Case* court suggested, however, that the contract itself could leave areas for individual bargaining, by prescribing minimum wages and allowing negotiation for higher wages, for example.[170]

In *National Licorice Co.*,[171] the Court also addressed the issue of individual contracts.[172] There the employer negotiated individual agreements through an employer-dominated labor organization that waived employee rights to demand a closed shop and a collective bargaining agreement, and to arbitrate discharge claims.[173] The contracts provided an alternative to arbitration for employee discharges that consisted of a challenge presented directly to the employer.[174] The Court upheld the Board's conclusion that these contracts violated the statute, finding that the arbitration provision "forestall[ed] collective bargaining with respect to discharged employees" by discouraging, if not barring, presentation of discharge grievances through a union.[175]

Where bargaining over a subject is not mandatory, however, the employer is not precluded from making unilateral changes, even in existing contracts.[176] By implication, at least, the employer could also negotiate directly with employees over permissive subjects of bargaining, as the court

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[168] *Id.* at 337 (quoting Nat'l Licorice Co. v. NLRB, 309 U.S. 350, 364 (1940)).

[169] Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684–85, 687 (1944).

[170] *J.I. Case*, 321 U.S. at 338.

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

[172] *Id.* at 354–55.

[173] *Id.* at 360.

[174] *Id.*

[175] *Id.*

[176] Allied Chem. & Alkali Workers of Am., Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 185–86 (1971). However, such action may unlawfully breach the agreement. *Id.* at 188.

of appeals in *ALPA* so held.[177] An exploration of the impact of such negotiations in the instant case, however, reveals that the waiver is so intertwined with mandatory subjects that individual negotiations without union consent should be barred. First, the waiver is nonmandatory, not because it does not relate to terms and conditions of employment, but because of the possible frustration of the bargaining process that would result from finding it a mandatory subject.[178] In fact, it does relate to terms and conditions of employment. Second, it is not purely a waiver of a claim between the employee and the employer, but an agreement to an internal method of resolving the dispute.[179] The union unquestionably has an interest in negotiating the method of dispute resolution, particularly when, as here, the dispute relates to terms and conditions of employment and nondiscrimination in the workplace, and the Board has so held.[180] Third, the waiver has such a significant impact on terms and conditions of employment that unilateral implementation and individual bargaining must be prohibited.[181]

Where a subject of bargaining would otherwise be permissive, it may become mandatory when it is so intertwined with a mandatory subject of bargaining that it vitally affects the terms and conditions of employment of

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[177] Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc., 199 F.3d 477, 486 (1999). The analysis herein might apply to permissive bargaining subjects more broadly, suggesting that if an employer desires to bargain about a permissive subject, it must bargain with the union, not the employees. However, further discussion of this theory is beyond the scope of the article.

[178] *See supra* notes 99–109 and accompanying text.

[179] This distinguishes the instant situation from *Phillips Pipe Line Co.*, 302 N.L.R.B. 732, 732 (1991), where the Board found, under the unique circumstances of the case, that the union was not entitled to demand bargaining over a release requirement that accompanied an offer of enhanced severance pay. In that case, the Board did not find that the release was so intertwined with the severance that bargaining was required. The release, however, related to preexisting claims, not future claims, and participation in the program was purely voluntary, with no loss of contractual benefits if the employee refused to sign the release.

[180] *See* Heck's, Inc., 293 N.L.R.B. 1111, 1121 (1989) (finding employer violated section 8(a)(5) by unilaterally imposing on employees a grievance procedure separate from the negotiated procedure). The same analysis would apply to other statutory claims, such as claims for overtime pay under the Fair Labor Standards Act, 29 U.S.C. § 207 (1994), or claims for leave under the Family Medical Leave Act, 29 U.S.C. § 2601 (1994).

[181] What is likely to occur in this situation is unilateral implementation, rather than individual bargaining, because the efficiency and cost savings the employer seeks to achieve by arbitration are maximized by establishing a uniform procedure applicable to all employees. Estreicher, *supra* note 133, at 1358–59.

the employees. In *Star Tribune*,[182] the Board found that hiring discrimination had such a direct impact on the union's ability to eliminate workplace discrimination that the union was entitled to information that would enable it to investigate whether such discrimination was occurring, despite the fact that hiring procedures relate to non-bargaining unit members and thus are normally non-mandatory bargaining subjects.[183] Similarly here, the impact of the waiver on mandatory bargaining subjects is so significant that neither unilateral implementation nor individual bargaining should be permitted.[184]

To understand this impact, it is helpful to consider the possible outcomes of negotiation with individual employees (or unilateral implementation). If the employer were to implement a requirement that employees arbitrate statutory claims, an arbitration procedure would have to be established. One alternative would be inclusion of statutory claims in the collectively bargained grievance procedure. It seems beyond debate that such an alternative would require the consent of the union.[185] Accordingly, it could not be implemented unilaterally or individually negotiated with the employee absent union agreement. The other alternative is a separate procedure for arbitration of statutory claims. The arbitration procedure would be a mandatory subject of bargaining because it is a dispute resolution mechanism that settles terms and conditions of employment. While it might initially appear that the waiver could be separated from the procedure for negotiation purposes,[186] further analysis reveals that it is not the case. Negotiation of the waiver requires establishment of procedures, and the interrelationship between this exclusive arbitration obligation and the contractual rights and procedures mandates a conclusion that the union must be involved in both the decision to require statutory arbitration and the procedures to be utilized.

The primary issues likely to be included in an arbitration procedure for statutory claims are complaints of discrimination on the basis of gender, race,

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[182] Star Tribune, 295 N.L.R.B. 543 (1989).

[183] *Id.* at 548.

[184] However, this conclusion does not convert the waiver to a mandatory bargaining subject. *See* Borden, Inc., 279 N.L.R.B. 396, 399 (1986). The waiver is non-mandatory, not because it has no impact on terms and conditions of employment, but because injection of waiver issues into the collective bargaining process frustrates the process by allowing one party to condition bargaining on waiver of a statutory right unrelated to the statutory objectives of collective bargaining and labor peace.

[185] *See* Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 199–200 (1991); McClatchy Newspapers, Inc. v. NLRB, 131 F.3d 1026, 1030 (D.C. Cir. 1997); NLRB v. McClatchy Newspapers, Inc., 964 F.2d 1153, 1171 (D.C. Cir. 1992) (Edwards, J., concurring).

[186] *See* Phillips Pipe Line Co., 302 N.L.R.B. 732, 737 (1991).

religion, national origin, age, and disability.[187] Yet most collective bargaining agreements also prohibit discrimination as a matter of contract, and many refer to discrimination statutes in a way that does not constitute an exclusive agreement to arbitrate statutory claims under the contract.[188] There would be obvious overlap between a claim under the statutory procedure and one under the contractual procedure. Indeed, the statutory claims might be arbitrable under both.[189] Moreover, discrimination and other legal claims are most likely to involve discharges[190] and virtually every collective bargaining agreement contains a requirement of cause for termination that is subject to the grievance and arbitration procedure.[191] Other issues likely to be the subject of discrimination claims, such as demotions and other discipline,[192] disputes over pay rates,[193] and denials of promotion,[194] will also typically be

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[187] Also included are state statutory claims, other federal statutory claims such as the Fair Labor Standards Act or the Family Medical Leave Act, or common law claims such as discrimination for filing a workers compensation claim. *See* Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001); Lingle v. Norge Div. Of Magic Chef, Inc., 486 U.S. 399 (1988); Allis-Chalmers v. Lueck, 471 U.S. 202, 212, 220 (1985). For a thorough discussion of preemption and arbitration agreements, see Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U.L. REV. 1017 (1996).

[188] *See supra* note 70 and accompanying text.

[189] Parties to contractual arbitration procedures can authorize arbitrators to decide statutory claims. Harry Edwards, *Labor Arbitration at the Crossroads: The 'Common Law of the Shop' v. External Law*, 32 ARB. J. 65, 79 (1977).

[190] John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991) (finding that 59% of employment discrimination suits alleged unlawful discharge); Peter Siegelman & John J. Donohue, III, *Studying the Iceberg from its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases* 24 LAW & SOC'Y REV. 1133, 1164 (1990) (noting that most of the growth in employment discrimination litigation has been in lawsuits alleging discriminatory discharge).

[191] ELKOURI & ELKOURI, *supra* note 2, at 884, 887 (stating both that 94% of collective bargaining agreements contain a just cause provision and that a significant percentage of arbitration cases involve discharge or discipline); COOPER, *supra* note 2, at 258 (indicating that labor arbitrators hear more discipline and discharge cases than any other type of case and that arbitrators commonly infer protection from unjust termination even where the contract does not provide it expressly). Discrimination in a broad sense is often an issue in arbitration cases involving discharge because just cause has been interpreted to require "industrial equal protection." Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 85 DUKE L.J. 594, 621 (1985); *see* ELKOURI & ELKOURI, *supra* note 2, at 934–38.

[192] *See supra* note 190; ELKOURI & ELKOURI, *supra* note 2, at 780–84.

[193] *See* ELKOURI & ELKOURI, *supra* note 2, at 686–90, 739, 785–89 (citing cases).

covered by the collective bargaining agreement,[195] and are mandatory bargaining subjects.[196] Because of the substantial overlap between contractual issues and statutory issues, the procedures governing arbitrations of statutory issues, and the arbitrations themselves, will impact the contractual arbitration procedure and arbitrations thereunder.

Like the alternative procedure in *National Licorice Co.*,[197] the statutory procedure may discourage employees from using the contractual procedure to vindicate their rights.[198] Certainly, any requirement that the employees waive their right to file a contractual grievance by filing a claim under the statutory procedure would have such a substantial impact on the contractual grievance procedure that it could not be implemented without union input.[199] In addition, even if the statutory arbitration agreement makes clear that employees remain free to use both procedures for overlapping claims, the statutory process may affect the contractual process in several significant ways. The statutory arbitration procedure required, as well as the number of other claims pending under each procedure, may determine which case is

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[194] *Id.* at 775–79, 845–83. Gender and age have arisen in the context of promotion and job selection arbitrations often enough to be separately discussed in this comprehensive treatise on labor arbitration. *Id.* at 875–78, 880–82.

[195] Specific harassment provisions are less common, but harassment claims may be arbitrated under discrimination provisions of the agreement. Mary K. O'Melveny, *Negotiating the Minefields: Selected Issues for Labor Unions Addressing Sexual Harassment Complaints by Represented Employees*, 15 LAB. LAW. 321, 350 (2000) (suggesting that unions negotiate contractual prohibitions on harassment and retaliation); Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions*, 2 U. PA. J. LAB. & EMP. L. 1, 7 (1999) (indicating that number of contract provisions expressly prohibiting harassment is likely to increase). Labor arbitrators hear cases involving discipline for harassment, cases involving accommodation of religious beliefs, and cases involving accommodation of individuals with disabilities. ELKOURI & ELKOURI, *supra* note 2, at 1056–73, 792–94.

[196] *See* 29 U.S.C. § 160(d) (1994); THE DEVELOPING LABOR LAW 864–82, 887–89, 893–96 (Patrick Hardin ed., 3d ed. 1992).

[197] Nat'l Licorice Co. v. NLRB, 309 U.S. 350, 360 (1940).

[198] *See supra* notes 171–75 and accompanying text.

[199] Indeed, conditioning employment on prospective waiver of the right to grieve under the collectively bargained procedure might well be found unlawful. *See* Retlaw Broad. Co., 310 N.L.R.B. 984, 993 (1993) (finding unlawful employer's conditioning of reemployment on waiver of the NLRA's section 7 rights). *See also* Kolman/Athey Div. of Athey Prods. Corp., 303 N.L.R.B. 92, 96 (1991) (finding election of remedies provision to be non-mandatory subject of bargaining). Similarly, it might be argued that conditioning employment on waiver of the right to litigate in general might violate section 8(a)(1) of the NLRA because it coerces employees in the exercise of their right to engage in concerted activity. This theory depends on the interpretation of concerted activity and would apply not only in the union setting, but also in the nonunion setting. Further analysis of this theory is beyond the scope of this article.

heard first. The parties in the second proceeding may be faced with arguments that the doctrine of collateral estoppel bars relitigation of some or all of the issues before the arbitrator.[200] Although contractual arbitration decisions do not bind future arbitrators,[201] a contractual arbitrator may look to a decision by a statutory arbitrator in interpreting overlapping issues, either in the same case or similar cases.[202] Thus, arbitration of a statutory claim may have greater implications for contractual interpretation than litigation (and may be more likely to occur).[203]

If the statutory arbitration occurs first, the union may be faced with issues of collateral estoppel in the collectively bargained procedure.[204] Alternatively, if the contractual arbitration proceeds first, the employee and employer in the statutory procedure will face collateral estoppel issues. This potential for collateral estoppel may discourage the employee from participating in the contractual procedure, which is under the control of the union, out of concern that it may have an adverse effect on the statutory claim.[205] Such a decision would not prevent the union from proceeding, but would certainly hamper its ability to prevail and therefore adversely affect the union's ability to enforce the collective bargaining agreement.[206] Given

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[200] *See* Timothy J. Heinsz, *Grieve It Again: Of Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration*, 38 B.C. L. Rev. 275 (1997). This problem may be especially significant if the exclusive arbitration agreement purports to require arbitration, rather than litigation, of class claims. Statutory and contractual rights of employees represented by the union may be arbitrated without a mechanism for their participation or protection, and later attempts to assert those rights may be barred. For a thorough discussion of class actions and arbitration see Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

[201] *See* Heinsz, *supra* note 200, at 286–87.

[202] *Id.* at 288–90, 293–94 (indicating that most arbitrators are inclined to follow earlier awards on the same issue in the absence of unusual circumstances dictating a different decision).

[203] *See* Clark, *supra* note 134, at 177 (stating that the availability and lower cost of arbitration may encourage more employees to file claims against the employer); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL. J. 189, 189–90 (1997) (stating the same).

[204] Of course, application of collateral estoppel may benefit the union and employee in the contractual procedure if the employee prevails, but this only further supports the need for negotiation.

[205] An employee's attorney might well advise the employee to avoid participation in the contractual procedure or attempt to persuade the union not to proceed with the grievance.

[206] This is precisely the sort of effect that concerned the Court in *National Licorice* and Member Stephens in *Kolman/Athey*. *See supra* text accompanying notes 76–78, 171–75.

the potential impact of statutory arbitration on contractual claims, the union has a strong interest in insuring that if there is a statutory arbitration procedure, it is a fair procedure likely to yield unbiased and accurate decisions. If the arbitrator is not neutral or the employee has no right to discover necessary information relevant to the claim,[207] a decision that adversely affects the union's ability to eliminate workplace discrimination, both a mandatory bargaining subject and legal obligation,[208] might issue.[209] Collective bargaining negotiations about whether to have a statutory procedure and the form of the procedure could address the application of collateral estoppel.[210] But the potential for adverse impact on collectively bargained rights requires union involvement in negotiation of both the arbitration requirement and the arbitration procedure.

The union also may have a strong interest in remedies available under the statutory procedure, because they may impact collectively bargained rights. For example, an order of promotion may impact the seniority rights of other employees in the bargaining unit.[211] If the union is not a party to the proceedings, it cannot assert the rights of other employees or the possible conflict with the collective bargaining agreement. In court, the union could

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[207] *See, e.g., Hooters of Am.*, Inc., 173 F.3d 933 (4th Cir. 1999) (refusing to compel arbitration of statutory claim because of the unfairness of the procedure).

[208] Unions, like employers, have legal obligations not to discriminate on the basis of race, gender, religion, national origin, age, and disability. 42 U.S.C. § 2000e-2(c) (1994) (proscribing discrimination on the basis of race, gender, religion); 29 U.S.C. § 623(c) (1994) (proscribing discrimination on the basis of age); 42 U.S.C. §§ 12111(2), 12112(a)–(b) (1994) (proscribing discrimination on the basis of disability). Some courts have imposed on the union a duty to protect employees from employer discrimination. *E.g.*, Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1389 (5th Cir. 1978); Macklin v. Spector Freight Sys., 478 F.2d 979, 989 (D.C. Cir. 1973). *See also* Goodman v. Lukens Steel Co., 482 U.S. 656, 668–69 (1987) (finding the union liable for race discrimination for refusing to file discrimination grievances despite an absence of union racial animus). For discussion of union nondiscrimination obligations, see Note, *Union Liability for Employer Discrimination*, 93 HARV. L. REV. 702 (1980); Ann C. Hodges, *The Americans with Disabilities Act in the Unionized Workplace*, 48 U. MIAMI L. REV. 567, 579–87 (1994).

[209] It is not a sufficient answer to say that the employee could refuse to arbitrate if the procedure was unfair. The employee might not refuse because of the cost of litigation, and an employee who tried to avoid arbitration in favor of litigation might be unsuccessful. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28–29 (1991).

[210] Heinsz, *supra* note 200, at 286–87.

[211] *See, e.g.*, W. R. Grace & Co. v. Local Union 759, Int'l Union of Rubber & Plastic Workers, 461 U.S. 757, 769–72 (1983) (finding that employer who resisted compliance with labor arbitration award violated the seniority provisions of the collective bargaining agreement, since the agreement conflicted with conciliation agreement entered into to resolve discrimination litigation).

be joined as a party to help resolve these issues.[212] In arbitration, the statutory arbitration procedure would determine the role of the union, and if the employer unilaterally imposed the agreement on the employees, rights under the collective bargaining agreement might be affected without any mechanism for union participation.[213] Again, this demonstrates the interrelationship of statutory and contractual arbitration.

A statutory arbitration procedure also might contain provisions that prevent the union from obtaining information about discrimination against bargaining unit members. Indeed, one of the employer interests in preferring arbitration over litigation is confidentiality.[214] A union's inability to obtain such information might interfere with its ability to represent other employees and to eliminate discrimination from the workplace.[215] Not only is discrimination a mandatory subject of bargaining, but the union has a legal duty of nondiscrimination both under the NLRA and the federal antidiscrimination statutes.[216] Precluding the union from participation in the

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[212] Romasanta v. United Air Lines, Inc., 717 F.2d 1140, 1143 (7th Cir. 1983) (noting union intervention at remedial stage in case involving impact of reinstatement of discriminatorily-discharged flight attendants upon seniority of existing workers represented by union).

[213] Such a result could create difficulties similar to those faced in *W.R. Grace,* 461 U.S. at 771–72, in which the union's action to enforce an arbitration award reached the Supreme Court because the employer had entered a conciliation agreement in a discrimination action, without union participation, which conflicted with the collective bargaining agreement.

[214] Clark, *supra* note 134, at 177.

[215] *See* Star Tribune, 295 N.L.R.B. 543, 549, 551 (1989) (requiring employer to provide union with information relevant to alleged hiring discrimination because of impact on union efforts to eliminate workplace discrimination).

[216] *See supra* notes 207–09. Both the NLRB and the courts have read section 8(b)(1)(A) to encompass a duty of fair representation which precludes unions from discriminating in negotiations and handling of grievances. *See* NLRB v. Local 106, Glass Bottle Blowers Assoc., 520 F.2d 693, 696–97 (6th Cir. 1975) (upholding Board's decision requiring two local unions segregated on basis of sex to merge and to discontinue practice of segregated handling of grievances based on sex, since practice violated section 8(b)(1)(A)); NLRB v. Int'l Longshoremen's Ass'n, Local No. 1581, 489 F.2d 635, 638 (5th Cir. 1974) (upholding Boards' decision that union must discontinue negotiating preferences in hiring based on citizenship and residence of prospective employee's family that were in violation of section 8(b)(1)(A)); Agosto v. Corr. Officers Benevolent Assoc., 107 F. Supp. 2d 294, 310–11 (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 may have 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).

decision about whether to require arbitration of statutory claims and the implementation of a statutory arbitration procedure would interfere with its ability to fulfill this duty.

Permitting the employer to bypass the union and negotiate directly with the employees for such a procedure, or to impose it as a condition of employment, undermines the union in the eyes of the employees. Like the procedure for standardless, discretionary merit increases in *McClatchy Newspapers*, unilateral institution of a dispute resolution procedure that impacts the collectively bargained grievance and arbitration procedure, and may well impact other terms and conditions of employment, diminishes the union's representative role, resulting in a de-collectivization of bargaining.[217] The fact that the union may have no role in litigation of statutory claims does not vitiate the need for the union to have a role in an internal dispute resolution procedure that affects terms and conditions of employment in order to preserve its role as a collective bargaining agent. The limited role of the union in the former procedure is attributable to Congress, and will not be viewed as a sign of the union's ineffectiveness as a collective bargaining representative, while the latter well might.

In addition, permitting the employer to negotiate individually with employees for a statutory procedure for arbitration claims undermines majority rule. In *Emporium Capwell Co. v. Western Addition Community Organization*,[218] the Supreme Court found that concerted activity by minority members of the bargaining unit to pressure the employer to address discrimination claims outside the grievance and arbitration process as unprotected.[219] The Court was concerned with the negative impact on the principle of majority rule and the collective bargaining process that would result from permitting employees to bypass the collectively bargained procedure for resolving discrimination complaints to deal directly with the employer.[220] This concern is equally present when it is the employer who seeks to bypass the majority representative and deal directly with the employees on discrimination complaints. Moreover, should the individual employees desire to act collectively to negotiate with the employer or to resist employer efforts to impose a statutory arbitration procedure, the rationale of *Emporium Capwell* would deprive them of protection by the Act, rendering them subject to termination or other retaliation by the employer.

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[217] McClatchy Newspapers, Inc., 321 N.L.R.B. 1386, 1391 (1996), *enforced*, 131 F.3d 1026, 1033 (D.C. Cir. 1997). *See also* Toledo Blade Co., 295 N.L.R.B. 626, 628–33 (1989) (Stephens, J., dissenting), *rev'd sub nom.*, Toledo Typographical Union No. 63 v. NLRB, 907 F.2d 1220, 1224–25 (D.C. Cir. 1990).

[218] Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975).

[219] *Id.* at 70.

[220] *Id.* at 62–68.

This completes the decollectivization of the relationship because the employer can bypass the union and prevent the employees from acting collectively as well.

One might argue that the problems cited above are the effects of a decision to implement a statutory arbitration procedure, and can be dealt with by requiring the employer to bargain with the union over the effects of the decisions, but not the decision itself.[221] However, this ignores the effect of decollectivization of the bargaining relationship. In addition, cases involving effects bargaining exempt the decision from bargaining because of its entrepreneurial aspects.[222] The employer's interests in unencumbered decision making, secrecy, flexibility, and speed outweigh any benefit to bargaining over the decision despite its impact on terms and conditions of employment.[223] An examination of those interests here establishes that exempting the decision from bargaining is not required. The employer's interests in confining disputes to arbitration include cost, speed, and confidentiality.[224] Cost is not an employer interest that has been given substantial weight in avoiding bargaining.[225] While confidentiality may be desirable from the employer's point of view, keeping statutory violations secret cannot justify allowing unilateral imposition of arbitration.[226] Speed of decision-making supports a limitation on bargaining but, unlike the decisions exempted from bargaining, such as partial closure of facilities, speedy decisions on statutory discrimination claims do not further preservation of

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[221] I am grateful to Professor Samuel Estreicher for suggesting this analogy at the Symposium.

[222] *See, e.g.*, First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981).

[223] *Id.* at 682–83.

[224] Clark, *supra* note 134, at 176–77.

[225] Cost would always favor a determination that bargaining is not required. Moreover, one aspect of the cost reduction derives from the prediction that arbitrators will be less likely to award punitive damages. Clark, *supra* note 134, at 176. Relief from liability for statutory violations is similarly an interest that should not be given weight in avoiding negotiations.

[226] Indeed, the critics of arbitration, and alternative dispute resolution generally, have focused on the private nature of arbitration, arguing that it is inappropriate and contrary to public justice values to privatize litigation of statutory claims. *See, e.g.*, Malin, *supra* note 2, at 594–97; Joseph D. Garrison, *Pro: The Employee's Perspective: Mandatory Binding Arbitration Constitutes Little More Than a Waiver of a Worker's Rights*, DISP. RESOL. J., Fall 1997, at 15, 18; Stone, *supra* note 187, at 1046–47 (collecting comments of various critics); Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 29 (1990). *See also* Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 HASTINGS L.J. 1187, 1238 (1993) (arguing for de novo review of arbitral decisions on discrimination claims to preserve public justice values).

capital investment or continuation of the business. Thus, the value of bargaining outweighs the burdens on the employer.[227]

A second argument that bargaining is not required flows from the imposition of arbitration agreements at the time of hire. Since the applicants agreeing to arbitration are not employees, the union does not represent them and cannot bargain for their terms and conditions of hire. As noted in *J.I. Case*,[228] however, once the applicants become employees their terms and conditions of employment are governed by the union contract.[229] Whatever contract the employer negotiated with them must yield to the bargaining requirements of the statute. Furthermore, while hiring procedures are generally outside the scope of mandatory bargaining, when they impact the terms and conditions of employment of the employees, bargaining will be required.[230] Here, as established above, arbitration of statutory claims will impact the terms and conditions of employment of the employees, for such arbitration will not take place until the individual becomes an employee, and will, with the possible exception of disputes over hiring discrimination, involve disputes that arise from employment. The employer could not negotiate a different wage rate with an employee in hiring and argue that the union had no interest because it does not represent applicants. Neither can it negotiate an arbitration procedure that applies after hiring, unless it is privileged to negotiate such an agreement with existing employees.[231]

Finally, it might be suggested that both litigation of statutory discrimination claims under procedures imposed by law and voluntary post-dispute arbitration of individual discrimination claims have a similar impact

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[227] A determination that bargaining over the decision to impose statutory arbitration is not required, however, would not vitiate the arguments herein that bargaining over the effects, the statutory arbitration procedure, is mandated.

[228] J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

[229] *Id.* at 335–37.

[230] *See* United States Postal Serv., 308 N.L.R.B. 1305, 1308 (1992) (holding that employer is required to bargain about hiring practices when union has an objective basis for believing that the process may be discriminatory), *enforcement denied*, 18 F.3d 1089, 1092 (3d Cir. 1994) (agreeing with Board finding of unfair labor practice but refusing to enforce affirmative portion of remedial order because of determination that, as a matter of fact, the new hiring procedure did not have discriminatory impact), *remanded*, 314 N.L.R.B. 901, 901 (1994) (accepting Court's decision and modifying remedial order to eliminate affirmative requirement that employer bargain and supply the information not previously supplied); Star Tribune, 295 N.L.R.B. 543, 549, 551 (1989) (holding that employer must provide the union with information relevant to alleged sex discrimination in hiring because possible discrimination in the hiring process is so intertwined with possible discrimination in employment that to bar union investigation of the hiring process impairs its ability to eliminate discrimination in employment).

[231] *See* United States Postal Serv., 308 N.L.R.B. at 1308.

on mandatory subjects. Since there is no requirement of union involvement in statutory litigation or settlement, including agreements to alternative dispute resolution methods of settlement, the employer should be able to implement a mandatory statutory arbitration procedure without union input. Clearly, litigation and individual settlement of statutory claims may impact the union's ability to eliminate workplace discrimination. That impact, however, is dictated by the statutes. In addition, some of the effects on contractual rights are less likely to occur as a result of litigation. Where cases are actually litigated, rather than settled, information about the employer's discrimination will be publicly available and therefore accessible to the union to further its efforts to eliminate discrimination. Because of the relative speed of arbitration as compared to litigation,[232] the collateral estoppel issues are less likely to arise where claims are litigated. And, as noted, the opportunity to join the union as a party exists in the judicial forum. The impact of exclusive arbitration of statutory claims on the collective bargaining process, including arbitration, is quite different and significant.

The effect of voluntary post-dispute arbitration is also significantly different. It is the cumulative effect of mandatory arbitration of all statutory claims that poses risks to the collectively bargained terms and conditions of employment. The inability to obtain information about discrimination in one particular case will not substantially affect the union's ability to remedy workplace discrimination, but the inability to access such information about any case will. Similarly, the impact of the collateral estoppel effects increases when all statutory cases are arbitrated because the union may well face a collateral estoppel argument in large numbers of arbitration cases, not only discrimination cases but also just cause cases and others in which the employee contractual right is unrelated to discrimination.[233] Similarly, the potential effect of remedial provisions on collectively bargained rights increases with the number of cases arbitrated.[234] Accordingly, where the employer desires to bring the statutory claims into a workplace dispute resolution procedure that impacts on terms and conditions of employment, the employer should not be permitted to do so unilaterally.

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[232] Clark, *supra* note 134, at 176; Malin, *supra* note 2, at 593 (quoting Paul Tobias, "an icon of the plaintiffs' bar").

[233] *See supra* notes 186–96 and accompanying text, discussing the substantial potential for overlapping claims. In addition, arbitration under a collective bargaining agreement does not preclude judicial litigation of a discrimination claim. Alexander v. Gardner-Denver, 415 U.S. 36, 43, 47, 59–60 (1974). *But see* Clarke v. UFI, Inc., 98 F. Supp. 2d 320, 336 (E.D.N.Y. 2000).

[234] The union may litigate one case like *W.R. Grace,* but may have insufficient resources to litigate many. Therefore, it is essential that the union negotiate a right to intervene at the arbitral stage to protect employee rights.

VI. THE FUTURE OF ARBITRATION OF STATUTORY CLAIMS IN THE UNIONIZED WORKPLACE

Advocates of workplace arbitration of statutory claims need not fear that this interpretation sounds the death knell for arbitration of statutory claims in the unionized workplace.[235] It merely requires that the employer obtain the agreement of the union (and if the union cannot waive employee rights, of the employees) to arbitration of statutory claims. A union and employer could agree to arbitrate statutory claims under the collectively bargained procedure or under a separate procedure. The separate procedure could be negotiated to best serve the interests of the employer and the employees in the particular workplace. A union uninterested in negotiating the details of a statutory arbitration agreement could authorize the employer to deal directly with the employees or applicants.[236]

Negotiation with the union may provide some advantages for the employer. Employees may be more willing to buy into a procedure negotiated by their representative, and therefore, to utilize it. This would minimize efforts to avoid the procedure and proceed to litigation, whether the procedure is mandatory or voluntary. In addition, the employees may utilize the procedure in lieu of filing an EEOC charge, which could be litigated by the agency despite the arbitration agreement. Thus, the employer may avoid both the time and effort required to respond to EEOC charges and the potential for EEOC litigation. The union's involvement in negotiation may encourage courts to enforce the procedure because waiver of the judicial forum may be considered more knowing and voluntary, and the protections of the union may be deemed to make the process fairer to the employee.[237] While the employer could not lawfully condition employment on the employee's agreement not to file grievances over claims that involve overlapping contractual and statutory issues, an agreement with the union and the employee providing the employee with a choice of forum, but only

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[235] Even if it did so, the low unionization rate minimizes the impact and leaves multitudes of employees and employers free to utilize arbitration. And even if every possible private sector employer was unionized, millions of supervisors and managers would still be candidates for arbitration.

[236] However, the employer could not insist to impasse that the union agree to a contract provision authorizing direct dealing on the arbitration procedure. *See* Toledo Typographical Union No. 63 v. NLRB, 907 F.2d 1220, 1224 (D.C. Cir. 1990).

[237] *Cf.* Prudential Ins. Co. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994), (holding that employees who do not "knowingly" agree cannot be required to submit Title VII claims to arbitration); Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940–41 (4th Cir. 1999) (invalidating agreement to arbitrate because of unfairness of employer-imposed procedures).

one forum, might well be enforced.[238] The employer could thereby confine the employee to one forum, eliminating two bites at the apple that otherwise would remain available to the employee in the unionized workplace because of the overlap of contractual and statutory claims.[239]

Thus, rather than bypassing the union and risking litigation, employers should attempt to negotiate arbitration agreements with the union. If it is advantageous to both parties, an agreement will be reached which may benefit all concerned.

VII. CONCLUSION

With the increase in legislation relating to individual employees in recent years, there has been a corresponding rise in situations in which individual rights and collective rights intersect in the workplace. Accommodating collective interests and individual interests, and the NLRA and other statutes, is a continuing process. The requisite accommodation is best served here by providing for a union role in negotiating any statutory arbitration process, while barring the employer from forcing statutory arbitration on the employees, either through the union or individually. This approach preserves the benefits of arbitration where they exist, while providing protection from employer overreaching to avoid the obligations imposed by statutes enacted to protect employee rights. Employees who have chosen union representation retain the benefits of that representation and do not sacrifice other rights as a result of that choice. The employer also may benefit from this approach through negotiation of an arbitration procedure that is utilized as an alternative to litigation and survives judicial challenge. In this way arbitration can serve its intended purpose—to provide a low cost, speedy, and efficient dispute resolution method for all parties.

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[238] *See supra* note 199 and accompanying text.

[239] *See supra* notes 197–210 and accompanying text.