

2016

Union Representation in Employment Arbitration

Ann C. Hodges

University of Richmond, ahodges@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Ann C. Hodges, *Union Representation in Employment Arbitration*, in *Beyond Elite Law: Access to Civil Justice in America* 550 (Samuel Estreicher & Joy Radice eds., 2016).

This Book Chapter is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

Beyond Elite Law:
Access to Civil Justice in America

Edited by

SAMUEL ESTREICHER AND JOY RADICE

University of Richmond

OCT 26 2016

Law Library



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

32 Avenue of the Americas, New York NY 10013-2473, USA

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107070103

© Cambridge University Press 2016

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2016

Printed in the United States of America by Sheridan Books, Inc.

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Estreicher, Samuel, editor. | Radice, Joy, editor.

Beyond elite law : access to civil justice in America / edited by Samuel Estreicher, Joy

Radice. New York : Cambridge University Press, 2016.

LCCN 2015045192 | ISBN 9781107070103 (hardback)

LCSH: Legal assistance to the poor – United States. | Legal aid – United States. | BISAC:
LAW / General.

LCC KF336 .B49 2016 | DDC 344.7303/258–dc23

LC record available at <http://lcn.loc.gov/2015045192>

ISBN 978-1-107-07010-3 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

ICF
336
,B49
2016

Contents

<i>Beyond Elite Law: Editors' Preface</i>	page xi
Samuel Estreicher & Joy Radice	
<i>Foreword</i>	xv
Dean Martha Minow	
<i>List of Contributors</i>	xix
<i>Overview</i>	xxv
Hon. Wallace B. Jefferson	
<i>Overview</i>	xxxi
Hon. Jonathian Lippman	
PART I CURRENT STATE OF ACCESS TO LEGAL SERVICES	
1 Access to Civil Justice in America: What Do We Know?	3
Ian Weinstein	
2 Life in the Law-Thick World: Legal Resources for Ordinary Americans	21
Gillian K. Hadfield & Jamie Heine	
3 The Need for a National Civil Justice Survey of Incidence and Claiming Behavior	53
Theodore Eisenberg	
4 When Does Representation Matter?	71
Russell Engler	
5 Self-Representation and the Dismissal of Chapter 7 Bankruptcy Cases	87
Rafael I. Pardo	

6	Racial Disparities in Legal Representation for Employment Discrimination Plaintiffs	107
	Amy Myrick, Robert L. Nelson & Laura Beth Nielsen	
7	The Unemployment Action Center: A Student-Driven Response to a Legal Need	123
	David Yin	
8	Immigrant Representation: Meeting an Urgent Need	135
	Hon. Robert A. Katzmann	
9	Self-Representation, Civil <i>Gideon</i>, and Community Mobilization in Immigration Cases	141
	Alina Das	
PART II SOURCES OF LEGAL SERVICES ASSISTANCE FOR WORKING AMERICANS		
10	Evolution of Legal Services in the United States: From the War on Poverty to Civil <i>Gideon</i> and Beyond	161
	Jeanne Charn	
11	The Effect of Contingent Fees and Statutory Fee-Shifting	170
	David L. Noll	
12	The Market for Recent Law Graduates	184
	William D. Henderson	
13	Clinical Legal Education and Access to Justice: Conflicts, Interests, and Evolution	194
	Margaret Drew & Dean Andrew P. Morriss	
14	Loan Repayment Assistance and Access to Justice	218
	Emily S. Bremer	
15	Federally Funded Civil Legal Services	249
	Joy Radice	
16	New York's Lawyer Referral Services	261
	Allen Charne	

17	Growth of Large Law Firm Pro Bono Programs Steven A. Butcher	270
18	Institutionalizing Pro Bono Samuel Estreicher & Jonathan Remy Nash	285
19	Pro Bono as a Second Career Steven C. Bennett	296
20	Employer-Provided Legal Services for Employment Claims Michael Z. Green	304
21	Company-Provided Legal Services Maggie Gousman, John P. Frantz & Randal S. Milch	311
22	Individualized Justice in Class and Collective Actions Adam Klein, Olivia Quinto & Nantiya Ruan	326
PART III FASHIONING A REFORM AGENDA		
23	New York State Task Force to Expand Access to Civil Legal Services Helaine M. Barnett	343
24	New York's 50-hour Pro Bono Requirement Hon. Victoria A. Graffeo	359
25	Starting a "Low Bono" Law Practice Luz Herrera	367
26	Toward a More Effective and Accessible Solo and Small Firm Practice Model Ann Juergens	383
27	Facilitating Homemade Wills Reid Kress Weisbord	395
28	Court Facilitation of Self-Representation Rachel Ekery	413
29	Limited Representation and Ethical Challenges Russell Engler	431

30	Technology Can Solve Much of America's Access to Justice Problem, If We Let It	444
	Benjamin H. Barton	
31	Mediation of Employment Disputes at the EEOC	463
	E. Patrick McDermott & Ruth Obar	
32	AAA Consumer Arbitration	478
	Christopher R. Drahozal	
33	Saturns for Rickshaws: Lessons for Consumer Arbitration and Access to Justice	493
	Dean Peter B. Rutledge	
34	Employment Arbitration in the Securities Industry	506
	Michael Delikat & Lisa Lupion	
35	FINRA Arbitration and Employment Disputes	518
	Ariel B. Wolder	
36	Arbitration as an Employee-Friendly Forum	523
	Zev J. Eigen & David S. Sherwyn	
37	Access to Justice in Employment Arbitration: a Critical Look	529
	Alexander J.S. Colvin & Kelly Pike	
38	Collaborative Technology Improves Access to Justice	544
	Michael J. Wolf	
39	Union Representation in Employment Arbitration	550
	Ann C. Hodges	
40	Legal Representation for New York City's Chinese Immigrant Workers	563
	Aaron Halegua	
41	Reassessing Unauthorized Practice of Law Rules	581
	Kate Levine	
42	The Pyett Protocol: Collectively-Bargained Grievance Arbitration as a Forum for Individual Statutory Employment Claims	607
	Terry Meginniss & Paul Salvatore	

PART IV CREATING A CULTURE OF SERVICE

- 43 **Integrating Pro Bono with the Law Firm's Business** 621
Lisa Dewey, Anne Geraghty Helms, Sara Andrews, Roberta Ritvo
& Richard Gruenberger
- 44 **Facilitating Law Firm Pro Bono in Transactional Cases** 636
Daniel L. Greenberg
- 45 **What Bar Associations Can Do to Improve Access
to Civil Justice** 645
Lynn M. Kelly
- 46 **The Teaching Law Office: Service and Learning in the
Law School Years** 656
Jeanne Charn
- 47 **The Emergency-Room Law School Clinic** 667
Joy Radice & Randy Hertz
- 48 **CUNY Law School's Community-Based and
Community-Empowering Clinics** 680
Natalie Gomez-Velez
- 49 **A New Law School in Texas to Address Unmet Legal Needs** 694
Dean Royal Furgeson, Ellen Pryor, Cheryl Wattlely, Valerie James
& Eric Porterfield
- 50 **Public Service Residency in Lieu of the Third Year of Law School** 701
Samuel Estreicher & Randal S. Milch
- Index* 705

Union Representation in Employment Arbitration

Ann C. Hodges

Employers in recent years have promulgated arbitration programs to resolve disputes with their present and former employees. Arbitration may in many cases provide a lower-cost forum than litigation for resolving such disputes. But the problem of representation of Americans of modest incomes still remains. Ann Hodges explores in this chapter whether labor unions can help address that representation gap.

In the 1980s, the Supreme Court began to enforce agreements to arbitrate statutory claims. The cases involved arbitration agreements between businesses of roughly equal bargaining power. Businesses, however, seized on the judicial approval of arbitration of statutory claims and began to include arbitration agreements in contracts of adhesion with employees and consumers. Arbitration agreements deprive the parties of jury trials. They may limit discovery and other procedures available in court. Perhaps most importantly, they may limit the ability to bring a class action suit, rendering many smaller claims uneconomical.¹ With their long history of representing employees in arbitration, unions have an opportunity to provide representation for employees in these cases, enhancing their ability to enforce their legal rights. Private attorneys who represent employees are rarely attracted to individual arbitration cases because of the often limited potential for damages. In contrast, unions can offer representation as a benefit to recruit new employee members. Additionally, representation in arbitration can become part of a campaign against employer-imposed arbitration systems that limit the legal rights of employees. Accordingly, unions should explore cost-effective methods of providing such benefits to enhance workplace justice.

ARBITRATION OF EMPLOYMENT DISPUTES

For the employer, the arbitral forum offers certain advantages over litigation. It is not public, it is faster and often cheaper than litigation, and the case is not heard

¹ See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (overturning on preemption grounds. California law finding class waiver in arbitration agreement was unconscionable); *American Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (ruling that high cost of expert testimony of individual claim relative to class action does not render class waiver unenforceable). An expanded version of this chapter was originally published as Ann C. Hodges, *Trilogy Redux: Using Arbitration to Rebuild the Labor Movement*, 98 *Minnesota Law Review* 1682 (2014).

by a jury, which may be more sympathetic to an employee than a business. There is some evidence that employers who are sued in arbitration more than once benefit as repeat players in the system.² Large employers have this advantage in both arbitration and litigation, although it is plausible that arbitrators may favor such employers if viewed as a source of repeat business. Over time, the employee bar has organized, which can balance the employer's repeat-player advantage for employees who use experienced employment lawyers. And, of course, the class action limitations are extremely valuable, particularly where the employees' claims are of low value individually but large value collectively.³

Arbitration is not a panacea for employers, however. In litigation, many employment cases are decided in favor of the employer on summary judgment motions, before a trial is held. Motions for summary judgment are rare in arbitration, although evidence indicates their use is increasing.⁴ Further, the arbitrator must be paid directly while judges are paid by the taxpayers. And the ability to appeal arbitration decisions is extremely limited, which is beneficial for the winner, but not the loser.⁵ Also, because employee lawyers are likely to challenge arbitral agreements, they may result in costly enforcement litigation.⁶ Thus there are some counterincentives for employers considering implementation of an arbitration agreement, but the net advantage is for employers.⁷

While most employer processes allow employees to choose their own representative, if only to ensure enforceability of the agreement,⁸ Colvin & Pike's study of employment arbitration found that almost a third of employees in employer-

² 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, 234, 238 (1998); Douglas M. Mahony & Hoyt N. Wheeler, *Adjudication of Workplace Disputes*, in LABOR AND EMPLOYMENT LAW AND ECONOMICS 361, 379-80 (Kenneth G. Dau Schmidt et al. eds., 2009).

³ A prime example would be claims under the Fair Labor Standards Act or state wage law for overtime pay or work off the clock.

⁴ See Alexander J.S. Colvin & Kelly Pike, Chapter 37 in this volume.

⁵ Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 426 (2000).

⁶ *Id.* at 422.

⁷ See Colvin & Pike, *supra* note 4.

⁸ The Due Process Protocol, developed by representatives of the National Academy of Arbitrators, the American Arbitration Association, the American Bar Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Employment Lawyers' Association, and the Society of Professionals in Dispute Resolution, set forth the elements for a fair arbitration procedure that included employee choice of representatives. See A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, available at <http://naarb.org/protocol.asp>. The American Arbitration Association will decline to administer arbitration if the process "substantially and materially deviates" from the Due Process Protocol. American Arbitration Association, *Employment Arbitration Rules and Mediation Procedures, AAA's Policy on Employment ADR*, available at www.adr.org/aaa/faces/aoc/lec/lec_search/lec_rule/lec_rule_detail?doc=ADRSTG_004366&_afLoop=1466211146913426&_afWindowMode=0&_afWindowId=360ex3709_198#%40%3F_afWindowId%3D360ex3709_198%26_afLoop%3D146621146913426%26doc%3DADRSTG_004366%26_afWindowMode%3D0%26_adf.ctrl-state%3D360ex3709_254, last visited Nov. 6, 2015.

promulgated arbitration procedures represented themselves.⁹ Further, those employees with representation were far less likely than their employer to have an experienced employment lawyer.¹⁰ Representation was an important predictor of both employee win rates and the amount of damages, which increased substantially with representation.¹¹ Accordingly, representation of employees could help balance the employer advantage in arbitration.

THE ADVANTAGES OF AN ARBITRATION REPRESENTATION PROGRAM

The Benefits of Union Representation

Unions have existing expertise to assist workers in arbitration of legal claims. Most collective bargaining agreements require arbitration for contractual violations, and unions regularly arbitrate these claims. Thus, union lawyers and union representatives have extensive experience in the arbitral forum. While the employer-created arbitration forum will not be identical to labor arbitration, the experience will still be valuable.¹²

In addition, unions can balance the repeat-player effect that benefits employers in employment arbitration. Data on labor arbitration show relatively high union win rates. Union representation across a range of employment arbitrations should yield a pro-employee repeat-player effect or at least counterbalance the pro-employer effect where claimants are not represented by repeat players in the system. Arbitrators would be less likely to seek to curry favor with the employer knowing that unions will make selection decisions about the arbitrator in the future.

The Benefits for Unions

Even if unions can provide effective representation to employees in employer-promulgated arbitration, there must be an incentive for them to do so. That incentive comes in the form of increased potential for union membership, both initially from employees joining the union to obtain representation and in the long term, through building individual representation into majority representation in

⁹ Colvin & Pike, *supra* note 4, at 14.

¹⁰ *Id.*

¹¹ *Id.* at. See also Laura J. Cooper et al., *ADR in the Workplace* 652 (2005) (citing study showing that the outcome of disputes is similar when both parties are, or neither party is, represented but where only one party has legal representation, the represented party is more likely to win). But see Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 800 n. 93, 818 (2003) (finding similar win rates in arbitration for low-income employees with and without counsel).

¹² See Ariana Levinson, *What the Awards Tell Us about Labor Arbitration of Employment Discrimination Claims*, 46 U. MICH. J.L. REF. 789 (2013).

collective bargaining units.¹³ Union membership has been declining for many years in the private sector. In the public sector, it has remained relatively steady. There are many explanations for the difference but one way that public-sector unions have retained membership, even in states where collective bargaining is illegal or limited, is by providing legal representation.¹⁴

Representation in arbitration offers an immediate and tangible value to the employee that is also visible to other employees.¹⁵ Unions can use the opportunity provided by representation to inform the employee(s) of other benefits of membership and representation such as union-sponsored training, collective bargaining agreements, “just cause” protection against discharge, and union representation on the job site. Preparation of employee witnesses for arbitration presents a chance for the client to connect with union members and staff and learn more about the union. Motivated employees who demonstrate leadership potential could be trained to organize and educate workers at the workplace or in the particular industry about the union and the benefits of representation. Indeed, particularly skilled individuals might even be trained to represent employees from their workplace in arbitration of similar claims.¹⁶

While there is always the potential that an employee who loses in arbitration will blame the union, an effective advocate will educate employees about the risks of loss and demonstrate the value of representation, win or lose. Additionally, representation in arbitration can and should be part of a broader campaign to challenge unfair arbitration provisions imposed by employers.¹⁷

Another benefit to the union of representing workers in arbitration is ensuring enforcement of the law in all workplaces. Research has demonstrated that

¹³ In moving to majority representation, unions must be careful that their legal assistance complies with the restrictions of *Stericycle, Inc.*, 357 N.L.R.B. No. 61 (2011), in order to avoid having a union representation election victory overturned under the National Labor Relations Act. *Stericycle* bars union financing of litigation for employees between the filing of a petition for representation and the election unless the financing is a benefit of membership available to all regardless of the election.

¹⁴ See, e.g., National Education Association, available at www.nea.org/home/34718.htm; American Federation of Teachers, available at www.aft.org/about/member-benefits/aft-legal-and-financial-services/; Fraternal Order of Police, available at www.foplegal.com/; Los Angeles Police Protective League, available at <http://lapd.com/about/services/>.

¹⁵ One difficulty with this strategy is that many cases may involve employees who have been terminated, limiting their continued contact with coworkers. See Colvin and Pike, *supra* note 4, at 13 (showing only 5% of 217 American Arbitration Association cases in 2008 involved employees who were still employed). It is possible, however, that the availability of union representation in arbitration may encourage more employees to bring claims while still employed.

¹⁶ But pp. 561–63 *infra*, regarding representation by non-lawyers.

¹⁷ See Ann C. Hodges, *Avoiding Legal Seduction: Reinvigorating the Labor Movement to Balance Corporate Power*, 94 MARQ. L. REV. 889, 899–905 (2011) (discussing risks to unions of excessive reliance on legal action).

employees in unionized workplaces are more likely to enforce their rights.¹⁸ To the extent that greater enforcement by union members is due to the absence of fear of retaliation because of the protection of a union contract, offering representation to workers in a nonunion facility may not necessarily increase enforcement. Another part of the explanation, however, is the union's education of workers about their rights and representational support in enforcing them. Thus, education and representation of workers in unorganized workplaces could result in greater enforcement of laws. Such enforcement will benefit unionized workers also, as their employers will not be threatened by nonunion competitors offering lower prices based on avoidance of legal compliance.

BARRIERS TO UNION REPRESENTATION IN ARBITRATION

While there are benefits to unions and unorganized employees from union representation in employer-imposed arbitration, there are also barriers that must be overcome for such a system to provide employees greater access to justice. The three most significant issues are financing the program, bar requirements, and accountability with corresponding potentiality liability for the union. Additionally, it is possible that once unions initiate such a program, employers could respond by limiting representation in arbitration.

Financing and Bar Requirements

The most immediate challenge is creating a financially viable program. If the union can use lay union representatives rather than attorneys, as it often does in contractual arbitration, the program will be cheaper. But bar requirements may limit the use of lay representatives in some jurisdictions. First, I will discuss other aspects of the program related to financing and then turn to the choice of representative.

Public-sector unions maintain legal assistance programs for members and other bargaining unit employees because the value of the protection convinces many employees to join the organization, though few actually have to utilize the services.¹⁹ In the private sector, unions will need to educate employees about the value of representation, for most are unaware of the difficulty of finding legal representation

¹⁸ See, e.g., David Weil, *Employee Rights, Unions and the Implementation of Labor Policies*, in PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING, INDUS. REL. RES. ASS'N 474, 476 (1993) (analyzing various studies and concluding that unions improve enforcement of laws, including the Fair Labor Standards Act, OSHA, MSHA, certain provisions of ERISA, workers' compensation laws and unemployment compensation laws).

¹⁹ For teachers and police officers, the protection not only applies to legal actions when their own job is threatened but also protection when legal action is taken against them by the public. See, e.g., Virginia Education Ass'n, *VEA Legal Services: Your Safety Net*, available at www.veanca.org/home/legal-services.htm, last visited Nov. 6, 2015; Fraternal Order of Police, *FOP Legal Defense Plan*, available at www.foplegal.com/, last visited Nov. 6, 2015.

for the arbitration of statutory claims and many will also fail to anticipate the need.²⁰ If the union can only attract members once the need for representation arises, it will be difficult to construct a financially viable program. Additionally, dues must be set at a reasonable rate for employees to feel that they are worth the benefit offered. They will not be sufficient to cover any individual's costs of representation should it be needed, but should be adequate as a group to help defray the cost to the union.

The design of the program will have a significant impact on costs. Unions will need to determine eligibility requirements, the scope of assistance, and the means of providing assistance. Eligibility requirements will affect costs by establishing when members are eligible to receive assistance and by limiting representation to viable claims. The scope of assistance will dramatically influence costs. Unions must decide whether all legal claims are covered or only particular claims, whether actions in court are covered or only claims in arbitration, and what costs are covered, e.g., only the hearing representational costs or costs of discovery, arbitrator fees, and other associated costs.²¹ Unions must also decide whether they will represent employees in challenging biased arbitration programs in court, or only in the actual arbitration. Careful consideration of these options will help the union construct a financially viable program.²²

There are several ways unions can provide representation in arbitration. Unions could use staff attorneys, outside counsel, or trained union representatives, or they could train employees for self-representation.²³ Alternatively, and perhaps most practical, an arbitration program could be a hybrid of these choices. Some complex cases may require counsel while simpler cases could

²⁰ Many employees have an inflated view of their rights in the nonunion workplace. See Ian H. Eliasoph, *Know Your (Lack of) Rights: Reexamining the Causes and Effects of Phantom Employment Rights*, 12 EMP. RTS. & EMP. POL'Y J. 197 (2008).

²¹ See Judith L. Maute, *Pre-paid and Group Legal Services: Thirty Years after the Storm*, 70 FORDHAM L. REV. 915 (2001) (describing the importance of innovative mechanisms of service delivery, preventive lawyering, and high-quality representation in effective group legal services plans).

²² See, e.g., Employee Benefits Research Institute, *Fundamentals of Employee Benefits Plans 393-96* (6th edn., 2009), available at www.cbri.org/pdf/publications/books/fundamentals/2009/39_Legal-Svcs_OTHER-BENS_Funds-2009_EBRI.pdf (describing the types of plans and limitations often built into legal services plans to contain costs). In addition, consultation with public sector unions, such as the National Education Association and its affiliates, and trade organizations such as Group Legal Services Association could be helpful in structuring viable cost-effective plans. See Group Legal Services Association, *Join GLSA* available at http://glsaonline.org/attorneys/attorneys_join-glsa/ (last visited Nov. 6, 2015).

²³ It is clear that unions can, without violating bar anti-solicitation and unauthorized practice strictures, offer representation to members using staff attorneys or outside counsel. See *United Mine Workers of America, District 12, v. Illinois State Bar Assoc.*, 389 U.S. 217, 225 (1967) (invalidating on First Amendment grounds Illinois State Bar decision that union's employment of staff attorney to represent members in workers' compensation cases was unauthorized practice of law, concluding the minimal risk of harm did not just the constitutional impairment); *Brotherhood of R.R. Trainmen v. Va. State Bar*, 377 U.S. 1, 7-8 (1964) (reaching similar conclusion with respect to referral of members to specific outside lawyers for representation).

be tried by union representatives or trained employees.²⁴ In particular, a series of cases that would otherwise be a class action might be tried initially by an attorney who could establish a pattern to be followed by union representatives or employees in later cases.

Financing will be affected in several ways by these choices. Staff attorneys will generally be cheaper than outside counsel, although in today's legal market, the union may be able to negotiate favorable fee arrangements with outside counsel.²⁵ Attorney fees may be available as a remedy in many cases.²⁶ Fees may be recovered at market rates, even for attorneys who are paid as staff attorneys, which would enable the union to use them to finance arbitration for other employees.²⁷ To comply with bar requirements, however, recovered fees should be segregated into a separate fund and used only for legal expenses.²⁸ Using trained union representatives for some or all cases (subject to bar rules against unauthorized practice of law) would be even less expensive than attorneys and training employees for self-representation could be cheaper yet. Even where attorneys are used, trained union representatives could be used as paralegals in preparing the case, reducing the cost of representation and enabling recovery of fees for their services.²⁹ Where the choice of representative is based on the case, the decisions must be carefully made by an attorney and the criteria for selection

²⁴ See Levinson, *supra* note 12, at 847 (finding union representatives effectively represented employees in many statutory discrimination cases in labor arbitration).

²⁵ For example, consider the case of a nonprofit group that paid an attorney a \$10,000 retainer to represent day laborers in their workers' compensation claims. *D.C. Ethics, Op.* 329 (2005) available at www.dcbar.org/bar-resources/legal-ethics/opinions/opinion329.cfm. The attorney kept 10% of the recovery for each claim and paid back the organization with the first \$10,000 collected through this process. The ethics committee of the District of Columbia Bar approved the arrangement because the payment to the nonprofit was not contingent on the amount of the recovery and based on the nonprofit's purpose, there was little likelihood that the nonprofit would interfere with the attorney's professional judgment. Additionally, allowing the practice would further the purpose of making legal services more available to underserved populations.

²⁶ For example, these employment law statutes authorize the award of attorney fees to prevailing plaintiffs. Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k); Americans with Disabilities Act of 1990, 42 U.S.C. § 12205; Family Medical Leave Act, 29 U.S.C. § 2617(a)(3).

²⁷ See, e.g., *Kean v. Stone*, 966 F.2d 119 (3d Cir.1992); *Am. Fed'n of Gov't Employees v. Fed. Labor Relations Auth.*, 944 F.2d 922 (D.C.Cir. 1991); *Curran v. Dep't of Treasury*, 805 F.2d 1406 (9th Cir. 1986); *Raney v. Fed. Bureau of Prisons*, 222 F.3d 927 (Fed. Cir. 2000). See also *Blum v. Stenson*, 465 U.S. 886 (1984) (allowing full recovery of market rate fees to nonprofit legal services organization although attorney was salaried and had no billing rate). There is no guarantee that an arbitrator will award the same amount of fees or apply the same standards as a court would. Both the American Arbitration Association Rules and the Due Process Protocol, however, require fee awards in accordance with applicable law and the Due Process Protocol goes further to say fees should be awarded in the interests of justice. See Jonathan D. Canter, *The Employment Arbitrator and the Pro Se Party*, 57 DISP. RESOL. J. 52, 52-54 (2002).

²⁸ See *Raney v. Fed. Bureau of Prisons*, 222 F.3d 927, 936-37 (Fed. Cir. 2000).

²⁹ See, e.g., *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 553 (7th Cir. 1999); *Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1249 (10th Cir. 1998) (stating fees for paralegal services are recoverable and should be determined in the same manner as lawyers' fees).

must be transparent and available to members at joining to avoid subsequent disappointment and legal claims against the union.

Another approach would be to create a separate legal services program, either exclusive to the union or in combination with other social justice organizations such as worker centers or general legal aid programs.³⁰ Legal services programs might attract attorneys willing to work at lower rates if they are eligible for loan forgiveness,³¹ as well as alleviating any bar concerns about sharing legal fees with nonprofit organizations and insuring independence of attorneys.³²

The other bar requirement that may impact the program is the prohibition on unauthorized practice of law.³³ This regulation may affect attorneys operating outside of their licensed jurisdiction and non-lawyer union representatives. While historically, unions have been able to use non-lawyer union representatives in contractual arbitration without running afoul of unauthorized practice of law strictures,³⁴ this may change with the growth of arbitration of statutory and other legal claims.³⁵ An employer's program of arbitration may permit representation of choice, but this does not prevent the bar from intervening to protect consumers from unauthorized legal practice. The bar may be more concerned if the arbitration

³⁰ Some unions have negotiated legal services programs for employees of particular employers. See, e.g., UAW Legal Services Plan, available at www.uawsp.com/default.asp (last visited Nov. 6, 2015). Unions have more general plans as well. See Union Plus, *Legal Help for Union Families*, www.unionplus.org/legal-aid-services (last visited Nov. 6, 2015) (offering free consultation and discounted legal assistance to members and retirees of participating unions). Worker centers frequently offer legal assistance as well. See, e.g., Jennifer Gordon, *Suburban Sweatshops* 300–02 (2005); Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream* 2 (2006).

³¹ See U.S. Dep't of Ed., *Public Service Loan Forgiveness Program*, available at <http://studentaid.ed.gov/repay-loans/forgiveness-cancellation/charts/public-service#what-kinds-of-employment> (last visited Nov. 6, 2015).

³² While some state bar associations have eliminated the ban on fee sharing with nonprofit organizations, as have the ABA Model Rules, other states retain limitations on fee-sharing with non-lawyers. See American Bar Ass'n, Model Rules of Prof'l Conduct R. 5.4(a)(4) (2002); Ark. Bar Assoc. Op. RO-95-08 (1995); Pennsylvania Bar Ass'n, *Ethics Op.* 93-162 (1993); Virginia Legal Ethics Comm. Op. 1744 (2001) (all permitting fee-sharing with nonprofit organizations). Cf. Rhode Island Ethics Op. 2000-5 (2000), available at www.courts.ri.gov/AttorneyResources/ethicsadvisorypanel/Opinions/2000-5.pdf#search=Rhode%2520Island%2520Ethics%2520Opinion%25202000%2520D5; Massachusetts Ethics Op. 97-6 (1997), available at www.massbar.org/publications/ethics-opinions/1990-1999/1997/opinion-no-97-6; Texas Ethics Op. 503 (1994), available at www.legalethictexas.com/Ethics-Resources/Opinions/Opinion-503.aspx (all finding fee-sharing with nonprofit groups unethical).

³³ See Kate Levine, Chapter 41.

³⁴ In 2012, the Rhode Island Supreme Court allowed non-lawyer union representatives in contractual labor arbitration, despite the state's ban on unauthorized practice of law. See *In re Town of Little Compton*, 37 A.3d 85 (R.I. 2012). The court noted that some states explicitly allowed the practice while some had not addressed the issue, but the parties could not find any decisions that had prohibited union representatives from arbitrating contractual claims. 37 A.3d at 90–91. See also CAL.CODE CIV. PRO. §1282.4(h) (authorizing non-lawyers to appear in arbitration under collective bargaining agreements).

³⁵ Kristen M. Blankley et al., *Multijurisdictional ADR Practice: Lessons for Litigators*, 11 CARDOZO J. CONFLICT RESOL. 29, 29–31 (2009); Sande L. Buhai, *Act Like a Lawyer, Be Judged Like A Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 125–26.

is undertaken for compensation in the form of dues, as the program contemplates, as contrasted with representation by a friend, family member or coworker. Further, an employer who fears that union representation in arbitration may lead to unionization of the workforce may be motivated to report such representation to the bar. Uncertainty about the legal protection available to inadequately represented workers may trigger interest in invoking unauthorized practice of law restrictions.

There is no easy answer to the question of when unauthorized practice of law occurs in arbitration. In contrast to labor arbitration cases,³⁶ the cases that would be covered by the proposed program will largely involve statutory claims. That they take place in the arbitral forum does not automatically place them outside the unauthorized practice of law prohibition. Such determinations depend on the law of the state. One question will be whether the state has allowed representation by either non-lawyers or out-of-state lawyers in arbitration,³⁷ which will depend on which state's law applies.³⁸ In some states, out-of-state attorneys may be able to do a few arbitrations per year without engaging in unauthorized practice or may be able to obtain admission *pro hac vice* for purposes of a particular case.³⁹

³⁶ In finding no unauthorized practice of law by a union representative in *Town of Little Compton*, the court relied in part on the fact that labor arbitration focuses on contractual issues and the law of the shop, with which union representatives were as likely to be as familiar as lawyers, if not more so. 37 A.2d at 93.

³⁷ See Blankley, *supra* note 35, at 32–33; Buhai, *supra* note 35, at 125–26; Virginia State Bar, *Virginia UPL Opinion* 206, Feb. 10, 2004, available at www.vsb.org/site/regulation/virginia-upl-opinion-206 (finding a non-lawyer corporate officer could represent the corporation in arbitration because arbitration was not a tribunal under the rules); Virginia State Bar, *Virginia UPL Opinion* 214, Feb. 27, 2009, available at www.vsb.org/site/regulation/upl-opinion-214 (finding that CPA could not represent for compensation party that was not his employer in an arbitration as it was unauthorized practice of law); Virginia State Bar, *Virginia UPL Opinion* 200, Jan. 21, 2001, available at www.vsb.org/site/regulation/virginia-upl-opinion-200 (finding that an attorney licensed in another jurisdiction could represent existing client in arbitration in Virginia as it was incidental to representation of client in home jurisdiction); Cal. Code Civ. Pro. §1282.4 (authorizing appearance by out-of-state attorneys in arbitrations in California upon approval of the arbitrator after compliance with specified notice requirements). See also Minn. Stat. Ann. 481.02(5) (authorizing any bona fide labor organization to give advice to its members on matters arising out of employment).

³⁸ Blankley, *supra* note 35, at 38–43. Some arbitrations may take place in a location other than where the dispute arose, and much of the preparation may take place in yet other jurisdictions, *id.*, although that is probably less likely in workplace arbitrations.

³⁹ See, e.g., La. Sup. Ct. R., XVII, § 13(B)(6) (allowing participation in and preparation for ADR proceeding without admission to the bar *pro hac vice*); S.C. App. Ct. R. 404(g) (allowing participation in up to three ADR proceedings per year without admission *pro hac vice* if the representation is related to representation of clients in a jurisdiction in which the attorney is licensed to practice); Va. Sup. Ct. R. § 1A:4(10)(c) available at www.courts.state.va.us/courts/scv/rulesofcourt.pdf (allowing an out-of-state lawyer to prepare and participate in an ADR proceeding without admission *pro hac vice*); D.C. App. R. 49(c)(12) (excepting from the bar license requirement attorneys participating in no more than five ADR proceedings per year in DC); *N.J. Unauth. Prac. Op.* 28, 3 N.J.L. 2459, 138 N.J.L.J. 1558, 1994 WL 719208 (N.J. Comm. Unauth. Prac.) (allowing an out-of-state attorney to engage in representation in arbitration without admission to the bar in New Jersey); Md. Rules Gov'g Admission to the Bar R. 14(a), available at www.courts.state.md.us/ble/pdfs/baradmissionrules.pdf (allowing admission *pro hac vice* for arbitration).

In the many jurisdictions that have adopted ABA Model Rule 5.5(c)(3), the questions are easier to answer for attorneys; the rule authorizes licensed attorneys to practice law temporarily in an ADR proceeding if their representation in the case is "reasonably related" to their practice in the jurisdiction where they are licensed.⁴⁰ For non-attorneys, however, or attorneys in other jurisdictions, the questions are more complex and require a careful evaluation of state law. Modification of bar rules to allow union representatives to represent their members in claims arising out of their employment would resolve this problem.

Union Liability Issues

An arbitration program will be effective in increasing access to justice only if unions provide the best possible representation, which requires some mechanism for accountability. Additionally, unions must factor the risk of liability into their calculation of whether to institute a program. Some cases will be lost, some workers will be unhappy, and some may bring legal action against the union. While setting realistic expectations regarding the outcome of arbitration will help, it is important to consider what legal claims might be available to dissatisfied workers.

If attorneys are used, ethical standards regarding representation will apply, and malpractice claims will lie against the lawyers who fail in their duty. The union can protect against such claims with malpractice insurance. When representing workers in arbitration under collective bargaining agreements, unions are governed by the duty of fair representation, which imposes liability for representation that is arbitrary, discriminatory or in bad faith.⁴¹ The duty of fair representation, however, is a judicially implied corollary of statutory grants of exclusive representation.⁴² Thus, the duty may not apply at all when the union is offering representation to employees who may choose instead to represent themselves because they are not a part of a majority bargaining unit. Employees remain free to choose alternative representation.⁴³

Whether or not the statutory duty of fair representation is applicable, negligent representation by a union might give rise to a common law claim of negligence.⁴⁴

⁴⁰ See ABA Model Rule 5.5(c)(3). Twenty-nine states have adopted this provision although six have modified the rule in ways that may alter its application. Blankley, *supra* note 35, at 47.

⁴¹ See *Vaca v. Sipes*, 386 U.S. 171, 190, 195-96 (1967); *Bowen v. U.S. Postal Serv.*, 459 U.S. 212, 223 (1983).

⁴² *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 204 (1944).

⁴³ See, e.g., *Freeman v. Local Union No. 135, Chauffeurs, Teamsters and Helpers*, 746 F.2d 1316, 1321 (7th Cir. 1984) (finding no duty of fair representation requiring appeal of unfavorable grievance arbitration award because the "union does not serve as the exclusive agent for the members of the bargaining unit with respect to . . . [that] particular matter . . ."); *Lacy, et al. v. Local 287, UAW*, 102 L.R.R.M. 2847, 2850 (S.D. Ind., 1979) (finding union owed plaintiffs no duty with respect to filing claim for Trade Readjustment Assistance benefits), *aff'd mem.*, 624 F.2d 1106 (7th Cir. 1980).

⁴⁴ Some courts have addressed the issue of what standard of care applies to provision of what might be characterized as legal services by non-lawyers. See Buhai, *supra* note 35, at 97. The issue of the standard is intertwined with the question of what is the practice of law. *Id.* In some cases the courts find

Regardless of the standard, however, there is some risk of liability for unions instituting such a program. Clarification of the accountability standard to be applied would encourage development of representation programs.

Employer Responses

Though current employer programs generally allow employees to choose their own representative and dispute resolution providers actively encourage such choice, employers concerned about union representation of their employees might respond by limiting employee representation choices in these unilaterally promulgated programs. To date limits on representation have not been one of the primary problems with arbitration, perhaps because the cost of representation imposes a natural limit. If employees begin to litigate small claims with union representation, however, representation limits may become a part of employer systems.

One way to challenge such limits would be through service providers such as the American Arbitration Association, which have rules allowing representation of choice and also rely on collectively bargained arbitration for business.⁴⁵ Because employment arbitration is unilaterally structured, however, employers could choose providers who would accept such limits. In those cases, legal challenges to representation limits would be necessary. Two possibilities for challenge are the National Labor Relations Act (NLRA)'s protection of employee rights to engage in union and concerted activity and the due process and unconscionability bars to enforcement of unilaterally imposed arbitration agreements.

Any explicit limitation on the use of union representatives or attorneys alone would seem to run afoul of the employee's NLRA Section 7 right to engage in union activity.⁴⁶ A general limitation on representation would not implicate Section 7, under current NLRA law. The National Labor Relations Board has held that nonunion employees do not have a Section 7 right to co-employee

non-lawyers should be held to the standard of a lawyer. *Id.* A second approach is to apply a general negligence standard without explicitly defining the standard of care. *Id.* at 97–98. Other cases have declined to apply an attorney standard where a layperson is authorized to engage in representation in a legal forum. *Id.* at 99–100. Generally employees have failed in their efforts to hold lay union representatives to the standard of attorneys in handling cases in the contractual grievance and arbitration procedure. See Ellyn Moscovitz & Victor J. Van Bourg, *Carve-Outs and the Privatization of Workers' Compensation in Collective Bargaining Agreements*, 46 SYR. L. REV. 1, 52 (1995) (discussing cases).

⁴⁵ See Sarah Rudolph Colc, *Federalization of Consumer Arbitration*, 2013 U. CHI. LEGAL FORUM 271, 290–91 (advocating implementation of reform by arbitration providers in consumer arbitration).

⁴⁶ 29 U.S.C. §§ 157, 158(a)(1) (protecting employee rights to form, join, and assist unions, as well as to engage in concerted activity for mutual aid or protection and prohibiting interference, restraint, or coercion of employees in the exercise of those rights).

representation in interviews that may lead to discipline, although this position has fluctuated across administrations.⁴⁷ The rationale of the most recent decision focused on both the need for confidentiality in investigations and the limited assistance that could be provided by coworkers as compared to union representatives. This decision might support an employer's denial of either union representation in the unorganized workplace or representation by co-employees. Professor Lofaso's suggestion of a statutory change in this ruling to enable union or coworker representation in arbitration would alleviate this problem. Alternatively, the NLRB might reach a different result in the more formal arena of arbitration where union representation is common in other workplaces.

A second alternative would be to challenge limitations on representation as violative of due process requirements since representation choice, at least legal representation, would be available in court. Limits on representation could prevent an employee from vindicating statutory rights. Under an unconscionability analysis, such limits also might be void, particularly if they applied only to the employee and not to the employer.⁴⁸ Representation by laypersons, however, whether union representatives or fellow employees, is less susceptible to this argument, since it would not be possible in the judicial forum where most statutory claims covered by arbitration agreements would otherwise be tried.

Finally, any limits on representation would provide fuel to a union-led legislative campaign to challenge unfair arbitration. To deprive employees of their right to litigate, confine them to an arbitration procedure designed by the employer, restrict their right to proceed as a class to reduce their costs, and then bar them from using cost-effective representation seems particularly egregious and might spark legislative action to create a fairer system for employees.

⁴⁷ See *IBM Corp.*, 341 N.L.R.B. 1288 (2004), overruling *Epilepsy Found.*, 331 N.L.R.B. 676 (2000), and rejecting argument that Section 7 gives employees in the nonunion workplace the right to coworker representation in disciplinary investigations, known as *Weingarten* rights, after the case that established the right in the unionized workplace. In *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982), the Board first found that nonunion employees had a right to coworker representation in disciplinary interviews, but that decision was overruled in *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, 232 (1985), which found that the NLRA compels the conclusion that nonunion employees have no *Weingarten* rights. *E. I. DuPont de Nemours*, 289 N.L.R.B. 627, 630-31 (1988) rejected the *Sears* rationale but decided that the proper balancing of employer and employee rights required limiting *Weingarten* rights to unionized employees. Despite court enforcement, 876 F.2d 11 (3d Cir. 1989), the Board revisited the issue in *Epilepsy Foundation*, concluding that nonunion employees have *Weingarten* rights. Court enforcement followed, 268 F.3d 1095 (D.C. Cir. 2001), but in *IBM*, the Board reversed course once again.

⁴⁸ Cf. *Armendariz v. California Psychcare Services, Inc.*, 24 Cal. 4th 83, 116-17 (2000) (invalidating arbitration agreement as unconscionable where it required employees to arbitrate their claims against the employer but left the employer free to litigate claims against the employee). It is not uncommon, however, for employers to agree not to use counsel if employees do not. Laura J. Cooper et al., *ADR in the Workplace* 703 (3d ed., 2014). Such a provision might pass muster.

CONCLUSION

The reduction in unionization and the advent of compulsory employment arbitration, combined with the Supreme Court's enforcement of virtually any arbitration agreement, have reduced access to justice for employees despite the existence of many laws designed to protect them from abusive employer practices. Unions, which remain the most powerful employee protective organizations despite their loss of membership, could improve access to justice and increase their membership by developing a program of representation in arbitration for union members in unorganized workplaces. A creative, carefully designed program could meet the needs of both unions and employees, improving enforcement of laws to the benefit of all workers.