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## Alternatives to Mainstream Alternative Dispute Resolution: Eliminating Forced Arbitration Agreements as a Condition of Employment

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ALTERNATIVES TO MAINSTREAM ALTERNATIVE DISPUTE  
RESOLUTION: ELIMINATING FORCED ARBITRATION AGREEMENTS  
AS A CONDITION OF EMPLOYMENT

Anne Marie Lofaso\* & Ashley M. Stephens\*\*

*Abstract*

*Today, many employers require their employees, as a condition of employment, to agree to arbitrate employment-related legal claims rather than pursue them in court. While arbitration can be mutually beneficial, allowing parties to avoid the cost, time, publicity, and unpredictability associated with traditional litigation, mandatory arbitration often lacks the same procedural safeguards afforded by the justice system. Forced arbitration not only deprives employees of their right to sue their employer in a public court, but it also denies them any meaningful voluntary choice to surrender that right. This Article takes a close look at a variety of workplace grievance procedures with a particular focus on peer-centered processes. This Article then argues that preserving employee choice to pursue litigation or internal dispute resolution with peer advocacy remains the most effective way to promote fairness and justice for employees. Finally, this Article suggests several workable alternatives to mandatory arbitration that are cost-effective and advantageous to employees and employers alike.*

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## INTRODUCTION

Conflict is an unavoidable part of being human, and workplace conflict is ubiquitous.<sup>1</sup> From mild gripes about work assignments to more egregious clashes

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<sup>1</sup> See *Workplace Conflict Statistics*, POLLACK PEACEBUILDING SYS., <https://pollackpeacebuilding.com/workplace-conflict-statistics/> [https://perma.cc/DF5-872Z] (last visited June 25, 2022) (summarizing workplace conflict data from government and academic sources through 2018). See *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2021*, EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021> [https://perma.cc/2PQQ-6UDC] (last visited June 25, 2022). According to the EEOC, employees filed 61,331 charges alleging workplace discrimination based on race, sex, national origin, religion, color,

involving sexual harassment, racial bullying, or vaccine mandates, workplace disputes can create negative consequences for both employers and employees. Failure to address workplace conflict in a fair, equitable, and timely manner can affect employee morale and hinder performance, both of which can negatively impact an employer's reputation and revenues.

As litigation costs increase, both public and private employers have turned to internal grievance mechanisms as an alternative, and less expensive, source of conflict resolution.<sup>2</sup> Pre-dispute arbitration agreements have become increasingly popular in both unionized and non-unionized workplaces.<sup>3</sup> Today, many companies rely on forced arbitration clauses, making arbitration mandatory to resolve disputes.<sup>4</sup> One recent study found that as many as 80 of the largest 100 American companies use arbitration agreements to resolve workplace disputes, most of which are mandatory and 39 of which contain class action waivers.<sup>5</sup> Another study of predominantly Fortune 100 companies found that 92.9 percent of employment contracts sampled, which contained mandatory arbitration agreements, also waived the worker's right to a jury trial.<sup>6</sup> According to a study published by the Economic Policy Institute, the number of workers subjected to mandatory arbitration rose from just over 2 percent in 1992 to more than 55 percent by the year 2018.<sup>7</sup> The study also shows that 23.1 percent of private sector, non-union employees, or nearly 24.5 million American workers, have waived their right to bring a class action claim.<sup>8</sup>

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retaliation, age, disability, pay, and genetic disclosure. These charges are, however, down from a recent high of nearly 100,000 charges in both 2011 and 2022. *Id.*

<sup>2</sup> See David Lewin, *Grievance Procedures in Non-union Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcome*, 66 CHI-KENT L. REV. 823, 824–25 (1990); DAVID W. EWING, JUSTICE ON THE JOB: RESOLVING GRIEVANCES IN THE NONUNION WORKPLACE 7–8, 32 (1989).

<sup>3</sup> Cf. *A Predispute Arbitration Clause—Arbitration Agreement Explained*, ADR TIMES (Mar. 17, 2021), <https://www.adrtimes.com/predispute-arbitration-clause/> [<https://perma.cc/6436-B72K>].

<sup>4</sup> See Genevieve Carlton, *Forced Arbitration Agreements*, WORKING: NOW AND THEN (June 1, 2018), <https://www.workingnowandthen.com/blog/forced-arbitration-agreements/> [<https://perma.cc/6ZZP-C8NV>].

<sup>5</sup> Imre S. Szalai, *Institute Report Indicates Widespread Use of Workplace Arbitration*, NAT'L INST. FOR WORKERS' RTS., <http://employeeightsadvocacy.org/publications/widespread-use-of-workplace-arbitration/> [<https://perma.cc/VJ8A-LP55>] (last visited June 25, 2022).

<sup>6</sup> See Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Mandatory Arbitration for Customers but Not for Peers: A Study of Arbitration Clauses in Consumer and Non-consumer Contracts*, 92 JUDICATURE 118, 122 (2008) (noting also that these same companies favored jury trials in business-to-business disputes.).

<sup>7</sup> ALEXANDER J.S. COLVIN, THE GROWING USE OF MANDATORY ARBITRATION 1, 2, 5 (2018), <https://files.epi.org/pdf/144131.pdf> [<https://perma.cc/H8FK-MGFJ>].

<sup>8</sup> *Id.* at 11.

The coercive nature of forced arbitration agreements makes them dangerously unfair to workers.<sup>9</sup> Rather than having their rights adjudicated by juries of their peers, American workers often must bring claims—which are based on statutes enacted by Congress or state legislatures—through arbitral forums designated by agreements that their own employers drafted and required them to agree to as a condition of employment.<sup>10</sup> Thus, employees who sign forced arbitration agreements are compelled to make an untenable choice: give up their civil rights or give up their job.<sup>11</sup> This dynamic is the direct result of a dramatic shift in how the employment rights of American workers are enforced.

While arbitration agreements are not inherently immoral, access to justice in employment has become fragmented and enormously one-sided. For example, studies have shown that employees are not only less likely to pursue discrimination cases in arbitration,<sup>12</sup> they are also far less likely to succeed even when they do.<sup>13</sup> Moreover, monetary awards are usually far lower for employees who manage to obtain a successful outcome in arbitration than they would be in court.<sup>14</sup> While arbitration can be more efficient and less costly than litigation in many cases, it lacks the same procedural safeguards provided by a court of law.<sup>15</sup> Arbitration is not uniform among companies; rather, “arbitration” is used to describe a variety of dispute resolution procedures that employers can implement in almost any manner they choose.<sup>16</sup> For instance, “arbitration may not provide parties with the same extent of discovery that a court would,”<sup>17</sup> and it does not always permit access to evidence held by the other side that can substantiate a party’s claims.<sup>18</sup> The lack of evidentiary safeguards is particularly concerning in discrimination claims, which often hinge on knowing how the employer has treated other employees.<sup>19</sup> Moreover, arbitrators

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<sup>9</sup> See Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROBS. 279, 300–08 (2004) (discussing the lack of accountability, transparency, rationality, substantive equal treatment, and personal autonomy of mandatory arbitration and characterizing arbitration as “coerced”).

<sup>10</sup> *Arbitration at Work*, LEGAL AID AT WORK, <https://legalaidthatwork.org/factsheet/arbitration-at-work/> [<https://perma.cc/C25S-XQBF>] (last visited June 25, 2022).

<sup>11</sup> See *id.* (explaining that the employee must arbitrate employment disputes unless the agreement is deemed unconscionable).

<sup>12</sup> Cf. Cynthia L. Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 698–89 (2018).

<sup>13</sup> KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 19 (2015), <https://files.epi.org/2015/arbitration-epidemic.pdf> [<https://perma.cc/JY3J-YNKT>].

<sup>14</sup> *Id.*

<sup>15</sup> See *id.* at 18, 4–5.

<sup>16</sup> See *id.* at 5.

<sup>17</sup> *Id.* at 3–4.

<sup>18</sup> See R.W. Fleming, *Some Problems of Evidence Before the Labor Arbitrator*, 60 MICH. L. REV. 134, 139–44 (1961).

<sup>19</sup> See Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LABOR & EMPLOY. L. J. 381, 416 n.226 (1996) (noting

may or may not be well versed in labor and employment law, and they may or may not be trained in resolving disputes.<sup>20</sup> The outcome of arbitration is binding, and there is typically no right to appeal.<sup>21</sup> The outcome is also kept secret, which enables companies to evade public accountability.<sup>22</sup> Many of these drawbacks are notably present in the sexual harassment context. While the voices of sexual harassment victims are finally being heard, thanks to the #MeToo movement, they are often silenced by mandatory arbitration agreements.<sup>23</sup>

Mandatory arbitration agreements have recently come under fire, in part because of the spotlight placed on its downsides by the #MeToo movement. For instance, Microsoft became the first Fortune 500 company to announce that it would eliminate mandatory arbitration agreements for workplace sexual harassment disputes and also endorsed bipartisan legislation to end arbitration of sexual harassment claims.<sup>24</sup> Similarly, on March 3, 2022, President Joe Biden signed an anti-arbitration agreement bill into law.<sup>25</sup> This Act amends the Federal Arbitration Act to provide individuals asserting sexual assault or sexual harassment claims the option to adjudicate those claims in court even if they had agreed to arbitrate such

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arbitrations in which no racial animus was found since the employer treated the employee similar to other employees).

<sup>20</sup> Cf. STONE & COLVIN, *supra* note 13, at 5 (“[T]he arbitrator can be any person the parties have designated . . .”).

<sup>21</sup> *Id.* at 3.

<sup>22</sup> See Ashlee E. Hamilton, *Arbitration Award Ruled a Non-Confidential Judicial Record*, ABA (Apr. 9, 2021), <https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2021/arbitration-award-ruled-non-confidential-judicial-record/> [<https://perma.cc/A9L4-6ABZ>]; cf. STONE & COLVIN, *supra* note 13, at 15 (discussing the lack of public transparency in arbitration).

<sup>23</sup> See Matthew DeLange, Note, *Arbitration or Abrogation: Title VII Sexual Harassment Claims Should Not Be Subjected to Arbitration Proceedings*, 23 J. GENDER, RACE & JUST. 228, 230 (2020) (“Arbitration is an inappropriate venue for sexual harassment claims because impermissible sexual conduct occupies a unique place in society and deserves special consideration, [and] the lack of accountability and transparency associated with arbitration, compared to federal litigation, ineffectively vindicates Title VII sexual harassment rights.”).

<sup>24</sup> See Brad Smith, *Microsoft Endorses Senate Bill to Address Sexual Harassment*, MICROSOFT BLOGS (Dec. 19, 2017), <https://blogs.microsoft.com/on-the-issues/2017/12/19/microsoft-endorses-senate-bill-address-sexual-harassment/> [<https://perma.cc/C62E-SUX8>] (noting, as the President and Vice-Chair of Microsoft, that Microsoft supports legislation introduced by Senators Kirsten Gillibrand and Lindsey Graham to end forced arbitration for sexual harassment claims and that Microsoft would waive its own policy for such claims); Sara Ashley O’Brien, *Microsoft Lifts Policy that Silences Sexual Harassment Claims*, CNN (Dec. 19, 2017, 1:57 PM), <https://money.cnn.com/2017/12/19/technology/microsoft-ends-forced-arbitration/index.html?iid=EL> [<https://perma.cc/ME3S-AHFG>]. The Gillibrand-Graham Bill was reintroduced most recently as the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, as Senate Bill 2342 and supported by House Bill, H.R. 4445. See Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022).

<sup>25</sup> *Id.*

disputes before those claims arose.<sup>26</sup> Yet, as this Act only applies to sexual harassment claims, for every other kind of workplace grievance, an arbitration agreement would still likely govern.

This Article examines workplace grievance procedures with an eye toward developing fair and accessible mechanisms for dispute resolution without threatening essential employee rights and attaining employer support. This Article explores alternative mechanisms for increasing access to workplace justice, including litigation, peer advocacy and peer review panels, and voluntary arbitration agreements. It argues that, given the current legal climate, preserving employee choice to pursue litigation or internal dispute resolution with peer advocacy remains the most effective way to promote justice for employees.

The Article proceeds in the following four parts. Part I presents a historical account of how U.S. workplace law shifted from a near absolute at-will situation to one where employers increasingly favor forced arbitration and briefly introduces the reader to the enormous costs associated with workplace conflict. Part II analyzes the pros and cons of formal litigation and informal internal dispute resolution in both union and nonunion workplaces. Part III explores how companies such as the Polaroid Corporation developed and used peer advocacy programs as a successful method of reducing workplace conflict. Part III also briefly assesses peer advocacy against other forms of conflict resolution to highlight the innovative thinking behind the peer review program. Part IV examines three viable solutions to the workplace justice problem: trading mandatory arbitration for just cause dismissal, extending *Weingarten* rights—the right to peer representation—to nonunion arbitration, and voluntary arbitration that preserves judicial remedies. Part IV also presents the legal argument for how to structure peer review to avoid labor law violations and concludes with suggestions about how the law should and should not regulate workplace disputes with observations about pending federal legislation designed to outlaw unilateral forced-arbitration clauses.

## I. HISTORY OF WORKPLACE DISPUTE RESOLUTION IN THE U.S.

In the United States, employment-at-will is the default job-security legal rule.<sup>27</sup> The default rule can be expressed in terms of the duties it imposes and the rights it creates.<sup>28</sup> According to the employment-at-will doctrine, an employer may lawfully

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<sup>26</sup> *Id.*

<sup>27</sup> Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 71–72 (2000).

<sup>28</sup> For an examination of the distinct types of rights and legal obligations, see generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710, 717 (1917) [hereinafter *Judicial Reasoning*]; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913) [hereinafter *Some Fundamental Legal Conceptions*].

fire an employee for any reason—good or bad—or for no reason at all.<sup>29</sup> Notably, at-will employment is rather unique to the United States.<sup>30</sup> Most western industrialized countries presume that an employer-employee relationship is indefinite and generally protects employees from discharge without just cause.<sup>31</sup> According to legal scholars, the origin of at-will employment doctrine can be traced back to an inadvertent misstatement of then-existing labor law by treatise writer Horace C. Wood.<sup>32</sup> In his 1877 legal treatise titled *Master and Servant*, Wood sought to distinguish American and English common law.<sup>33</sup> However, in doing so, Wood erroneously cited four cases he claimed supported the principle that an employer could discharge any employee “at will.”<sup>34</sup> Courts around the country overlooked Wood’s mistake, and the at-will employment doctrine quickly became embedded in American law “without question or discussion.”<sup>35</sup>

Over the past half-century, however, American law has chipped away at this judicially created doctrine by prohibiting employers from discharging employees for some enumerated reasons.<sup>36</sup> Most states, for example, have limited the harshness of the default at-will rule by creating common-law or statutory exceptions.<sup>37</sup> Those

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<sup>29</sup> See *Payne v. W. & Atl. Railroad Company*, 81 Tenn. 507, 519–20 (1884), *overruled by* *Hutton v. Watter*, 179 S.W. 134, 138 (1915); see also Anne Marie Lofaso, *Talking Is Worthwhile: The Role of Employee Voice in Protecting, Enhancing, and Encouraging Individual Rights to Job Security in a Collective System*, 14 EMP. RTS. & EMP. POL’Y J. 55, 62–63 (2010); Summers, *supra* note 27, at 65.

<sup>30</sup> See Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMPAR. L. 310, 311 (1985).

<sup>31</sup> See *id.*; George K. Pitchford, *An Examination of the At-Will Employment Doctrine*, AM. LIBR. ASS’N ALLIED PRO. ASS’N (Aug. 2005), <https://ala-apa.org/newsletter/2005/08/17/an-examination-of-the-at-will-employment-doctrine/> [<https://perma.cc/QDX6-JAC6>].

<sup>32</sup> Summers, *supra* note 27, at 67.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; see also Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126–127 (1976); HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877) (“With us, the rule is inflexible, that a general hiring or indefinite hiring is prima facie a hiring at will. . .”).

<sup>35</sup> Summers, *supra* note 27, at 68.

<sup>36</sup> Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, 124 MONTHLY LAB. REV. 3, 3–4 (2001).

<sup>37</sup> *Id.* at 4. Montana’s Wrongful Discharge from Employment Act of 1987 is the only state law that grants a general employee right to just-cause dismissal. See MONT. CODE. ANN. §§ 39-2-901 to -915 (2021). Montana defines a discharge as “wrongful only if: (a) it was in retaliation for the employee’s refusal to violate public policy or for reporting a violation of public policy; (b) the discharge was not for good cause and the employee had completed the employer’s probationary period of employment; or (c) the employer materially violated an express provision of its own written personnel policy prior to the discharge, and the violation deprived the employee of a fair and reasonable opportunity to remain in a position of employment with the employer.” *Id.* § 39-2-904(1). For an in-depth history chronicling the events leading to codification of this act and recording the act’s immediate impact on Montana workplaces and beyond, see LeRoy H. Schramm, *Montana Employment Law and*



exceptions typically prohibit employers from discharging an at-will employee for reasons that violate an explicit, well-established public policy found in state law.<sup>38</sup> At the federal level, Congress has passed statutes such as the National Labor Relations Act of 1935<sup>39</sup> and Title VII of the Civil Rights Act of 1964,<sup>40</sup> both of which forbid employers from discriminating against employees for certain enumerated reasons, such as union animus,<sup>41</sup> race, color, religion, sex, or national origin.<sup>42</sup> Since the passage of these landmark civil rights acts, Congress has created additional causes of action protecting employees from employment discrimination “because of” age,<sup>43</sup> disabling conditions,<sup>44</sup> and other reasons that Congress has determined are “bad enough” to prohibit employers from making adverse employment decisions based on these reasons.<sup>45</sup> Thus, most U.S. employees who feel that their employers have treated them unjustly have no option but to try to fit their square-peg situation into one of the round-holes afforded by law.

This state of the law has contributed to two significant problems that incentivize employers and employees to seek alternative dispute resolution.<sup>46</sup> First, public reaction to unfair employment practices has coincided with “a steep rise in administrative regulation of the workplace, whose overlapping mandates (both federal and state) impose significant costs on employers and employees.”<sup>47</sup> Second, “is the explosion of litigation under laws that rely in whole or in part on individual lawsuits for enforcement.”<sup>48</sup>

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*the 1987 Wrongful Discharge from Employment Act: A New Order Begins*, 51 MONT. L. REV. 94 (1990).

<sup>38</sup> See generally Summers, *supra* note 27, at 66 (“[T]he doctrine of employment at will, its fundamental assumptions, and its ambivalence.”); Muhl *supra* note 36, at 4 (charting data showing that only seven states had not adopted the public policy exception and only four states had no exception to the at-will rule).

<sup>39</sup> 29 U.S.C. §§ 151–169.

<sup>40</sup> 42 U.S.C. § 2000e.

<sup>41</sup> 29 U.S.C. § 158(a)(3).

<sup>42</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>43</sup> 29 U.S.C. §§ 621–34.

<sup>44</sup> 29 U.S.C. § 794 (prohibiting disability discrimination in federal employment); 42 U.S.C. § 12131 (prohibiting disability discrimination in the private sector).

<sup>45</sup> See, e.g., 42 U.S.C. § 2000e(k) (2018) (clarifying that Title VII prohibits discrimination because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth); Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 101, 122 Stat. 881, 883 (2008) (codified as amended at 29 U.S.C. § 1182) (prohibiting discrimination because of genetic information).

<sup>46</sup> See DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP’T OF LABOR 19 (1995), <https://ecommons.cornell.edu/bitstream/handle/1813/79039/DunlopCommissionFutureWorkerManagementFinalReport.pdf?sequence=1&isAllowed=y> [<https://perma.cc/N42J-NBHK>] [hereinafter DUNLOP COMMISSION].

<sup>47</sup> See *id.* at 49–60.

<sup>48</sup> See *id.* (identifying the Fair Labor Standards Act, Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, as primary examples of such privately enforced laws).

By the 1980s, nonunion employers had already begun to experiment with internal dispute resolution mechanisms to reduce the cost of litigation arising from employment disputes.<sup>49</sup> Based partly on the Supreme Court's endorsement of arbitration in the early 1990s,<sup>50</sup> employers' experiments with internal dispute resolution resulted in an increase in forced arbitration clauses for at-will employees by the dawn of the twenty-first century.<sup>51</sup> This development is discussed below.

#### A. *The Rise of the Illusory At-Will Employment Contract*

The story of employee access to workplace justice over the past 150 years is one of reaction and counter-reaction to changing legal rights and obligations. As explained above, around the turn of the twentieth century, it was commonplace for industrial employers to dictate terms and conditions of employment.<sup>52</sup> This in itself was a considerable change given that just a century earlier there were few (if any) industrial employers, so the employer-employee relationship was organized very differently.<sup>53</sup> Indeed, by the early twentieth century, the industrial employer's prerogative to discharge an employee at will had become so legally entrenched that the Supreme Court, in *Lochner v. New York*,<sup>54</sup> had arrogated the employer's freedom

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<sup>49</sup> See Thomas J. Barnes & Jeffrey S. Rueble, *Making Wrongful Discharge Right*, 66 MICH. BAR J. 128, 129–30 (1987).

<sup>50</sup> See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 22 (1991) (holding that statutory age discrimination claims are arbitrable under the Federal Arbitration Act).

<sup>51</sup> COLVIN, *supra* note 7, at 1, 3.

<sup>52</sup> See Summers, *supra* note 27, at 66–68; see generally Andrew Lisa, *Major Laws that Changed the Workplace over the Last 100 Years*, STACKER (May 21, 2019), <https://stacker.com/stories/3093/major-laws-changed-workplace-over-last-100-years> [<https://perma.cc/CQ6Q-33CU>].

<sup>53</sup> The changes in the employment relationship between pre-industrial Britain and post-industrial America are much more significant, reflecting a transition in the employment relationship from one of status to contract. See generally Otto Kahn-Freund, *Blackstone's Neglected Child: The Contract of Employment Law*, 93 L.Q. REV. 508, 524 (1977) (explaining that Blackstone's treatment of the employment relationship under master-servant law describes pre-industrial British law). In *Blackstone's Neglected Child*, Professor Kahn-Freund makes three significant observations before concluding that Blackstone's *Commentaries* regarding the employment relationship were outdated from the moment the print became dry on the first publication. First, Kahn-Freund observes that Blackstone's *Commentaries*, considered by many to be the greatest legal tome of modern English law, contains only a small section on contract law, which itself fails to include anything about the employment contract. *Id.* at 509–11. Second, he observes that employment law was instead treated under the law of master and servant. *Id.* at 511. Third, Kahn-Freund notes the paucity of change between the first publication of Blackstone's *Commentaries* on master-servant law and later publications in the mid-nineteenth century, even though the “active lifetime of Blackstone's *Commentaries* as the dominant textbook of English law, roughly 1770 to 1850, more or less coincide with the period normally assigned by economic historians to the industrial revolution” in Britain. *Id.* at 523–24.

<sup>54</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

to contract (or terminate) the services of employees to a cognizable, constitutionally protected liberty interest.<sup>55</sup>

During the *Lochner* era (1905–1937), Congress passed the Federal Arbitration Act of 1925 (“FAA”)<sup>56</sup> in response to the perception that courts were unduly hostile towards arbitration as put forth by a major lobbying campaign backed by the New York Chamber of Commerce and the American Bar Association’s Committee on Commerce, Trade, and Commercial Law.<sup>57</sup> Prior to the FAA’s passage in 1925, courts routinely refused to enforce arbitration agreements as against public policy.<sup>58</sup> The purpose of the statute was to provide for the “enforceability of arbitration agreements between merchants—parties presumed to be of approximately equal bargaining strength—who needed a way to resolve their disputes expeditiously and inexpensively.”<sup>59</sup> The Supreme Court described the FAA as “reflecting both a ‘liberal federal policy favoring arbitration,’ and the ‘fundamental principle that arbitration is a matter of contract.’”<sup>60</sup> The Court thus demanded that courts “place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.”<sup>61</sup>

### B. *The Rise of Litigation to Vindicate Workers’ Rights*

Throughout the *Lochner* era and beyond, progressive interests whittled away at the at-will rule on legislative, regulatory, and judicial fronts.<sup>62</sup> For example, President Franklin Delano Roosevelt’s Congress passed the New Deal legislation,<sup>63</sup> which, among other things, limited the employer privilege to fire employees because of union animus.<sup>64</sup> And eventually, the Supreme Court adopted a more progressive stance on employment contracts when it overruled *Lochner*.<sup>65</sup>

In the post-*Lochner* world, workplace regulations proliferated, which raised the floor of rights upon which employers and employees could “negotiate” the terms and conditions of employment. At the federal level, Congress passed legislation that

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<sup>55</sup> *Id.* at 57–58.

<sup>56</sup> Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1–14).

<sup>57</sup> STONE & COLVIN, *supra* note 13, at 7.

<sup>58</sup> *Arbitration: Past, Precedents, and Future*, JONES FOSTER (June 17, 2019), <https://jonesfoster.com/our-perspective/arbitration-article-1> [https://perma.cc/SGA8-XPA9].

<sup>59</sup> Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 106 (2006).

<sup>60</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citations omitted).

<sup>61</sup> *Id.* (citations omitted).

<sup>62</sup> See Summers, *supra* note 27, at 66–68.

<sup>63</sup> See generally WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932–1940 (2009) (describing the history and development of the New Deal).

<sup>64</sup> 29 U.S.C. § 158(a)(3).

<sup>65</sup> See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (upholding as constitutional a state minimum wage law); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937) (upholding as constitutional the National Labor Relations Act).

improved the lives of working people. For example, in the 1930s, President Franklin Delano Roosevelt's New Deal Congress passed the National Labor Relations Act of 1935,<sup>66</sup> which protected for the first time workers' rights to band together for mutual aid or protection,<sup>67</sup> and the Fair Labor Standards Act of 1938,<sup>68</sup> which instituted a federal minimum wage<sup>69</sup> and mandated paid time and a half for overtime work.<sup>70</sup> The FLSA also prohibited child labor.<sup>71</sup> The 1940s witnessed clarification of these laws<sup>72</sup> as well as the creation of the Federal Mediation and Conciliation Service, established to help mediate and settle labor disputes.<sup>73</sup>

Passage of workplace rights greatly accelerated in the 1960s with Congress's enactment of the Equal Pay Act of 1963,<sup>74</sup> which prohibits employers from pay wage differentials based on sex;<sup>75</sup> Title VII of the Civil Rights Act of 1964,<sup>76</sup> which prohibits employment discrimination because of race, color national origin, sex, and religion;<sup>77</sup> and the Age Discrimination in Employment of 1967,<sup>78</sup> which prohibits employers from discriminating against workers ages forty years and older because of age.<sup>79</sup> The 1970s also witnessed great improvements in workers' rights to a safer

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<sup>66</sup> Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

<sup>67</sup> 29 U.S.C. §§ 157, 158 (granting employees the right under NLRA Section 7 to self-organize, to join, form, or assist a union, to engage in collective bargaining, or to engage in other concerted activities for the purpose of mutual aid or protection; and making it unlawful under Section 8 for employers to (1) interfere with, restrain, and coerce employees in the exercise of their union rights and rights to engage in concerted activity for mutual aid or protection; (2) dominate or control a union; (3) discriminate against workers because of their union activity; (4) retaliate against workers; (5) refuse to bargain with workers' representatives).

<sup>68</sup> Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219).

<sup>69</sup> Fair Labor Standards Act of 1938 § 6 (codified as amended at 29 U.S.C. § 206).

<sup>70</sup> *Id.* § 7 (codified as amended at 29 U.S.C. § 207) (prohibiting employers from allowing employees to work more than forty hours per week unless the employer compensates the employee at a rate of at least one-and-one-half times the employee's hourly rate). Under the FLSA, Congress reduced the maximum work week first to forty-four hours and then to forty hours by 1940.

<sup>71</sup> *Id.* § 12 (codified as amended at 29 U.S.C. § 212).

<sup>72</sup> *See* Pub. L. No. 77-283, 55 Stat. 756 (1941) (clarifying the forty-hour week as permitting no more than “two thousand and eighty hours during any period of fifty-two consecutive weeks” subject to the minimum wage provisions).

<sup>73</sup> In 1947, Congress also created the Federal Mediation and Conciliation Service. *See* Pub. L. No. 95-524, 61 Stat. 152 (1947) (codified as amended at 29 U.S.C. § 171–183).

<sup>74</sup> Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206).

<sup>75</sup> 29 U.S.C. § 206(d).

<sup>76</sup> Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-17).

<sup>77</sup> *See* 42 U.S.C. § 2000e-2.

<sup>78</sup> Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–634).

<sup>79</sup> *See* 29 U.S.C. §§ 623, 631.

and healthier workplace,<sup>80</sup> to guaranteed retirement pensions,<sup>81</sup> and to freedom from workplace discrimination because of pregnancy.<sup>82</sup>

In the final two decades of the twentieth century, Congress enacted the Worker Adjustment and Retraining Notification Act of 1988,<sup>83</sup> which requires employers to provide employees with sixty-days' notice of plant closings or mass economic dismissals,<sup>84</sup> the Americans with Disabilities Act of 1990,<sup>85</sup> which prohibits employers from discriminating against qualified individuals with disabling conditions,<sup>86</sup> and the Family and Medical Leave Act of 1993,<sup>87</sup> entitling employees to take reasonable medical leave for the birth or adoption of a child or to care for a child, spouse, or parent with a serious medical condition.<sup>88</sup>

The twenty-first century has given us the Genetic Information Nondiscrimination Act of 2008<sup>89</sup> (prohibiting discrimination in group health plan coverage based on genetic information),<sup>90</sup> and the Lilly Ledbetter Fair Pay Act of 2009.<sup>91</sup> Finally, the Supreme Court has at times interpreted these laws as requiring additional employer obligations to employees.<sup>92</sup>

There are also numerous state laws regulating the workplace; for example, state human rights laws often complement Title VII.<sup>93</sup> Moreover, nearly every state has a minimum wage law that is higher than the federal minimum wage.<sup>94</sup>

As this brief historical sketch of only some significant labor law changes makes clear, by the late twentieth century there were significant exceptions to the at-will

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<sup>80</sup> See Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678) (requiring employers to maintain certain workplace safety and health standards).

<sup>81</sup> See Employment Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 29 U.S.C.) (regulating private employment group pension plans).

<sup>82</sup> See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (extending Title VII prohibition against sex discrimination in employment to pregnant workers).

<sup>83</sup> Pub. L. No. 100-379, 102 Stat. 890 (1988) (codified as amended at 29 U.S.C. §§ 2101–2109).

<sup>84</sup> See 29 U.S.C. § 2102.

<sup>85</sup> Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213).

<sup>86</sup> See 42 U.S.C. §§ 121112.

<sup>87</sup> Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654).

<sup>88</sup> See 29 U.S.C. 2612.

<sup>89</sup> Pub. L. No. 110-233, 122 Stat. 881.

<sup>90</sup> 42 U.S.C. § 2000ff-1.

<sup>91</sup> Pub. L. No. 111-2, 123 Stat. 5 (making sex-based wage differentials unlawful each time the employer issues remuneration).

<sup>92</sup> See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) (interpreting Title VII as prohibiting employers from discriminating against gay and transgender workers).

<sup>93</sup> See, e.g., 5 ME. REV. STATS. §§ 4551–4634; W. VA. CODE, §§ 5-11-1 to 5-11-20.

<sup>94</sup> See *Consolidated Minimum Wage Table*, U.S. DEPT OF LABOR (Jan. 1, 2022), <https://www.dol.gov/agencies/whd/mw-consolidated> [<https://perma.cc/TC2N-UZ9J>].

employment rule that an employer could fire an employee for any reason. With every legislative, executive, or judicial encroachment on the at-will doctrine, the terms and conditions of employment became increasingly more favorable for employees.<sup>95</sup> For example, an employer's offer of employment in the 1880s might look identical to an employment offer given in the 1980s, but in 1880 an employer could lawfully fire the employee because he was Black and in 1980 the employer could not.

Yet, traditionally, workers could only vindicate their rights through litigation. Workplace conflict is expensive, and the cost of workplace conflict rises with increased labor standards.<sup>96</sup> Under the pure at-will employment legal system that existed in the United States pre-1964, employers could simply discharge employees involved in conflict, regardless of whether that discharge constituted just cause.<sup>97</sup>

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<sup>95</sup> The decline of the at-will doctrine coincided with growing scholarly commentary on the subject. The first law review article to criticize the employment at-will doctrine was published in 1967. Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405–06, 1410–13 (1967) (discussing the employer's unilateral privilege to terminate workers' employment as the prime source of its power over those workers; criticizing the inadequacy of limitations on that power, primarily stemming from just clause causes in collective-bargaining agreements or individual contracts of employment; and noting that the infrequent use of state criminal laws to prohibit employers from coercing employees in certain respects does nothing to compensate the coerced employee for employment loss). Between 1971 and 1979, only one law review article turns up in a Westlaw search for the term "employment at-will." See J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974). But, between 1980 and 1999, the same search turns up 1,827 articles, many of which trace the development of the at-will doctrine and the courts' role in chipping away at that doctrine. See, e.g., Justin R. Olsen, *The Course of the Employment-At-Will Doctrine in Utah: Berube v. Fashion Centre, Ltd.—A Turning of the Tide*, 5 B.Y.U. J. PUB. L. 249, 250 (1991) (discussing the "development of the employment-at-will doctrine in Utah and the Utah Supreme Court's recent recognition of exceptions to the doctrine"); Mark R. Kramer, Comment, *The Role of Federal Courts in Changing State Law: The Employment At Will Doctrine in Pennsylvania*, 133 U. PA. L. REV. 227, 227–28 (1984) (examining emerging exceptions to the at-will-employment doctrine); Susan Ward, Note, *Three New Exceptions to the Employment At Will Doctrine—Thompson v. St. Regis Paper Co.*, 102 Wn. 2d 219, 685 P.2d 1081 (1984), 60 WASH. L. REV. 209, 209–11 (1984) (discussing then-recent state supreme court case limiting Washington employer's right to discharge employees). Nevertheless, the at-will doctrine still reigns supreme. See generally Summers, *supra* note 27 (discussing the roots of the at-will and the development of judicial and statutory circumvention of the rule, while concluding that the perception of employer domination over its employees remains the dominant narrative).

<sup>96</sup> See Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 U.M.K.C. L. REV. 1, 8 (2007).

<sup>97</sup> Prior to passage of the Equal Pay Act of 1963, Pub. L. No. 88-38, § 2, 77 Stat. 56, 56 (codified as amended at 29 U.S.C. § 206(d)), and Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17), the U.S. workplace was largely unregulated except for minimum wage maximum hour legislation under the Fair Labor Standards Act, 29 U.S.C. § 201–219, and

Viewing the employment relationship as a contract for work, labor standards raise the cost of breaching that contract. No longer does the employment relationship merely constitute work in exchange for wages earned. The employment relationship has become a much more complex relationship, imbued with employer duties to maintain a discrimination-free, harassment-free, safe workplace and to pay employees for work performed. In this manner, the employment relationship is simply more expensive to maintain than it was fifty years ago.<sup>98</sup>

A few caveats are notable. First, to argue that legal duties are costly is not to indict the worker. To the contrary, employers have little to fear regarding labor standards if they meet those standards. Employer arguments for removing labor standards are arguments for making breaching the employment contract less expensive. So long as the labor standard is something that we value, employer arguments for removing this so-called Kaldor-Hicks inefficiency<sup>99</sup> are morally reprehensible.

Second, the possibility that workers would sue employers who had not breached labor standards is not to indict labor standards. Rather, it identifies a market failure—vexatious or fraudulent litigation—which must be treated separately.<sup>100</sup> Just as there are unscrupulous employers, there are unscrupulous workers who are willing to invent workplace grievances in hopes of a legal settlement.<sup>101</sup> Eliminating labor standards to eliminate the possibility of fraud is simply a cure worse than the disease.

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regulation of the unionized workplace, most prominently under the National Labor Relations Act, 29 U.S.C. § 151–169.

<sup>98</sup> See Lofaso, *supra* note 96, at 8.

<sup>99</sup> *Overview: Kaldor-Hicks Efficiency*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100028833> [<https://perma.cc/EB2K-RSC3>] (last visited June 25, 2022) (“In economic theory, an alteration in the allocation of resources is said to be Kaldor-Hicks efficient when it produces more benefits than costs.”); see also WASH. CTR. EQUITABLE GROWTH, *Efficiency, Inequality, and the Costs of Redistribution*, (Aug. 5, 2014), <https://equitablegrowth.org/efficiency-inequality-costs-redistribution/> [<https://perma.cc/D3A5-4SYW>] (“[E]conomists Nicholas Kaldor and John Hicks stated that an outcome is efficient if a person made better off by a change in economic circumstances could compensate a person made worse off by the change. Think of opening up domestic markets to freer international trade. If the winners from reduced tariffs in those markets could compensate the losers in those same markets from the move then opening up those markets would result in a more efficient domestic economy, according to the two economists. . . . Now there’s a very important word in the definition of the principle that might slip by: could. Under the Kaldor-Hicks principle an outcome is efficient if the winners *could* compensate the losers. They don’t actually have to do it for the new outcome to qualify as efficient. So the winners of newly opened markets don’t have to compensate the workers who have lost jobs. They could, but they don’t have to in order for the situation to be efficient.”).

<sup>100</sup> See, e.g., FED. R. CIV. P. 11; MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS’N 2020).

<sup>101</sup> *How to Handle Frivolous Lawsuits*, JEFFREY M. VERDON LAW GROUP, LLP, (Mar. 14, 2019), <https://jmvlaw.com/handle-frivolous-lawsuit/> [<https://perma.cc/FG75-7398>].

Third, and unrelated to the other two arguments, it is important to place the cost argument in a historical and economic context. It is true that in a vacuum, labor standards are more expensive than having no standards<sup>102</sup> due to the cost of implementing such standards as well as potential litigation costs for potential breaches and the defense of frivolous lawsuits.<sup>103</sup> But the issue is complicated by the fact that labor standards may, in the long run, save costs.

The Dunlop Report, written almost twenty years ago, described the costs associated with workplace litigation: “For every dollar paid to employees through litigation, at least another dollar is paid to attorneys involved in handling both meritorious and non-meritorious claims.”<sup>104</sup> In addition to pointing out the direct costs of litigation—in terms of attorney’s fees—the Dunlop Report elaborated on two other drawbacks to litigation. First, litigation is typically unavailable to working-class employees.<sup>105</sup> Second, litigation is inefficient. Claims linger, subjecting employees, already the victim of indignity or injustice, to additional stress and humiliation.<sup>106</sup>

Relatedly, Congress amended Title VII<sup>107</sup> in 1991 to permit jury trials<sup>108</sup> and to allow plaintiffs to recover emotional distress and punitive damages<sup>109</sup> while simultaneously capping the total amount of damages a Title VII plaintiff can

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<sup>102</sup> See Lofaso, *supra* note 96, at 8.

<sup>103</sup> See *id.*

<sup>104</sup> See DUNLOP COMMISSION, *supra* note 46, at 49.

<sup>105</sup> *Id.* at 49–50 (“[W]hile the prospective costs of court awards do serve to deter employers from illegal actions, it is not clear that litigation protects all kinds of employees equally well. Most employment discrimination suits are brought by employees who have already left the job where the discrimination took place. Further, those ex-employees who bring suit tend to come from the ranks of managers and professionals rather than from lower-level workers.”).

<sup>106</sup> *Id.* at 50 (“[E]ven for those employees properly situated to file suit, the pursuit of a legal claim through litigation often proves stressful and unsatisfying. Overburdened federal and state judicial dockets mean that years often pass before an aggrieved employee is able to present his or her claim in court. The combative nature of litigation tends to push the employee to the sidelines in this legal struggle, though occasionally subjecting employees to detailed investigation of their personal histories and character.” (footnote omitted)); see also Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 982 (2003) (summarizing the perceived fears of the litigation explosion but concluding that more data is needed before drawing conclusions and arguing that efficiency should not swallow other values).

<sup>107</sup> Title VII of the Civil Rights Act of 1964 is a federal law that protects employees against discrimination based on certain specified characteristics: race, color, national origin, sex, and religion. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

<sup>108</sup> 42 U.S.C. § 1981a(c).

<sup>109</sup> 42 U.S.C. § 1981a(a), (b) (creating right to recover compensatory and punitive damages under Title VII).



recover.<sup>110</sup> To the extent that defendant employers already perceived litigation as an expensive option, the caps on recovery were a significant compromise. Anti-discrimination laws, arguably the most prominent type of federal labor standard enacted since the 1960s,<sup>111</sup> have contributed to the rise in workplace dispute resolution costs if only by virtue of their existence. The more charges that employees file, the more pressure there is to lower these costs.

In short, firms, which are always interested in maximizing profit, have an interest in reducing workplace conflict—or at least in reducing the cost of conflict. As litigation costs increase and as the floor of employment rights increases, employers have turned to internal grievance mechanisms as an alternative—and less expensive—source of conflict resolution.<sup>112</sup>

### *C. Mid-Century Criticism of Litigation and the Push for Alternative Dispute Resolution*

At least by mid-century, academics were already raising such complaints about litigation, including in the workplace context: “There is widespread perception that our judicial system needs changing. It is expensive, unnecessarily technical, intrusive on private relations, and it gives an unfair advantage to the wealthy and powerful. Labor arbitration, by contrast, is frequently pointed to as the paradigm of private justice.”<sup>113</sup> These observations resulted in a significant and ongoing legal debate centered around the question whether the United States was an overly litigious society<sup>114</sup> and whether alternative dispute-resolution mechanisms were necessary.<sup>115</sup>

Hidden in these arguments is an assumption against regulatory and labor standards. If only workers did not hold rights and employers did not owe legal obligations employers could terminate the employment relationship at will and there would be no litigation. Even if the odd employee sued every now and again, a court would simply dismiss the case on the employer’s motion to dismiss for failure to

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<sup>110</sup> 42 U.S.C. § 1981a(b)(3) (limiting amount recoverable to \$300,000 in the case of employers with 500 or more employees; \$200,000 in the case of employers with 201–500 employees; \$100,000 in the case of employers with 101–200 employees; and \$50,000 in the case of employers with 15–100 employees).

<sup>111</sup> See Lisa, *supra* note 52 (highlighting “landmark” anti-discrimination legislation, such as the Civil Rights Act, Age Discrimination in Employment Act, Pregnancy Discrimination Act, and Americans with Disabilities Act).

<sup>112</sup> See *supra* note 2 and accompanying text; see also Lofaso, *supra* note 96, at 7–8 (discussing labor standards in terms of cost and efficiency).

<sup>113</sup> Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L. J. 916, 916, 916 (1979); see also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1073–75 (1984) (noting this phenomenon).

<sup>114</sup> See Harry T. Edwards, *The Rising Workload and Perceived “Bureaucracy” of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 871–74 (1983).

<sup>115</sup> See Fiss, *supra* note 113, at 1075.

state a claim upon which relief could be granted.<sup>116</sup> In effect, labor standards are viewed as incompatible with wealth maximization, as measured in terms of the Kaldor-Hicks definition of efficiency, whereby the breaching party to a transaction is “willing and able to pay enough to compensate fully those who are hurt by the [transaction] whether or not such compensation is ever actually made, either before or after the transfer takes place.”<sup>117</sup> Simply put, labor standards make it more costly to discharge at-will employees.<sup>118</sup>

As noted above, workers’ rights and employers’ legal obligations to their employees to refrain from firing them without good cause have been increasing throughout the late twentieth century into the present time. Employers, who wished to reduce litigation costs, sought a solution in alternative dispute resolution.<sup>119</sup>

*D. Using Pre-Dispute, Forced Arbitration Agreements to Limit Wrongful Discharge Litigation*

Employers sought new ways to avoid the costs of wrongful discharge litigation; one such way was to ask employees to sign pre-dispute, forced arbitration agreements.<sup>120</sup> Notwithstanding the existence of the FAA—passed in 1925 to codify the right to enforce arbitration agreements just like any other contract as a way to limit court costs—the option to force employees to arbitrate their employment disputes and forfeit court review of that claim appeared unavailable in 1980.<sup>121</sup> For example, in 1974, in *Alexander v. Gardner-Denver Company*, the Supreme Court held that an employee, who had arbitrated his federal statutory discrimination claim under an arbitration clause in a collective-bargaining agreement, did not forfeit his right to bring his Title VII discrimination claim to court based on the same set of facts.<sup>122</sup>

Despite the Supreme Court’s initial hesitancy to curtail litigation in favor of arbitration, alternative dispute resolution was gaining in popularity as a method for reducing litigation costs and as a means of protecting the autonomy and privacy of those subject to lawsuits. As early as 1981, Professor Douglas Laycock endorsed (as constitutional) the presumption of an internal dispute resolution mechanism for the

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<sup>116</sup> See FED. R. CIV. P. 12(b)(6).

<sup>117</sup> Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUDS. 227, 235–36 (1980) (“The Kaldor-Hicks test is fully equivalent to the principle of wealth maximization.”).

<sup>118</sup> For an in-depth analysis of this argument, see Lofaso, *supra* note 96, at 8.

<sup>119</sup> See Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571, 576 (1990) (stating that labor arbitration enables “contracting parties to resolve their bargaining agreement disputes in an informal, inexpensive, and relatively expeditious manner”).

<sup>120</sup> See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1639–40 (2005).

<sup>121</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974).

<sup>122</sup> *Id.* at 48.

employment disputes of religious institutions.<sup>123</sup> Professor Laycock argued that disputes between religious institutions and their employees should be resolved internally,<sup>124</sup> based in part on the principle that religious institutions have a constitutional right to decide their own internal disputes.<sup>125</sup>

The watershed moment for nonunion employment arbitration came with the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corporation*.<sup>126</sup> There, the employer discharged its employee Gilmer, a 68-year-old manager, and replaced him with a much younger person.<sup>127</sup> At the time Gilmer was hired in 1981, he had signed, as a condition of employment, a broker registration form that contained a compulsory arbitration agreement.<sup>128</sup> Six years later, Gilmer sued the employer in district court, alleging age discrimination.<sup>129</sup> The employer moved to compel arbitration under the FAA Section 2, which provides that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>130</sup> The United States Court of Appeals reversed the district court's denial of that motion,<sup>131</sup> and the case proceeded to the United States Supreme Court.<sup>132</sup>

The Supreme Court held that Congress did not preclude arbitration of age discrimination claims when it enacted the Age Discrimination in Employment Act (ADEA).<sup>133</sup> The Court also determined that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."<sup>134</sup> The Court gave a legalistic contractual analysis for its decision: "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."<sup>135</sup>

In rejecting Gilmer's argument that Congress intended to preclude waiver of judicial remedies for age discrimination claims,<sup>136</sup> the Court made the following four

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<sup>123</sup> See Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373–74 (1981).

<sup>124</sup> See *id.* at 1396, 1404, 1408–09.

<sup>125</sup> See *id.*; *id.* at 1389 n.131. In his discussion, Professor Laycock cites, among other cases, *Jones v. Wolf*, 443 U.S. 595, 602 (1979). *Id.* This case explains that the first amendment "severely circumscribes" a civil court's authority to resolve church land disputes. *Jones*, 443 U.S. at 602.

<sup>126</sup> 500 U.S. 20, 35 (1991).

<sup>127</sup> *Id.* at 23–24.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> 9 U.S.C. § 2.

<sup>131</sup> *Gilmer*, 500 U.S. at 24.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 26–27.

<sup>134</sup> *Id.* at 26.

<sup>135</sup> *Id.* (quoting *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 227 (1987)).

<sup>136</sup> *Id.*

observations. First, although forced arbitration clauses may deprive litigants of a judicial forum granted by statute, laws such as the ADEA would continue to serve their remedial and deterrent functions “so long as the prospective litigant[s] effectively may vindicate [their] statutory cause of action in the arbitral forum.”<sup>137</sup> Second, the ADEA’s statutory text favors “informal methods of conciliation”<sup>138</sup> and is consistent with “out-of-court dispute resolution, such as arbitration.”<sup>139</sup> Third, arbitrators do not necessarily favor employers, and arbitration is not necessarily a deficient dispute resolution mechanism.<sup>140</sup> Fourth, although the bargaining power inequality between employers and employees might render employee free choice illusory, that is “not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”<sup>141</sup>

The Court left open the question whether the FAA excludes employment contracts from forced arbitration, notwithstanding the plain language of FAA Section 1: “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>142</sup> The Court concluded that it did not have to reach that question because the forced arbitration clause was located in Gilmer’s broker agreement rather than his employment agreement.<sup>143</sup> This argument seems strained, not only as too narrowly construed as the dissent pointed out,<sup>144</sup> but also because signing the broker agreement was in this case a condition of employment.<sup>145</sup> In contract terms, this would mean that the broker agreement was incorporated by reference into the at-will employment contract.<sup>146</sup> The Court’s glibness in distinguishing *Alexander v. Gardner-Denver Company* primarily on grounds that

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<sup>137</sup> *Id.* at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

<sup>138</sup> *Id.* at 29.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 30–33.

<sup>141</sup> *Id.* at 33.

<sup>142</sup> *Id.* at 49–52.

<sup>143</sup> *Id.* at 25, n.2. *But see id.* at 36–43 (Stevens, J., dissenting).

<sup>144</sup> *Id.* at 38–39.

<sup>145</sup> *Id.* at 40.

<sup>146</sup> *See* 11 Williston, ON CONTRACTS, § 30:25 (4th ed. 2013) (“Generally, all writings which are part of the same transaction are interpreted together. . . . One application of this principle is the situation in which the parties have expressed their intention to have one document’s provision read into a separate document. As long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document, including a separate agreement to which they are not parties, and including a separate document which is unsigned. It is not necessary to refer to or incorporate the entire document; if the parties so desire, they may incorporate a portion of the document.” (citations omitted)). Taking the Court’s reasoning and the employer’s contention to their logical conclusion would mean that any time an at-will employee signs a broker agreement with a general arbitration clause, then that employee would have a right to arbitrate disputes that she would not ordinarily have a right to litigate.

the employees in *Alexander* never contractually agreed to arbitrate their Title VII claims<sup>147</sup> further highlights the overly formalistic reasoning of *Gilmer*. The Supreme Court answered the question left open in *Gilmer* ten years later when, in *Circuit City, Inc. v. Adams*, it held that forced arbitration of claims involving employment discrimination disputes under the ADEA were permissible under the FAA.<sup>148</sup>

The Court further curtailed individual employees' rights to have their day in court in *14 Penn Plaza LLC v. Pyett*, where it held that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law."<sup>149</sup> In other words, a union and an employer can waive an individual's right to judicial review of that individual's ADEA claim.

The most recent and pernicious developments in workplace dispute resolution involve the coupling of arbitration with class-action waivers. In *AT&T Mobility LLC v. Concepcion*, the Court held that the FAA permits consumers to waive their rights to participate in a class action lawsuit by signing a forced arbitration agreement to that effect.<sup>150</sup> Similarly, in *Epic Systems v. Lewis*, the Court held that mandatory arbitration agreements providing for individualized proceedings and waiving the right to participate in class actions, do not violate the NLRA.<sup>151</sup> Justice Neil Gorsuch, writing for the majority, noted that neither the FAA nor the NLRA specified that class-action waivers within arbitration agreements were unlawful.<sup>152</sup> He claimed that by contesting the individualized nature of arbitration proceedings, plaintiffs sought to interfere with the most fundamental attributes of arbitration—informality and speed.<sup>153</sup> Gorsuch wrote, "[w]hile Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the [FAA]. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies."<sup>154</sup>

The National Labor Relations Board ("NLRB" or "Board") addressed questions involving mandatory arbitration agreements following the Supreme Court's *Epic Systems* decision. Specifically, the Board, which had by then transitioned from a Democratic-led majority under the Obama administration to a Republican-led majority under the Trump administration, held that employers were not prohibited under the NLRA from notifying employees that failing or refusing to sign a mandatory arbitration agreement would result in their discharge or from promulgating mandatory arbitration agreements in response to employees opting into a collective action under the Fair Labor Standards Act or state wage-and-hour

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<sup>147</sup> 415 U.S. 36, 49–52 (1974).

<sup>148</sup> 532 U.S. 105, 109 (2001) (holding that the FAA applies to all non-transportation employment contracts).

<sup>149</sup> 556 U.S. 247, 274 (2009).

<sup>150</sup> 563 U.S. 333, 339, 356–57 (2011).

<sup>151</sup> 138 S. Ct. 1612, 1632 (2018).

<sup>152</sup> *Id.* at 1626–27.

<sup>153</sup> *Id.* at 1622.

<sup>154</sup> *Id.* at 1632.

laws.<sup>155</sup> Employers were, however, prohibited from taking adverse action against employees for engaging in concerted activity<sup>156</sup> by filing a class or collective action, consistent with the Board's long-standing precedent.<sup>157</sup>

The significance of these cases is clear: Employers prefer to arbitrate employment disputes and have won, by judicial fiat, the privilege to compel arbitration for employment disputes as a condition of employment. This means that employers compelling arbitration as a condition of employment face almost no chance of ever having to formally litigate and defend against claims of violating an employee's supposedly "inalienable" rights.<sup>158</sup>

## II. ASSESSING LITIGATION AND INTERNAL DISPUTE RESOLUTION MECHANISMS

Just because forced-arbitration agreements limit litigation opportunities, including jury trials, does not mean that all arbitration agreements are fundamentally bad. Indeed, for much of the twentieth century, many scholars and practitioners viewed arbitration as the panacea for the ills created by litigation.<sup>159</sup> This section considers the pros and cons of litigation and forced arbitration to draw informed conclusions about the efficacy of each dispute-resolution mechanism.

To evaluate any dispute-resolution mechanism, it is important to create standards by which to judge dispute mechanisms and to use those standards to assess the strengths and weaknesses of litigation and other dispute mechanisms. Nearly forty-five years ago, Professor Julius Getman devised the following rubric for making such an assessment, which this article adopts:

- (1) *Finality*. Once decided, are cases likely to be retried or appealed?
- (2) *Obedience*. Are the decisions put into effect or are they rendered meaningless by subsequent refusals to carry them out?
- (3) *Guidance*. Do the decisions provide necessary guidance to the parties involved in the dispute? Can they subsequently structure behavior in a reasonable fashion and avoid future litigation?
- (4) *Efficiency*. Are the majority of disputes settled without a formal

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<sup>155</sup> See *Cordúa Restaurants, Inc.*, 368 N.L.R.B. No. 43 (2019).

<sup>156</sup> See 29 U.S.C. § 157.

<sup>157</sup> See *id.*

<sup>158</sup> See Estlund, *supra* note 12, at 703–05.

<sup>159</sup> See, e.g., Getman, *supra* note 113, at 916 (“There is a widespread perception that our judicial system needs changing. It is expensive, unnecessarily technical, intrusive on private relations, and it gives unfair advantage to the wealthy and powerful. Labor arbitration, by contrast, is frequently pointed to as the paradigm of private justice.”); Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1483 (1959) (expressing concerns that courts might inject themselves into labor-contract-interpretation disputes thereby disrupting labor arbitration); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 269 (1926) (explaining that the newly enacted Federal Arbitration Law would alleviate court delay due to docket congestion, expensive litigation, and failure of litigation to result in just solutions, while also expressing the idea that the law had commercial (not labor) arbitration in mind).

hearing? When cases are tried, are the procedures adequate, flexible, and suited to the particular issue? Are the benefits achieved from the system economical compared to the costs?

(5) *Availability*. Is the dispute-resolution machinery routinely available without undue expense to people whose behavior is governed by the system, and are they provided with adequate representation?

(6) *Neutrality*. Do the decision-makers avoid favoritism and bias for one side or another?

(7) *Conflict Reduction*. Does the entire process, including the adjudication, lead to more amicable relations and contribute to mutual respect among the potential disputants?

(8) *Fairness*. Will the disputes be resolved in a way that appropriately recognizes the interests of the various parties likely to come before the system?<sup>160</sup>

While these are not the only factors useful in assessing dispute-resolution systems, they do serve as a starting point for discussion.<sup>161</sup>

Using Professor Getman's factors, Section A examines the effectiveness of litigation, while Section B examines the effectiveness of ADR.

#### *A. Resolving Employment Disputes Through Formal Litigation*

The most formal method of resolving an employment dispute is through litigation.<sup>162</sup> One benefit litigation provides is the uniform procedure found in federal, state, and local rules.<sup>163</sup> For example, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence govern federal court proceedings.<sup>164</sup> These rules are so central to the U.S. litigation system that failure to follow them could result in dismissal of the

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<sup>160</sup> Getman, *supra* note 113, at 916.

<sup>161</sup> The dispute systems design (DSD) field, where a dispute systems designer creates a custom conflict resolution process for an institutional client, has created a number of similar assessment tools. *See generally* NANCY H. ROGERS, ROBERT C. BORDONE, FRANK E.A. SANDER & CRAIG A. MCEWEN, *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* (2d ed. 2019).

<sup>162</sup> Legal Information Institute, *Litigation: Overview*, CORNELL L. SCH., <http://www.law.cornell.edu/wex/litigation> [<https://perma.cc/6JE7-ELNM>] (last visited June 25, 2022).

<sup>163</sup> *See* J. Michael Goodson Law Library, *Court Rules Research Guide*, DUKE U. SCH. L. (Nov. 2017), <https://law.duke.edu/sites/default/files/lib/courtrules.pdf> [<https://perma.cc/B9FY-W94S>] (last visited June 25, 2022).

<sup>164</sup> A set of the most current federal rules is available on the U.S. courts website. *See Current Rules of Practice and Procedure*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/rules/current-rules.aspx> [<https://perma.cc/M7FK-FD9H>] (last visited Aug. 25, 2022). Administrative proceedings, such as those governing proceedings before the National Labor Relations Board or the Equal Employment Opportunity Commission, also have their own set of rules. *See, e.g.*, 29 C.F.R. §§ 101–103 (2018).

lawsuit.<sup>165</sup> Simply put, formal court proceedings and the accompanying rules of practice are considered “essential to court operations and maintaining a fair and impartial federal judiciary.”<sup>166</sup>

Under Professor Getman’s rubric—finality, obedience, guidance, efficiency, availability, neutrality, conflict reduction, and fairness—litigation is likely to result in justice but at a cost in terms of time, judicial and litigant resources, and exacerbation of already vexatious relations.<sup>167</sup> Simply stated, litigation is *final*—eventually.<sup>168</sup> Although not required as a matter of constitutional law, our justice

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<sup>165</sup> See, e.g., FED. R. CIV. P. 4(m) (“If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.”); FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”); FED. R. CIV. P. 37(b)(2)(A)(v) (“If a party . . . fails to obey an order to provide or permit discovery, . . . the court where the action is pending may issue further just orders. . . . includ[ing] . . . dismissing the action or proceeding in whole or in part”); FED. R. CIV. P. 41(b) (“If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.”); FED. R. APP. P. 3(a)(2) (“An appellant’s failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.”); FED. R. APP. P. 31(c) (“If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.”).

<sup>166</sup> See United States District Court: Eastern District of California, Rules (2022), <https://www.caed.uscourts.gov/CAEDnew/index.cfm/rules/> [<https://perma.cc/5XPJ-BAAW>].

<sup>167</sup> U.S. litigation is, of course, adversarial and the adversarial process is more contentious by design. See generally Stephan Landsman, *Introduction to the Adversary System*, in READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION I (1988).

<sup>168</sup> There are two legal maxims that support the foundational premise that litigation should be final. First, “[i]t reipublicae ut sit finis litium,” meaning “it is for the public good that there be an end to litigation.” HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 330 (7th Am. ed. 1874). Second, “nemo debet bis vexari pro eadem causa”—a person should not be troubled twice for the same reason. See Arthur L. Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 YALE L.J. 221, 240 (1910). These doctrines are commonly considered especially critical in terms of res judicata and double jeopardy. See Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1272 (1964); E. H. Schopler, *Modern Status of Doctrine of Res Judicata in Criminal Cases*, 9 A.L.R.3d 203 (originally published in 1966). See also Fleming James, Jr., *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173, 184 (1959) (discussing policies favoring finality of judgments, summing up



system insists on appellate review of cases for three reasons: to correct mistakes; to develop legal precedent, and to ensure justice.<sup>169</sup> These goals, though important, make the litigation process time-consuming and costly.<sup>170</sup> Additionally, court orders, once issued, are likely to be *obeyed* because courts possess contempt powers.<sup>171</sup> Litigation, more than any other system, employs *neutral* advocates, whose job is to resolve conflicts in a fair manner while considering the various interests of all parties to the dispute.<sup>172</sup> Moreover, court decisions, when clearly written, not only provide the necessary *guidance* to the parties involved in the dispute, but also provide guidance to similarly situated future litigants through precedential opinions.<sup>173</sup> Sophisticated parties can structure their behavior based on judicial precedents to avoid future litigation.<sup>174</sup>

By contrast, although most disputes settle without a trial, litigation is not considered *efficient*.<sup>175</sup> In particular, the formalities associated with litigation make it opaque to the layperson who typically needs an attorney to travail through

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those policies in these two legal maxims, and explaining that the first maxim stresses the social utility of finality whereas the second maxim “emphasizes the hardship of multiple litigation on the individual adversary”).

<sup>169</sup> See Anne Marie Lofaso, *The Appellate Courts’ Role in the Federal Judicial System*, in A PRACTITIONER’S GUIDE TO APPELLATE ADVOCACY 3 (Anne Marie Lofaso & Lawrence D. Rosenberg eds., 2010).

<sup>170</sup> As the former Chief Judge of the Second Circuit once explained, “[t]he relationship between the cost of settlement and the expense of continued disagreement is immediate and highly visible. Thus, even a party who might ultimately succeed on an appeal may prefer an early settlement to the increasingly expensive, time-consuming process of waiting for his case to be briefed, argued and decided.” Irving R. Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094, 1100 (1974). For more modern views, see, e.g., Michele M. Jochner, *To Appeal or Not to Appeal* (Nov. 11, 2019), <https://familylawyermagazine.com/articles/to-appeal-or-not-to-appeal/> [<https://perma.cc/6V8K-DY47>] (“[A]n appeal is a time-consuming and often expensive endeavor.”); Christine M. Salmi, *To Appeal or Not To Appeal: That Is the Question*, 58 ADVOCATE 23, 24 (Aug. 2015) (“Appeals can be very time-consuming and expensive.”).

<sup>171</sup> “The power to punish for contempt is inherent in every court at common law, and its exercise is essentially a judicial function.” *Recent Cases: Constitutional Law—Contempt—Judicial Powers*, 14 HARV. L. REV. 383, 385 (1901).

<sup>172</sup> *But see* Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1431–32 (2013) (discussing the extent to which the Roberts Court has a pro-business bias); Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1156 (2009) (arguing that race and political affiliation significantly affect race-discrimination case outcome).

<sup>173</sup> This precedential portion of a judicial opinion is often called the *ratio decidendi*. Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 161 (1930).

<sup>174</sup> See Getman, *supra* note 113, at 916, 923–24.

<sup>175</sup> For a comparison between the U.S. and German litigation systems that argues that the U.S. litigation system is intentionally more inefficient, see Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 734 (1987).

technical, legal procedures.<sup>176</sup> Litigation is therefore *unavailable* to those who cannot obtain an attorney.<sup>177</sup> Even if a disputant can obtain an attorney—because that disputant is wealthy, poor enough to qualify for free legal services, or can find an attorney to finance the litigation on a contingency basis—litigation may not resolve the conflict.<sup>178</sup> Before settlement is seriously considered, most parties will endure costly and time-consuming discovery.<sup>179</sup> Attorneys may even cross-move for summary judgment upon completion of discovery.<sup>180</sup> Those motions are, once again, costly and time-consuming for the litigants and the judges.<sup>181</sup> Moreover, litigation’s combative style is certainly not conducive to *conflict reduction* among the parties.<sup>182</sup>

In sum, litigation exchanges efficiency for formality. Although formal litigation guarantees complaining employees several procedural safeguards typically not available in arbitration—including evidentiary safeguards, access to a trained and neutral decisionmaker, the opportunity to consult with and be represented by an attorney, and the ability to appeal unfavorable decisions—the process is often time-consuming, expensive, and increasingly antagonistic. Because of these pitfalls, both employers and employees alike in the twentieth century urged for alternative dispute resolution.

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<sup>176</sup> The movement to guarantee an indigent right to counsel in civil litigation comparable to the indigent right to counsel in criminal litigation is often called “civil *Gideon*” after the famed U.S. Supreme Court decision *Gideon v. Wainwright*, 372 U.S. 335 (1963). See generally Tonya L. Brito, David J. Pate Jr., Daanika Gordon & Amanda Ward, *What We Know and Need to Know About Civil Gideon*, 67 S.C. L. REV. 223 (2016).

<sup>177</sup> Cf. *id.* at 223–25.

<sup>178</sup> See ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 42–45 (Penguin Press rev. ed. 2011) (explaining how positional bargaining like litigation can fail to resolve some of the underlying interests).

<sup>179</sup> Cf. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 n.6 (2007) (calling discovery “a sprawling, costly, and hugely time-consuming undertaking” (quoting Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989))).

<sup>180</sup> See David F. Herr & Roger S. Haydock, *Cross-Motions for Summary Judgments*, 2 MINN. PRAC., CIV. RULES ANNOTATED § 56.13 (6th ed. 2022) (stating that in Minnesota “cross-motions for summary judgment [are] a common occurrence”).

<sup>181</sup> See D. Theodore Rave, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 876 (2006) (stating that summary judgment “is a frequently used motion that is costly to oppose and . . . may be a net drain on society”).

<sup>182</sup> See Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 582 (1983) (defining the American legal system as “among the most expensive and least efficient in the world,” and commenting on how the first-year legal curriculum—which remains essentially unchanged thirty years later—contributes this problem by focusing on the Federal Rules of Civil Procedure rather than alternative dispute resolution). Bok called the failure to include alternative dispute resolution in legal education the “familiar tilt in the law curriculum toward preparing students for legal combat.” *Id.*

*B. Resolving Employment Disputes Through ADR: The Rise of Forced Arbitration in the Union and Nonunion Workplace*

Alternative dispute resolution (ADR) is a process for settling disputes using techniques other than litigation.<sup>183</sup> ADR is diverse and includes arbitration, mediation, conciliation, and fact-finding.<sup>184</sup> ADR processes have different implications depending on whether the workplace is organized. Both unionized and nonunionized workplaces are examined below.

*1. Development of Policies Favoring Grievance-Arbitration Procedures in Unionized Workplaces*

History demonstrates that grievance arbitration has been particularly well developed in unionized workplaces.<sup>185</sup> During World War I, leading labor and employer representatives, with President Woodrow Wilson's blessing, voluntarily agreed to create the National War Labor Board in response to the perceived need to limit "industrial disturbances with a view to the full production of war necessities."<sup>186</sup> The Board had twelve members—five labor, five management, and

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<sup>183</sup> See *Alternative Dispute Resolution*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/topic/labor-relations/adr> [<https://perma.cc/95E8-LMCK>] (last visited June 25, 2022); see generally *Conflict Resolution & ADR Services for Government*, FED. MEDIATION & CONCILIATION SERV. (July 2015), [https://www.fmcs.gov/wp-content/uploads/2015/07/FMC\\_SConflict\\_ResADR10-07.pdf](https://www.fmcs.gov/wp-content/uploads/2015/07/FMC_SConflict_ResADR10-07.pdf) [<https://perma.cc/X4TA-2BX5>].

<sup>184</sup> For a brief overview of various forms of ADR, see Katherine V.W. Stone, *Alternative Dispute Resolution*, ENCYCLOPEDIA OF LEGAL HISTORY (Stan Katz ed., Oxford University Press 2009).

<sup>185</sup> See generally Morton Gitelman, *The Evolution of Labor Arbitration*, 9 DEPAUL L. REV. 181, 181–88 (1960) (detailing how labor arbitration developed alongside various union movements); JOHN R. COMMONS, DAVID J. SAPOSS, HELEN L. SUMNER, E. B. MITTELMAN, H. E. HOAGLAND, JOHN B. ANDREWS & SELIG PERLMAN, 2 THE HISTORY OF LABOUR IN THE UNITED STATES 16, 79, 98, 160–67, 179–80, 311–12, 325–26, 414–17, 426, 454, 479–81, 502, 508, 527–28 (reprt. 1966) (1918) (detailing the long and varied history of arbitration and attempts at arbitration in the United States); *Development of Collective Bargaining in Metal Mining*, 47 MONTHLY LAB. REV. 591, 595–98 (1938) (noting that as early as the late 1800s industrial unions had adopted arbitration as an alternative dispute resolution method); Jesse Freidin & Francis J. Ulman, *Arbitration and the National War Labor Board*, 58 HARV. L. REV. 309, 309–12 (1945) (discussing arbitration processes for the NWLB in WWII); Alexander Hamilton Frey, *Arbitration and the War Labor Board*, 29 IOWA L. R. 202, 203–04 (1944) (highlighting that arbitration in the 1940s was a viable option to resolve an issue while keeping disputants out of contact with one another); E. L. Oliver, *Arbitration of Labor Disputes*, 83 U. PA. L. REV. 206, 211–25 (1934) (detailing the history and processes of labor arbitration); David Weiss, *History of Arbitration in American Newspaper Publishing Industry*, 17 MONTHLY LAB. REV. 15 (1923); George M. Janes, *The Trend of Voluntary Conciliation and Arbitration in Labor Disputes*, 69 ANNALS AM. ACAD. POL. & SOC. SCI. 173 (1917).

<sup>186</sup> Richard B. Gregg, *The National War Labor Board*, 33 HARV. L. REV. 39, 39–40 (1919).

two public representatives (Frank P. Walsh and the Honorable William H. Taft).<sup>187</sup> By a proclamation dated April 8, 1918, President Wilson declared that one of the Board's main purposes was "[t]o bring about a settlement, by mediation and conciliation, of every controversy arising between employers and workers in the field of production necessary for the effective conduct of the war."<sup>188</sup> The Board increased in popularity up until the end of the war, at which time employers began to lose interest in mediating disputes.<sup>189</sup>

Employers' waning interest in mediation boiled down to supply-and-demand considerations.<sup>190</sup> The less production that occurred, the less demand for labor and the less need to keep employees disciplined (in terms of keeping them from striking).<sup>191</sup> Employer concerns about strikes also dissipated because labor supply (and therefore a greater supply of workers to replace strikers) naturally increased as war soldiers returned home. With less need for quicker, informal grievance resolution processes, the Board met for the last time on August 12, 1919, at which time it dissolved.<sup>192</sup>

During World War II, however, by Executive Order,<sup>193</sup> President Franklin D. Roosevelt reinstated the National War Labor Board, as a tripartite tribunal of twelve commissioners (four from labor, four from industry, and four to represent the public).<sup>194</sup> The Board had jurisdiction over "labor disputes which might interrupt work which contributes to the effective prosecution of the war," and would resolve those disputes through "mediation, voluntary arbitration, or arbitration under rules established by the Board."<sup>195</sup> Congress, through the War Labor Disputes Act,<sup>196</sup> required "a public hearing on the merits of the dispute,"<sup>197</sup> which further formalized these processes and strengthened the War Labor Board. However, Congress also disempowered workers by removing the employees' right to withdraw their labor (strike), absent "not less than thirty days" notice to the Secretary of Labor, the National War Labor Board, and the National Labor Relations Board (along with an NLRB-conducted, secret-ballot strike vote of the membership).<sup>198</sup> Congress also authorized the President to seize private industrial plants where a strike or other labor

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<sup>187</sup> *See id.* at 40.

<sup>188</sup> *Id.* at 41.

<sup>189</sup> *Id.* at 48–51.

<sup>190</sup> *See id.* at 50.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 51–52.

<sup>193</sup> Exec. Order No. 9017, 7 FED. REG. 237, 237–38 (Jan. 14, 1942) (superseding the National Defense Mediation Board, created by Exec. Order 8716, 6 FED. REG. 1532 (Mar. 19, 1941)).

<sup>194</sup> Freidin & Ulman, *supra* note 185, at 313.

<sup>195</sup> Exec. Order No. 9017, 7 Fed. Reg. 237, 237 (Jan. 14, 1942).

<sup>196</sup> War Labor Disputes (Smith-Connally) Act, Pub. L. No. 78-89, 57 Stat. 163–169 (1943).

<sup>197</sup> *Id.* § 7(a)(1).

<sup>198</sup> *Id.* § 8(a)(1)–(2).

disturbance was imminent.<sup>199</sup> By its own terms, the Act expired “at the end of six months following the termination of hostilities in the present war . . . or [earlier if by congressional amendment].”<sup>200</sup>

The War Labor Boards of 1918–19 and 1943–46 tangibly linked industrial peace with curtailed strike rights and enhanced grievance-arbitration proceedings to resolve disputes.<sup>201</sup> Congress additionally formalized this link in the immediate aftermath of World War II. Against a backdrop of post-war industrial strife<sup>202</sup> and the popular narrative that unions had grown too strong, Congress passed the Labor Management Relations Act of 1947 (the Taft-Hartley Act),<sup>203</sup> which both restricted secondary activity, such as secondary strikes,<sup>204</sup> and created the Federal Mediation and Conciliation Service.<sup>205</sup>

A flurry of wildcat strikes—strikes that are not authorized by a union—between late 1945 and 1946 similarly bolstered the message that because unions had grown too strong, employers needed to couple strike curtailment with quick resolution of workplace disputes.<sup>206</sup> Harvard scholars, Jerome F. Scott and George C. Homans, performed contemporaneous, preliminary research on wildcat strikes in Detroit.<sup>207</sup> They explored the phenomenon of wildcat strikes by asking the question why some workers did not strike.<sup>208</sup> According to Scott and Homans, social frustration, fatigue, and the economic power to insist on demands could not, by themselves, explain the number of wildcat strikes toward the end of the war, because many other workers, who were under the same conditions of frustration, and fatigue, and equally empowered, also refused to strike.<sup>209</sup>

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<sup>199</sup> *Id.* § 3.

<sup>200</sup> *Id.* § 10.

<sup>201</sup> See generally Ronald W. Schatz, “Industrial Peace through Arbitration”: *George Taylor and the Genius of the War Labor Board*, 11 LAB. 39, 42, 48 (2014); Gregg, *supra* note 186, at 39–42, 59–61.

<sup>202</sup> See generally Barton J. Bernstein, *The Truman Administration and the Steel Strike of 1946*, 52 J. AM. HIST. 791 (1966) (detailing how the post-war Truman administration was faced with and dealt with reconversion, inflation, and various strikes across industries).

<sup>203</sup> Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, (1947).

<sup>204</sup> See *id.* § 8(b)(4) (codified as amended at 29 U.S.C. § 158(b)(4)).

<sup>205</sup> See *id.* § 202(a) (codified as amended at 29 U.S.C. § 172(a)). See generally David E. Feller, Symposium, *Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards*, 19 BERKELEY J. EMP. & LAB. L. 296 (1998) (detailing the history of labor arbitration following the Taft-Hartley Act); Harry Shulman, Reason, *Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

<sup>206</sup> See Jerome F. Scott & George C. Homans, *Reflections on the Wildcat Strikes*, 12 AM. SOCIO. REV. 278, 280 (1947).

<sup>207</sup> See *id.*

<sup>208</sup> See *id.* at 285.

<sup>209</sup> *Id.* at 279–81.

Interestingly, immediately after the war, Scott and Homans concluded that “a number of strikes seemed to stem from faulty communication.”<sup>210</sup> The researchers observed a similar communication breakdown on management’s side. They further noted that the War Labor Board might have contributed to this faulty communication by creating delay in the process.<sup>211</sup> In short, lines of communication among the main players—workers, management, and government—were growing longer and more indirect, while lines of communication within particular groups—especially workers—were solidifying thereby making wildcat strikes more likely to occur.<sup>212</sup>

In contrast, in workplaces where few wildcat strikes occurred, the researchers observed well-developed communication channels.<sup>213</sup> Management promptly responded to workers’ complaints, and union representatives and managers dealt directly and honestly with each other.<sup>214</sup> Interestingly, the parties managed their disputes using plant workers—insiders, not outsiders.<sup>215</sup> This atypical model stands in contrast to the norm of a legalistic culture in which workers and managers would dig into their positions based on rights instead of working together to find creative solutions.<sup>216</sup>

Notwithstanding the connection between industrial peace and grievance-arbitration, no one seemed to think that employees could waive their statutory right to strike absent an express agreement to do so.<sup>217</sup> Indeed, in 1951, famed labor scholar Archibald Cox explained that express grievance clauses imposed at most an “implied commitment” by “each party” to refrain from “economic pressure until the [grievance] procedure has been exhausted.”<sup>218</sup> He added that “[a] ‘no strike’ clause

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<sup>210</sup> *Id.* (“Workingmen would call it the ‘runaround.’ They use that phrase when they feel that what they consider important is not in fact being treated as such by people in authority. . . . [C]ommunication is concerned with action, not with abstract understanding. Action may not be taken, but unless the man at the bottom feels that a responsible individual has given serious consideration to his concerns, communication, for him, has failed. Wartime conditions made communications . . . much more difficult, while they made workingmen much more ready to insist . . . that communication be improved.”).

<sup>211</sup> *Id.* (“With all its good intentions, the War Labor Board may have hurt communication more than it helped. Here was an organization outside the industry. Disputes referred to it meant longer delays before responsible action was taken. Rightly or wrongly, workers often felt that companies had used the War Labor Board to stall and to avoid dealing with matters which could perfectly well have been handled on the spot.”).

<sup>212</sup> *See id.* at 281–83. “[T]he feeling of the work[er] that he was at last in a position to insist on being heard became strong at a time when the actual avenues of communication, both for the company and the union, became weaker and more indirect than they had been in the past.” *Id.* at 282.

<sup>213</sup> *See id.* at 286.

<sup>214</sup> *See id.*

<sup>215</sup> *See id.*

<sup>216</sup> *See id.* at 285.

<sup>217</sup> *See* Archibald Cox, *The Right to Engage in Concerted Activities*, 26 IND. L. J. 319, 330 (1951).

<sup>218</sup> *Id.* at 329.

is the subject of considerable deliberation during contract negotiations and is often a concession for which the union exacts a substantial price from the employer.”<sup>219</sup>

Yet in a series of later-decided cases, the Supreme Court held precisely that unions and employees may waive the right to strike simply by agreeing to arbitrate a dispute, even in the absence of a no-strike promise.<sup>220</sup> First, in *Textile Workers Union v. Lincoln Mills*, the Court declared that “[p]lainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike.”<sup>221</sup> Then, in *Local 174 v. Lucas Flour Co.*, the Supreme Court held that an express arbitration clause in a collective-bargaining agreement created an implied duty not to strike over disputes subject to arbitration, notwithstanding the lack of a no-strike promise in that very same contract.<sup>222</sup> Judicial attitudes strongly in favor of forced arbitration in the union context culminated most recently in *14 Penn Plaza LLC v. Pyett*, where the Supreme Court held that a union and employer can agree to waive employees’ rights to litigate age discrimination claims simply by agreeing to arbitrate those claims.<sup>223</sup>

## 2. Development of Forced Arbitration in the Nonunion Workplace

There are many good reasons to favor some form of ADR in the nonunion workplace. Foremost, most workers are employed at-will.<sup>224</sup> An employer who provides ADR is providing at least some due process, which serves to dignify workers and give those workers some say in decisions affecting their jobs.<sup>225</sup> “Fair arbitral procedures can provide a more expeditious and less expensive alternative that may benefit workers more than judicial proceedings.”<sup>226</sup> “In a world without employment arbitration as an available option, we would essentially have a ‘cadillac’ system for the few and a ‘rickshaw’ system for the many.”<sup>227</sup>

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<sup>219</sup> *Id.* at 330.

<sup>220</sup> Analysis of the question whether a pro-business tilt on the court is responsible for these results is beyond the scope of this paper. For such an analysis, see Epstein et al., *supra* note 172; LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013).

<sup>221</sup> 353 U.S. 448, 455 (1957).

<sup>222</sup> 369 U.S. 95, 104–05 (1962).

<sup>223</sup> 556 U.S. 247, 274 (2009).

<sup>224</sup> See Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 8 (1993) (stating that most U.S. American workers have no legal recourse when fired).

<sup>225</sup> See Lofaso, *supra* note 96, at 57.

<sup>226</sup> Charles B. Craver, *The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims*, 11 KAN. J. L. & PUB. POL’Y 141, 158 (2001).

<sup>227</sup> Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001).

But why do employers prefer mandatory arbitration?<sup>228</sup> And why, at the same time when employers have increasingly favored mandatory arbitration, have some companies chosen to use trained peer or employee advocates in resolving workplace disputes?<sup>229</sup> To answer these questions, it is helpful to examine the reasons that employers have given for favoring mandatory arbitration of workplace disputes.

In addition to business reasons,<sup>230</sup> employers who favor mandatory arbitration claim that arbitration is cost-effective for all players—employers, employees, and the public; also, resolution is speedy<sup>231</sup> and the results are fair.<sup>232</sup> One of the most common reasons for employers to favor mandatory arbitration is that increase in employment discrimination cases and other wrongful discharge cases that has clogged court dockets and has cost industries billions in annual litigation expenses.<sup>233</sup> However, the data reveal a different story. According to the Equal

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<sup>228</sup> See Eisenberg et al., *supra* note 6, at 122–23 (suggesting two employer motives—to prevent consumers from aggregating claims into class actions and to avoid jury trials in both consumer and employment disputes).

<sup>229</sup> See Ann G. Leibowitz, *Mandatory Arbitration of Employment Disputes: Gilmer Threw Polaroid a Curve*, in PROCEEDINGS OF NEW YORK UNIVERSITY 49TH ANNUAL CONFERENCE ON LABOR (Samuel Estreicher ed. 1997). Polaroid employed four professional ombudsmen, trained in dispute resolution and who reported directly to the Chief Executive Officer. The ombudsmen had investigatory, fact-finding, and advisory powers. *Id.* at 152. Polaroid further trained sixty employees in mediation of employment disputes. *Id.* at 153. See Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI-KENT L. REV. 753, 754–55 (1990). For descriptions of peer-review grievance boards, see EWING, *supra* note 2, at 185–203 (discussing procedures at the Control Data Corporation); *id.* at 223–40 (discussing procedures at the Federal Express Corporation); Fred C. Olson, *How Peer Review Works at Control Data*, 62 HARV. BUS. REV. 58, 58 (1984) (discussing procedures at Control Data).

<sup>230</sup> Ms. Leibowitz provides the following three business reasons for favoring arbitration of employment disputes: (1) Arbitration provides a means for monitoring supervisory application of managerial policies; (2) arbitration can alert management to underlying or systemic organizational problems that might otherwise go undetected; (3) arbitration provides an incentive to managers, whose performance often depends on maintaining morale, to resolve disputes at the lowest possible level. See Leibowitz, *supra* note 229. Leibowitz also mentions that some employers use grievance-arbitration dispute resolution to discourage unionization. *Id.* at 149–50.

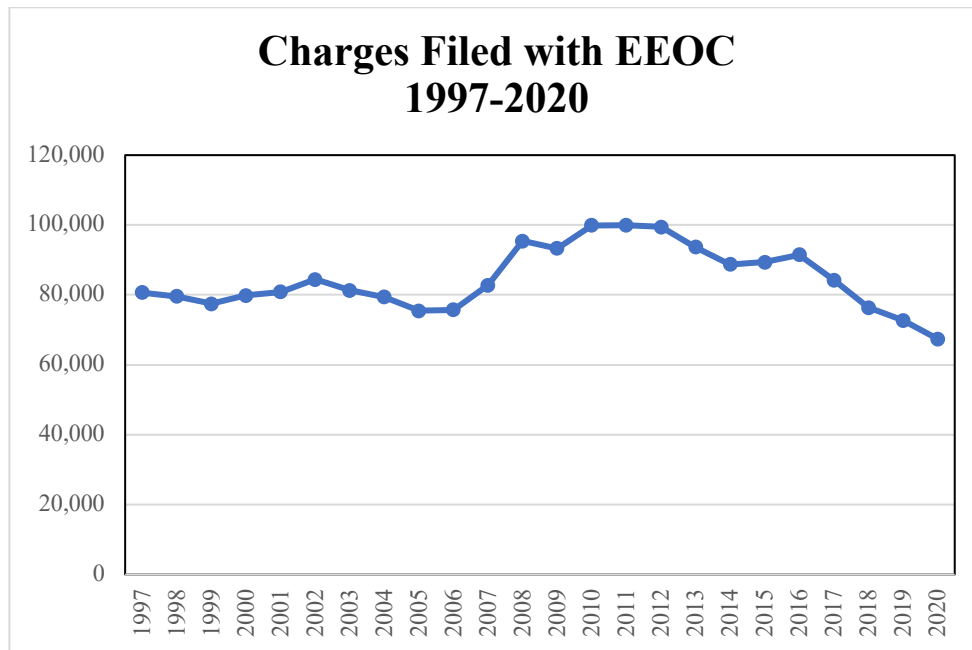
<sup>231</sup> Proponents of forced arbitration point out that forced arbitration enables parties to a workplace dispute to resolve their conflicts speedily because, unlike jury trials, arbitration is not plagued with endless motions and delay tactics. *Cf. Who Wins in Supreme Court's Arbitration Ruling*, CNN (Mar. 23, 2001), <https://www.cnn.com/2001/LAW/03/23/scotus.arbitration/> [<https://perma.cc/H54V-NHTH>]; *Lorber: Arbitration Good for Companies and Workers*, CNN (Mar. 23, 2001), <https://www.cnn.com/2001/LAW/03/23/scotus.arbitration.lorber/> [<https://perma.cc/37QH-NP9S>].

<sup>232</sup> See Eisenberg et al., *supra* note 6, at 119.

<sup>233</sup> See, e.g., Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 189 (1997) (“Proponents argue that [employment] arbitration will provide an expeditious, low cost means for employees to get a hearing on statutory, contractual, or other claims arising out of their dismissal.”).



Employment Opportunity Commission, charges filed in employment discrimination cases have remained constant between 1997 and 2007, averaging 79,782 charges during that ten-year period.<sup>234</sup> The year 2008 witnessed a jump in charges filed, followed by a eight-year plateau from 2008 to 2016 averaging 94,594 charges.<sup>235</sup> Between 2013 and 2016, charges remained steady between 93,727 and 88,778.<sup>236</sup> In 2017, charges plummeted to 84,254; the downward trend continued through 2020 with charges at 67,448.<sup>237</sup> The last three years for which we have data show a steady decline in charges filed from 76,418 filed in 2018 to 61,331 filed in 2021.<sup>238</sup> The result is an overall decrease in charges filed over the last quarter century.<sup>239</sup>



A more accurate narrative of the past quarter-century might be two-fold. After a period of stasis, EEOC complaints rose during the Obama years, when workers might have become more aware of their rights and believed, together with their attorneys, that the Administration and a more diverse judiciary would be more sympathetic to discrimination claims.

<sup>234</sup> See EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 1.

<sup>235</sup> *Id.*

<sup>236</sup> *See id.*

<sup>237</sup> *See id.*

<sup>238</sup> *See id.*

<sup>239</sup> For earlier studies questioning the litigation-explosion myth, see generally Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions About the Federal Court System*, 56 U. CHI. L. REV. 501 (1989) (examining the causes for these different perceptions).

Two significant changes in the legal landscape, however, tempered this uptick in charges filed.<sup>240</sup> First, and most significantly, is the Supreme Court’s decision in *Epic Systems v. Lewis*, which compels arbitration and waives litigation of many employment-discrimination claims.<sup>241</sup> Second, and more difficult to assess, is the demise of notice pleading<sup>242</sup> and the advent of plausibility pleading<sup>243</sup> in federal civil litigation. Under this relatively new pleading standard, a complaint must contain enough facts to raise “a reasonable expectation that discovery will reveal evidence of [unlawful conduct].”<sup>244</sup> Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.”<sup>245</sup> In adopting the “plausibility standard,” the Court expressly disavowed “as best forgotten”<sup>246</sup> the “no set of facts” language set forth in *Conley v. Gibson*,<sup>247</sup> which had governed pleading standards for fifty years.

Another common reason employers give for favoring arbitration is that arbitration yields fair results. To assess this claim, it is useful to compare arbitration to litigation.<sup>248</sup>

Almost fifty years ago, Professor Marc Galanter examined the advantages that repeat players (“RP”)—“who are engaged in many similar litigations over time”—have in litigation over one-shotters (“OS”)—“claimants who have only occasional recourse to the courts.”<sup>249</sup> After carefully noting that the RP-OS is not a dichotomous pair but a continuum,<sup>250</sup> Professor Galanter describes the ideal RP as “a unit which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long-run interests,” and the ideal OS as “a unit whose claims are too large (relative to his size) or too small

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<sup>240</sup> Consideration of other mitigating solutions, such as making the judicial-confirmation process more efficient and less political, are beyond the scope of this Article.

<sup>241</sup> See 138 S. Ct. 1612, 1619, 1632 (2018).

<sup>242</sup> See *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957).

<sup>243</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557–64 (2007). The graph could be read as discouraging EEOC filings as early as 2012, which would suggest a possible causal relationship between *Iqbal/Twombly* and the likelihood of employment-discrimination litigation.

<sup>244</sup> *Twombly*, 550 U.S. at 545.

<sup>245</sup> *Iqbal*, 556 U.S. at 678 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” (quoting *Twombly*, 550 U.S. at 570, 556, 557)).

<sup>246</sup> *Twombly*, 550 U.S. at 563.

<sup>247</sup> 355 U.S. 41, 45 (1957).

<sup>248</sup> Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 95 n.1 (1974).

<sup>249</sup> *Id.* at 97.

<sup>250</sup> *Id.* at 97–98.

(relative to the cost of remedies) to be managed routinely and rationally.”<sup>251</sup> Good present-day examples of the idealized RP are large corporate employers, such as Wal-Mart or Amazon. The discharged employee is an excellent example of the idealized OP. Significantly, RPs have the following characteristics that OSs do not possess: (1) advanced intelligence, having engaged repeatedly in similar litigations; (2) expertise, access to specialists, economies of scale, and therefore low start-up costs in any case; (3) “opportunities to develop facilitative informal relations with institutional incumbents;” (4) interest in preserving a bargaining reputation as a combatant; (5) capacity to play the odds and to adopt minimax strategies (minimize the possibility of maximum loss); (6) capacity to choose to play for substantive-rule changing, procedural-rule changing, or for gain.<sup>252</sup>

Devising a rubric of the four possible litigation pairs—OS v. OS, RP v. OS, OS v. RP, RP v. RP—Galanter concluded that “the great bulk of litigation is found” when an RP-plaintiff sues an OS-defendant.<sup>253</sup> By contrast, litigation between an OS-plaintiff and an RP-defendant is unusual outside of personal injury cases, wrongful discharge lawsuits, and canceled franchise agreements.<sup>254</sup> Employment disputes also arise in the RP v. RP scenario, for example, in which a union sues a corporation (or vice versa), or when the government sues a corporate employer on behalf of a discharged employee.

According to Galanter, RPs have a stake in the rules themselves and how they are applied in litigation and adjudication. Accordingly, it is expected for

... RPs to “settle” cases where they expected unfavorable rule outcomes. Since they expect to litigate again, RPs can select to adjudicate (or appeal) those cases which they regard as most likely to produce favorable rules. On the other hand, OSs should be willing to trade off the possibility of making “good law” for tangible gain. Thus, we would expect the body of “precedent” cases—that is, cases capable of influencing the outcome of future cases—to be relatively skewed toward those favorable to RP.<sup>255</sup>

Assuming Galanter is correct that precedent-setting cases are likely to be skewed in favor of RPs, the question becomes: how does this behavior play out in an arbitration setting? The answer often turns on whether the workplace is union or nonunion.

In a union setting, RPs are suing RPs; therefore, neither player has a particular advantage in selecting precedential cases or in currying favor with institutional legal officials, i.e., arbitrators. The situation is vastly different in the case of nonunion arbitration. Noting that arbitration decisions often become the “rule of the shop,” employer-RPs can make rule changes more quickly than in litigation settings.

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<sup>251</sup> *Id.* at 98.

<sup>252</sup> *Id.* at 98–101.

<sup>253</sup> *Id.* at 108–09.

<sup>254</sup> *Id.* at 110.

<sup>255</sup> *Id.* at 101–02.

Indeed, in arbitration, there is no public oversight, so employer-RPs can change the rules governing a workplace in a matter of years. Even with the advantages that RPs might have in litigation, such changes, if they come at all, come over decades of planned litigation. Simply put, if Galanter is correct, then litigation, which is flawed and tends to favor RPs, is still a much fairer system than arbitration, at least in the nonunion setting. If correct, then OS-employees who have meritorious claims have much to fear from arbitrating those claims against RP-employers.<sup>256</sup>

While employers may not admit it, one reason for favoring mandatory arbitration is to avoid jury trials.<sup>257</sup> Employers choose arbitration because it allows them to, in effect, privatize the court system and avoid public exposure.<sup>258</sup> At least one study has shown that mandatory arbitration clauses for employment disputes tend to incorporate jury waivers as well.<sup>259</sup> However, the study also reveals that the very same businesses that favor mandatory arbitration and jury waivers for employment disputes do not favor such procedures for business-to-business disputes, suggesting that businesses have a different motive.<sup>260</sup>

Revisiting Getman's rubric—finality, obedience, guidance, efficiency, availability, neutrality, conflict reduction, and fairness<sup>261</sup>—when arbitration functions properly, it is more *efficient* and less *costly* than litigation. These qualities make arbitration more *available* to the average American. To the extent that arbitration, especially in conjunction with mediation, can be utilized prior to discharge, this form of internal dispute resolution has a greater likelihood of *conflict reduction* than does litigation. Arbitration is also relatively *final* because court review of arbitration decisions is tightly circumscribed.<sup>262</sup> This means that if an employer refuses to *obey* an arbitration decision to reinstate a discharged employee, the employee can relatively quickly get court review of the arbitrator's decision.

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<sup>256</sup> It is difficult to assess the circumstances under which the wrongfully discharged employee with the meritorious claim is more disadvantaged. Some employers might prefer litigation to stall a meritorious employee claim. *Iqbal*'s plausibility pleading standard—particularly in employment discrimination cases where the employer tends to enjoy greater power and sole access to the relevant information—makes it harder for an employee with a meritorious claim to get to discovery.

<sup>257</sup> Bingham, *supra* note 233, at 190 (“[E]mployers likely will benefit from the elimination of the outlier jury award, concerns over which have motivated substantial changes in personnel practices, at some significant cost.”).

<sup>258</sup> See Cheryl Wilke, *New Frontier for Employers*, in EMPLOYMENT LAW 2012: TOP LAWYERS ON TRENDS AND KEY STRATEGIES FOR THE UPCOMING YEAR, 2012 WL 697226 (2012).

<sup>259</sup> See Eisenberg et al., *supra* note 6, at 122.

<sup>260</sup> See *id.*

<sup>261</sup> Getman, *supra* note 113, at 916.

<sup>262</sup> See *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). For an explanation of these precedent-setting cases, known as the Steelworkers Trilogy, see Anne Marie Lofaso, *Deflategate: What's the Steelworkers Trilogy Got to Do with It?*, 6 BERK. J. ENT. & SPORTS L. 50, 63–70 (2017).

Nevertheless, arbitration falters in at least three categories—neutrality, guidance, and fairness. First, as explained above, in the case of OS-employee v. RP-employer litigation, the RP has the capacity to critically influence the rules and outcomes. RP-employer “opportunities to develop facilitative informal relations with institutional incumbents,”<sup>263</sup> such as arbitrators, suggests that, at least in the nonunion setting, arbitration may not provide *neutral* decision makers.<sup>264</sup> Second, arbitral decisions may provide an opportunity for RP-employers to influence the rules that govern arbitrations but at least in the nonunion setting this guidance inures primarily to the benefit of the RP-employer, who has a stake in the rules and who is helping to shape those rules.<sup>265</sup> Arbitrators have no requirement to produce a written record or opinion,<sup>266</sup> and arbitration decisions have virtually no precedential value.<sup>267</sup> To be sure, OS-employees also may not pay much attention to court precedents, even though court precedents are less likely to change, and apply to a larger group of people than arbitration decisions (which typically apply only to the employer whose case was arbitrated).<sup>268</sup> Third, the very fact that arbitrations are more efficient also increase the likelihood that arbitrations are unfair, because there are fewer procedural safeguards for claimants. Litigation, on the contrary, has mistake-correction procedures built into its entire process. Indeed, final orders of federal claims and most state claims are entitled to at least one appeal.<sup>269</sup> In contrast, appeals of arbitrators’ decisions are constrained.<sup>270</sup> Under the Federal Arbitration Act, parties are allowed only limited judicial review of an arbitration award and virtually no review of the substantive merits of the award.<sup>271</sup>

Arbitration as currently practiced too often mutates into a private judicial system that can look and cost like the litigation it is supposed to prevent. However, companies that have developed more comprehensive internal dispute-resolution

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<sup>263</sup> Galanter, *supra* note 248, at 98–101.

<sup>264</sup> Ralph G. Wellington, *Is a Neutral Party-Appointed Arbitrator an Oxymoron?*, 27 ABA: DISP. RESOL. MAG. 34 (2021).

<sup>265</sup> Galanter, *supra* note 248, at 98–101.

<sup>266</sup> *Decision & Award*, FINRA, <https://www.finra.org/arbitration-mediation/decision-award> [<https://perma.cc/3R6C-KZ4U>] (last visited July 2, 2022).

<sup>267</sup> TERENCE LAU, *THE LEGAL & ETHICAL ENVIRONMENT OF BUSINESS* § 4.3 (2011), <https://cap-press.com/books/isbn/9781531018528/Modern-Labor-Law-in-the-Private-and-Public-Sectors-Third-Edition> [<https://perma.cc/SLR2-XESM>] (last visited July 2, 2022).

<sup>268</sup> Galanter, *supra* note 248, at 102 (discussing the OS-employee’s willingness to trade precedent for “tangible gain”).

<sup>269</sup> FED. R. APP. P. 4.

<sup>270</sup> See *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–85 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596–599 (1960).

<sup>271</sup> See generally *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008); *Mandatory Arbitration Clauses Are Discriminatory and Unfair*, PUB. CITIZEN, <https://www.citizen.org/article/mandatory-arbitration-clauses-are-discriminatory-and-unfair/> [<https://perma.cc/ZXS8-5D3G>] (last visited Feb. 10, 2022).

procedures, such as peer-centric grievance systems, have preserved the original ideals of efficiency and fairness that alternative dispute resolution espouses.

### III. PEER ADVOCACY: A COMPARATIVE STUDY

Employee committees utilizing peer advocates are a type of alternative dispute-resolution system whereby employees represent co-workers who bring their concerns to management.<sup>272</sup> Peer review comprises “[a] panel of employees (or employees and managers) who review the evidence and listen to the parties’ arguments to decide an issue in dispute. Peer review panel members are trained in the handling of sensitive issues. The panel’s decision may or may not be binding on the parties.”<sup>273</sup> Below is a description of three such programs: (A) Polaroid’s Employee Committee, which utilized peer advocates; (B) General Electric’s Peer Review Program; and (C) Kansas State University, which also utilizes peer advocates.

#### *A. Polaroid: A Case Study in Using Peer Advocates to Represent Employees in Internal Grievance Procedures*

##### *1. Overview: Formation of the Oldest Nonunion System of Industrial Democracy in the United States*

The Polaroid Corporation is a former Fortune 500 company in the camera and optics business,<sup>274</sup> which rose to fame and success in the postwar era under the leadership of its founder, Dr. Edwin Land.<sup>275</sup> Dr. Land had two goals for his company’s employee relations atmosphere. The first dealt with his vision for Polaroid’s financial success through innovation by making “products of the highest quality at reasonable cost,” which were “genuinely new and useful to the public.”<sup>276</sup>

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<sup>272</sup> U.S. GEN. ACCT. OFF., ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS’ EXPERIENCES WITH ADR IN THE WORKPLACE (1997).

<sup>273</sup> *Id.*

<sup>274</sup> Between 1959 and 1995, Polaroid continually remained on the Fortune 500 list, reaching a rank of 203 in 1992. *Fortune500*, CNN MONEY, [http://money.cnn.com/magazines/fortune/fortune500\\_archive/letters/P.html](http://money.cnn.com/magazines/fortune/fortune500_archive/letters/P.html) [<https://perma.cc/6382-BMHH>] (last visited Feb. 6, 2022); *Fortune500: Polaroid*, CNN MONEY, [https://money.cnn.com/magazines/fortune/fortune500\\_archive/snapshots/1992/1067.html](https://money.cnn.com/magazines/fortune/fortune500_archive/snapshots/1992/1067.html) [<https://perma.cc/LZ9K-XMQB>] (last visited July 26, 2022).

<sup>275</sup> See generally MILTON P. DENTCH, FALL OF AN ICON: POLAROID AFTER EDWIN H. LAND (AN INSIDER’S VIEW OF THE ONCE GREAT COMPANY) (Carol Chubb ed., 2012). Dr. Land founded Polaroid in 1937. *Id.* at 5. He resigned as Chairman in 1980. *Id.* at 254–56. Polaroid filed for Chapter 11 bankruptcy in 2001. *Id.* at 85. In the interest of fairness, Richard Kriebel, who came to Polaroid in 1936 as Director of Public Relations, is credited for having implemented Dr. Land’s personnel vision. *Id.* at 5. The literature suggests that Polaroid’s peer advocacy program was as much Kriebel’s idea as it was Dr. Land’s. *Id.*

<sup>276</sup> *Id.*

The second, which was radically progressive for its time, was that all employees—managers, supervisors, and rank-and-file—should be treated with dignity:

[E]veryone working for Polaroid [was to have] personal opportunity with the company for full exercise of his talents; to express his opinions, to share in the progress of the Company as far as his capacities permit, to earn enough money so that the need for earning more will not always be the first thing on his mind—opportunity, in short, to make his work here a fully rewarding, important part of his life.<sup>277</sup>

Dr. Land's search for a dignified workplace culminated in the Polaroid Employees Committee ("EC"). Formed in 1946, Polaroid's EC is the United States' oldest nonunion industrial due-process system.<sup>278</sup> The EC consisted of several members, drawing from a pool of employees with full-time jobs in nonsupervisory hourly and salaried positions, such as mechanics, maintenance workers, machine operators, financial analysts, research and development technicians, and model-makers.<sup>279</sup> These employee representatives, also called peer advocates, were elected by their co-workers to "sp[ea]k for employees" on matters concerning the firm and employee welfare in "discussions" with firm management.<sup>280</sup> The EC Chairman was as powerful as any top manager, and the Chairman had direct access to Dr. Land,<sup>281</sup> who himself viewed the EC as a "natural outgrowth of my relationship with Polaroid employees at the time."<sup>282</sup>

As far as EC peer advocates represented employees in labor-management discussions, particularly in discussions over cost-of-living increases and disciplinary proceedings,<sup>283</sup> the EC functioned as a union. However, while labor-management relations in an ordinary unionized shop were often characterized as antagonistic and based on opposing interests, Polaroid's EC attempted to cultivate a high trust and cooperative environment.

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<sup>277</sup> *Id.*

<sup>278</sup> See EWING, *supra* note 2, at 299 (citing Northrop as having formed a similar system of due process also in 1946).

<sup>279</sup> *Id.* at 303.

<sup>280</sup> See Polaroid Corp., 329 N.L.R.B. 424, 426 (1999).

<sup>281</sup> See Ann Leibowitz, *Another Insider's View*, in DENTCH, *supra* note 275, at 11.

<sup>282</sup> See EWING, *supra* note 2, at 299.

<sup>283</sup> When, in 1993, Polaroid reconstituted the EC into the Employee-Owners Influence Council (EOIC) to avoid labor prosecution, the EOIC continued discussions with management over money, including Employee Stock Ownership Plan (ESOP) funds, disciplinary proceedings, medical benefits, and time off for family and medical reasons. See *Polaroid Corp.*, 329 N.L.R.B. at 426–27.

## 2. *Polaroid's Disciplinary Process*

Polaroid's progressive disciplinary process resembled the standard disciplinary system typical of a unionized shop, despite a lack of clear contractual language.<sup>284</sup> Instead, grievance claims could be based on Polaroid's Personnel Policy Manual.<sup>285</sup> The progressive steps included a verbal warning,<sup>286</sup> a first written warning, a second written warning, a warning in lieu of termination, and a termination notice.<sup>287</sup>

## 3. *Polaroid's Grievance Process*

Polaroid's multi-step grievance process also resembled the standard grievance-arbitration mechanism of union shops, despite the lack of contractual language.<sup>288</sup> As with typical modern grievance mechanisms, Polaroid sported an informal pre-grievance step, whereby employees were encouraged to discuss concerns with their supervisor before filing a grievance.<sup>289</sup> When a Polaroid employee was dissatisfied with or concerned about a work issue, he<sup>290</sup> would talk to his rep.<sup>291</sup> The employee representative (rep) would "guide [the employee] a little. He might cite some past cases that are similar to yours so that you can decide better whether to press on. But whatever you decide, he represents you. It doesn't matter if he personally thinks you're way off base. If you say, 'I want to grieve,' then we grieve."<sup>292</sup>

Although Polaroid's informal pre-grievance conversations were remarkably like those that take place in the union workplace, the next steps demonstrate the uniqueness of Polaroid's process. Before filing a grievance, the rep would approach the general supervisor himself, with or without the grievant, to see if they could resolve the issue.<sup>293</sup> If the conversation between the rep and the general supervisor were unsuccessful, the rep would then go to the division manager.<sup>294</sup> Only if the grievant and rep remained unsatisfied with the division manager's response would the rep file the grievance.<sup>295</sup>

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<sup>284</sup> EWING, *supra* note 2, at 300–01.

<sup>285</sup> See Polaroid Personnel Policy Manual No. 410 (2020).

<sup>286</sup> The verbal warning was reduced to writing for purposes of documenting the concern for purposes of the grievance process. *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> See EWING, *supra* note 2, at 300 (quotation omitted).

<sup>289</sup> *Id.*

<sup>290</sup> We use a gendered pronoun here to recognize the fact that the workplace was overwhelmingly male at the time in question.

<sup>291</sup> EWING, *supra* note 2, at 300 (“‘Did you talk about this with your supervisor?’ If you didn't, he'll ask you to go back and do that before he'll talk with you. When you do talk with him, he wants to understand your problem. He doesn't judge whether you're right or wrong; he just wants to be able to represent your point of view.”).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*



As described by the EC Vice Chair, Polaroid's grievance process resembled a three-step grievance process typical of a union shop, with a penultimate internal appeal to Polaroid's president and an ultimate appeal to outside arbitration.<sup>296</sup> First, a formal grievance would be filed with the department manager and others involved in the case.<sup>297</sup> Second, if the grievant remained unsatisfied with the result, a formal grievance could be filed with the division officer.<sup>298</sup> Finally, if the grievant remained unsatisfied, a Personnel Policy Committee would convene, and a panel of three corporate officers would hear the case.<sup>299</sup> Both the grievant and managers would have the opportunity to present their case, and the panel would be permitted to ask questions.<sup>300</sup> The panel would then issue its decision in writing, which was appealable to the company President.<sup>301</sup> If still unsatisfied with the President's decision, the grievant could request outside arbitration subject to the company's authorization.<sup>302</sup> If the company permitted the grievance to proceed to arbitration, the company would pay for an arbitrator jointly picked by the company and the Employees Committee.<sup>303</sup> The grievant could hire an attorney for the arbitration.<sup>304</sup>

The following chart summarizes Polaroid's grievance process and compares it with the typical union-shop grievance process.

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<sup>296</sup> *Id.* at 300–01.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

**Comparison of Grievance Mechanisms**

	<b>Polaroid</b>	<b>Union</b> <sup>305</sup>
<b>Representatives</b>	Elected	Elected
<b>Discipline based on . . .</b>	Personnel Policy	Collective-bargaining Agreement
<b>Notice Prior to Discharge?</b>	Progressive Discipline	Progressive Discipline
<b>Pre-grievance steps?</b>	Encouraged to talk to supervisor before filing grievance	Many organized workforces encourage some pre-grievance dispute resolution
<b>Is the grievance process multi-tiered?</b>	Three steps with the possibility of bringing the grievance to the president himself as a fourth step	Typically
<b>With whom is grievance filed?</b>	Lowest level supervisor	Lowest level supervisor
<b>Representative during grievance process?</b>	Employee rep a.k.a. Peer Advocate	Shop steward or another union rep
<b>Who decides whether the grievance goes to arbitration?</b>	The Company	The Union
<b>Who pays for arbitration?</b>	The Company	Negotiated; usually some form of joint payment or cost shifted to loser
<b>Who selects arbitrator?</b>	Company and EC jointly	Company and Union jointly

Polaroid's grievance process worked well for at least five reasons. First, EC reps were well trained and competent, which thereby promoted three values considered significant for a successful dispute-resolution system under Professor Getman's rubric—efficiency, conflict reduction, and fairness.<sup>306</sup> Polaroid trained and paid as many as thirty-two employee reps, whose full-time job was to serve on the EC to decide grievances.<sup>307</sup> Training was done on the job. The more experienced EC reps, known as coordinators, trained or coached the newly elected EC reps.<sup>308</sup> Management also developed a training program for the reps: "The teachers [were] brought in from outside the company, but the subject matter [was] carefully worked out by [senior members of the employee committee]. It cover[ed] such topics as the

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<sup>305</sup> For a description of the typical union-grievance process, see SETH D. HARRIS, JOSEPH E. SLATER, ANNE MARIE LOFASO, CHARLOTTE GARDEN & RICHARD F. GRIFFIN, JR., *MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS* 1071–73 (3d ed. 2021).

<sup>306</sup> Getman, *supra* note 113, at 916. *See also* EWING, *supra* note 2, at 300–02.

<sup>307</sup> *See* EWING, *supra* note 2, at 302.

<sup>308</sup> *See id.* at 303.

nature of power and influence, negotiation skills, and effective presentation of facts and arguments.”<sup>309</sup>

Second, the EC promoted democratic values, which in turn promoted Getman’s value of fairness.<sup>310</sup> EC reps were elected by ballot to serve two-year terms, renewable by re-election.<sup>311</sup> At election time, “the candidates . . . c[a]me around and talk[ed] to you at your work. They [told] you what they want[ed] to do if elected.”<sup>312</sup>

Third, the EC was visible, which promoted Getman’s value of availability.<sup>313</sup> EC reps tended to possess excellent communication skills and therefore could promote the process to their co-worker constituents.<sup>314</sup> And the general system of dispute resolution was widely publicized.

Fourth, Polaroid’s work culture promoted dignity and supported a grievance mechanism run by peer advocates, which in turn promoted a high-trust environment between labor and management.<sup>315</sup> Such an environment was likely to promote Getman’s value of conflict reduction and fairness.<sup>316</sup> Even the most senior managers held EC reps in high esteem.<sup>317</sup> EC reps were proud of their positions in the company.<sup>318</sup>

Fifth, the process held supervisors and managers accountable, which promoted Getman’s values of finality.<sup>319</sup> The ultimate step before arbitration was the president himself.<sup>320</sup> This meant that all supervisors and managers were answerable for their actions to the president. Such accountability is a powerful deterrent for settling meritorious claims. “The fact that [managers] are held accountable by having their actions and decisions subject to open review and debate has an astonishingly strong tendency to keep them honest and prevent abuses of discretion.”<sup>321</sup> Related to points four and five regarding dignity and accountability, Polaroid’s management promoted a culture that viewed employee involvement as consistent with (and as even enhancing) Polaroid’s mission and one that encouraged management introspection.<sup>322</sup> Such introspection also corresponds to Professor Getman’s values of obedience, guidance, and neutrality.

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<sup>309</sup> *Id.*

<sup>310</sup> Getman, *supra* note 113, at 916; EWING, *supra* note 2, at 299.

<sup>311</sup> EWING, *supra* note 2, at 302.

<sup>312</sup> *Id.*

<sup>313</sup> Getman, *supra* note 113, at 916; EWING, *supra* note 2, at 300.

<sup>314</sup> *See* EWING, *supra* note 2, at 301, 302–03; *cf. id.* at 304–06.

<sup>315</sup> *Id.*

<sup>316</sup> *See* Getman, *supra* note 113, at 916.

<sup>317</sup> EWING, *supra* note 2, at 302.

<sup>318</sup> *Id.*; *see also* Telephone Interview with Ann Leibowitz, former Senior Labor Counsel, Polaroid Corp. (May 12, 2014) (notes on file with the author).

<sup>319</sup> *See* Getman, *supra* note 113, at 922–23.

<sup>320</sup> EWING, *supra* note 2, at 300–01.

<sup>321</sup> *See* EWING, *supra* note 2, at 8 (quoting Ann Leibowitz, Senior Legal Counsel for Polaroid) (quotations omitted).

<sup>322</sup> *See id.* at 307 (“I.M. Booth, Polaroid’s Chief Executive Officer, is said to feel strongly that the Employees Committee provides insights that it would be difficult for management to gain otherwise.”).

#### 4. *Tangible Successes of the EC Committee*

Polaroid's EC achieved success in three major ways. First, managers believed that the Committee saved the jobs of many good workers, who would have left but for the Committee's efforts.<sup>323</sup> Indeed, employee turnover was exceptionally low.<sup>324</sup> And with low turnover comes less costs incurred in training new employees. Second, the EC provided useful insights to management about personnel and other issues.<sup>325</sup> One supervisor related the following story: "Years ago when I was a supervisor . . . several [peer advocates] came to me confidentially and gave me some very good advice on how to be a better supervisor. It was the kind of advice you are lucky to get from a good boss."<sup>326</sup> Similarly, another manager commented: "In its role in dispute resolution as well as in its other functions, the committee seems to . . . bring a fresh perspective, a new dimension to operations. It is as if the organization's thought processes were expanded, its collective brain enlarged."<sup>327</sup>

Third, very few grievances ended in arbitration.<sup>328</sup> Employees seemed to be happy that their disputes were heard and that their concerns received a fair hearing, regardless of the outcome. Satisfaction with the process's fairness seemed to be sufficient to deter arbitration and litigation.<sup>329</sup>

In summary, expressly assessing Polaroid's EC program in terms of Professor Getman's rubric shows that it was destined for success.<sup>330</sup>

<b>Value</b>	<b>Assessment</b>
<i>Finality.</i> Once decided, are cases likely to be retried or appealed?	The ultimate appeal to the President of Polaroid ensured finality of the process. <sup>331</sup>
<i>Obedience.</i> Are the decisions put into effect or are they rendered meaningless by subsequent refusals to carry them out?	Inherent to this model was that managers were introspective about the results, suggesting that they implemented decisions. <sup>332</sup>
<i>Guidance.</i> Do the decisions provide necessary guidance to the parties involved in the dispute? Can they subsequently structure behavior in a	It yielded decisions that provided guidance to the parties by "bring[ing] a fresh perspective, a new dimension to

<sup>323</sup> *Id.* ("The Committee has saved lots of good employees' jobs.")

<sup>324</sup> *Id.* ("The turnover among hourly paid employees is very low.")

<sup>325</sup> *Id.* at 302.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 308.

<sup>328</sup> See Telephone Interview with Ann Leibowitz, former Senior Labor Counsel, Polaroid Corp. (May 12, 2014) (notes on file with the author).

<sup>329</sup> *Id.*

<sup>330</sup> Getman, *supra* note 113, at 916.

<sup>331</sup> See *supra* notes 301 and accompanying text.

<sup>332</sup> See *supra* notes 319–322 and accompanying text.

reasonable fashion and avoid future litigation?	operations,” thereby enlarging “its collective brain.” <sup>333</sup>
<i>Efficiency.</i> Are most disputes settled without a formal hearing? When cases are tried, are the procedures adequate, flexible, and suited to the issue? Are the benefits achieved from the system economical compared to the costs?	Polaroid’s election system allowed those who wanted to work as an employee representative and advocate for others to do so, thereby maximizing the efficiency of obtaining representation for grieving workers. <sup>334</sup>
<i>Availability.</i> Is the dispute-resolution machinery routinely available without undue expense to people whose behavior is governed by the system, and are they provided with adequate representation?	Rank-and-file workers, those governed by the system, also managed the system. This flat hierarchy advanced availability and transparency. <sup>335</sup>
<i>Neutrality.</i> Do the decision makers avoid favoritism and bias for one side or another?	Reps were trained by outside experts, thereby promoting neutrality. <sup>336</sup>
<i>Conflict Reduction.</i> Does the entire process, including the adjudication, lead to more amicable relations and contribute to mutual respect among the potential disputants?	Very few conflicts went to arbitration. <sup>337</sup>
<i>Fairness.</i> Disputes resolved in a way that recognizes the parties’ interests.	Managers were happy because of efficiency and productivity savings. Workers were satisfied because someone listened to their concerns with an open mind. <sup>338</sup>

### B. General Electric: A Case Study in Peer Review

Peer review is a similar type of alternative dispute mechanism that has been dubbed “the most cloned procedure for resolving complaints in U.S. manufacturing—and possibly in all industry.”<sup>339</sup> Indeed, several notable

<sup>333</sup> See EWING, *supra* note 2, at 308.

<sup>334</sup> See *id.* at 302.

<sup>335</sup> *Id.* at 303 (listing the kinds of employees who held positions on the Employees Committee).

<sup>336</sup> *Id.* (“[T]eachers are brought in from outside the company.”).

<sup>337</sup> See *id.* at 302 (“[The Employees Committee representatives] try to screen out nonsense and baseless complaints. They try to dissuade employees who don’t have legitimate concerns.”).

<sup>338</sup> See *id.* at 307 (“[T]he Employees Committee appears to be a strong fixture in the company . . . Polaroid’s Chief Executive Officer . . . is said to feel strongly that the Employees Committee provides [positive] insights.”).

<sup>339</sup> See EWING, *supra* note 2, at 241.

corporations adopted a peer review system for employee grievances, with remarkable success. In 1982, for example, managers for General Electric's Appliance Park-East facility in Columbia, Maryland,<sup>340</sup> developed a peer-review process as a union-avoidance technique and found that it succeeded in helping the general corporation.<sup>341</sup> In the words of one manager:

The [G.E. Park-East] plant had a long history of labor unrest and low morale, and Harvey was determined to change the atmosphere. By talking to employees Harvey learned that the major issues were not necessarily pay and benefits, but instead revolved around the day[-]to[-]day activities of the plant. The major concern of employees was the inconsistency with which company rules and policies were applied.

Another main concern of employees was that there was no effective means to air their grievances to management. The company's Open Door Policy was perceived to be nothing more than slow, ineffective, "rubber stamp" system, therefore it was rarely used. In an effort to . . . improve consistency and resolve employee disputes in a fair and timely manner [the personnel manager] developed the Peer Review dispute resolution system.<sup>342</sup>

General Electric ("G.E.") successfully implemented the peer-review program at the Columbia, Maryland plant.<sup>343</sup> Indeed, the plant remained nonunionized, and G.E. reported heightened morale among its workers.<sup>344</sup> The program was so successful that G.E. implemented it in several other facilities across the country.<sup>345</sup>

General Electric initially organized peer review panels comprised of five individuals—two management representatives and three employee representatives.<sup>346</sup> Although there were no fixed rules for how many individuals

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<sup>340</sup> See Gary W. Williams & Brian H. Kleiner, *Peer Review: Its Time Has Come*, 2 TEAM PERFORMANCE MGMT. J. 21, 22 (1996); see also Margaret M. Clark, *Making Peer Review Work*, SHRM (Jan. 1, 2005), <https://www.shrm.org/hr-today/news/hr-magazine/pages/making-peer-review-work.aspx> [<https://perma.cc/4B9Q-3PUQ>] (describing the work of Caras and Associates, a "Maryland-based consulting firm that helps companies install and administer peer review systems"); Margaret M. Clark, *A Jury of Their Peers*, SHRM (Jan. 1, 2004), <https://www.shrm.org/hr-today/news/hr-magazine/Pages/Jury-of-their-Peers.aspx> [<https://perma.cc/B2QU-AAP5>].

<sup>341</sup> See EWING, *supra* note 2, at 243 ("Both employees and Management at the plant [are] pleased with the results of the grievance procedure.").

<sup>342</sup> *Our Company History*, Caras & Assocs., <https://web.archive.org/web/20190901212659/http://www.peerpanel.com/history.html> [<https://perma.cc/JV3H-CLX3>] (last visited Sept. 1, 2019). See also Williams & Kleiner, *supra* note 340, at 22 (describing the peer review system at GE's Maryland facility).

<sup>343</sup> See EWING, *supra* note 2, at 241–44.

<sup>344</sup> See *id.* at 241–51.

<sup>345</sup> See *id.* at 250 ("The Columbia plant's grievance procedure reportedly has been adopted in eight other General Electric facilities.").

<sup>346</sup> See EWING, *supra* note 2, at 241.

should serve on panels,<sup>347</sup> they typically consisted of an odd number of members to avoid deadlock.<sup>348</sup> G.E. also structured panels so that the employee representatives would outnumber the management representatives.<sup>349</sup> When confronted by managers who were skeptical about a process in which they were “outnumbered,” G.E. manager, Joe Carando, responded, “[i]f we can’t convince at least one hourly employee, maybe we’re wrong. . . . if the two managers see a case clearly . . . , they should be able to persuade at least one other panelist and make it a 3–2 majority.”<sup>350</sup> The panel reviews evidence, hears the parties’ arguments, and then decides the disputed question. That decision may or may not be binding.<sup>351</sup>

### C. *Kansas State University: A Modern Example*

Several universities and other workplaces familiar with group governance utilize peer advocates in an internal grievance process. For example, Kansas State University “[p]rovides all permanent university support staff the opportunity for a fair hearing before an impartial panel of university support staff in unresolved matters involving performance reviews, proposed suspension with pay (decision-making leaves) not involving discrimination . . . ; and claims of unfair treatment not involving discrimination.”<sup>352</sup>

The peer review process at Kansas State occurs through a peer review committee. Kansas State’s peer review committee is comprised of 21 members of the University Support Staff (“USS”) that the Vice President of the University’s Division of Human Capital Services appoints based on recommendations from the USS Senate.<sup>353</sup> Membership includes a demographic cross-section of USS employees.<sup>354</sup> To maintain their eligibility, committee members must participate in a yearly training and are prohibited from engaging in any form of communication

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<sup>347</sup> See *id.* at 247–48 (explaining the subjective and open-ended rules that govern the panel).

<sup>348</sup> *Id.* at 241 (noting that the panel consists of “two salaried employees and three hourly paid employees.”).

<sup>349</sup> *Id.* at 242.

<sup>350</sup> *Id.*

<sup>351</sup> See generally Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOTIATION L. REV. 11, 41 (2005) (examining how recent reforms in workplace arbitration impacts democratic accountability in open workplaces).

<sup>352</sup> See *Human Capital Services: University Support Staff Grievances*, KAN. STATE UNIV., <https://www.k-state.edu/hcs/employee-relations/disciplinary-actions/hearings-grievances/uss.html#:~:text=University%20Support%20Staff%20Peer%20Review%20Committee%20Hearing%20Process%3A,treatment%20not%20involving%20discrimination%20under%20PPM%20Chapter%203010> [<http://perma.cc/E94L-UDB3>] (last visited June 25, 2022).

<sup>353</sup> *University Support Staff Peer Review Committee Hearing Process*, KAN. STATE UNIV., <https://www.k-state.edu/policies/ppm/4000/4030.html> [<https://perma.cc/ZXR4-RASW>] (last visited June 25, 2022).

<sup>354</sup> See *id.*

regarding the hearing with either the employee or the responding department any time prior to the actual hearing.<sup>355</sup> Typically, neither party has legal counsel present at the hearing, and each employee serves as their own spokesperson.<sup>356</sup> If either party wishes to have legal counsel present, the counsel's participation is limited to advising the client; that is, legal counsel may not act as a spokesperson.<sup>357</sup> However, an employee may have another Kansas State University USS employee voluntarily serve as their spokesperson.<sup>358</sup> All hearings occur in an open session (unless the disciplined employee requests a closed hearing), in an executive session, and hearings that involve dismissal or demotion are transcribed.<sup>359</sup> USS employees found to be in violation of the University's anti-discrimination policy can appeal the decision to the Director of Employee Relations who makes the final decision.<sup>360</sup>

Assessing Kansas State's peer advocate program in terms of Professor Getman's rubric shows that it is designed to be an effective and fair dispute resolution procedure. First, only employees found in violation of the University's policies can appeal to the Director whose final decision on the matter ensure *finality*. Second, the Committee is authorized to recommend suspension, demotion, or dismissal based on its findings to the Director who makes the final determination of the action to be taken in the matter. USS employees are subject to *obey* whatever action the Director determines is appropriate. Third, in reaching a decision or recommendation, the Panel may consider any information that may be helpful in arriving at its conclusion, including reviewing rules and documentations. The Panel's report will normally become a part of the employee's official personnel records and may be used as *guidance* in subsequent employment matters. Fourth, Kansas State's peer advocacy system permits those who wish to seek the advice of legal counsel and allows other USS employees to serve as representatives and advocate for their fellow employees, thereby maximizing the *efficiency* of obtaining representation for grieving workers. Fifth, the process is routinely *available* for all USS employees at minimal cost. Sixth, committee members must participate in a yearly training and are prohibited from communicating with any party prior to the hearing to maintain *neutrality*. Seventh, it is currently unknown how many *conflicts* proceed to formal arbitration or litigation following the peer review process. Finally, the peer review process allows each party a full opportunity for a *fair* hearing by an impartial panel and permits the parties to engage in mediation at any time prior to the actual hearing.

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<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*



## IV. POSSIBLE SOLUTIONS

By delegating dispute resolution to mandatory arbitration, the Supreme Court now permits corporations to not only write the rules that will govern their relationships with their workers and customers and design the procedures used to interpret and apply those rules when disputes arise. This degree of institutional power not only compromises fairness, but also alienates employees and can create hostility in the workplace. While arbitration certainly offers several benefits—namely that it is typically faster and cheaper than litigation—forced arbitration agreements overwhelmingly favor employers, particularly large institutional employers, because employers often possess considerably more bargaining power relative to individual employees, especially prospective employees. This Part sets forth three potential solutions aimed at restoring employees' bargaining power and removing the roadblocks that prevent fair and efficient workplace dispute resolution. Section A suggests swapping forced arbitration for just-cause dismissal and describes how doing so could help instill a better sense of fairness in the workplace. Section B discusses how, absent formal Congressional action, employers can take the initiative to extend *Weingarten* rights to their employees through specially trained peer advocates. Finally, Section C encourages employers to utilize voluntary arbitration, as opposed to forced arbitration, to avoid the pitfalls of superfluous litigation without limiting an employee's ability to seek judicial adjudication of their statutorily protected rights.

*A. The Case for Exchanging Forced Arbitration for Just-Cause Dismissal*

Unless a worker has an utterly unique skill—such as athletes like Wayne Gretzky, Albert Pujols, Serena Williams, or Megan Rapinoe—employees typically have less bargaining power than their employers. This is especially true for employees with fungible job duties who work for wealthy employers. In submitting (often unwittingly) to forced arbitration, employees also typically waive their right to a jury trial.<sup>361</sup> Nonetheless, arbitration gives employees at least some due process, by allowing employees to present some evidence for their position. But while arbitration is a viable tool for dispute resolution, it can add insult to injury when employees are unknowingly stripped of their right to have statutory claims heard by a judge or jury. Another way of looking at this conundrum is from a rights-duties perspective. In the United States, employees generally do not possess rights to just cause discharge, except where Congress, a state legislature, or common law has imposed a legal duty on an employer to refrain from discharging an employee for a particular reason.<sup>362</sup> When an employer offers to mediate-arbitrate all workplace discharges, then perhaps the employer is giving some consideration to the employee. The employee receives a right to arbitrate *all* disputes in exchange for surrendering the right to litigate *some* disputes. Of course, it is highly unlikely that employers

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<sup>361</sup> See Eisenberg et al., *supra* note 6, at 118–19.

<sup>362</sup> See *supra* Part II.B.

have this type of right in mind when they speak of forced arbitration of all workplace disputes. Instead, what they mean is the procedural right to arbitrate workplace disputes, not the substantive right to just-cause dismissal.<sup>363</sup>

This solution might be fair if the following conditions are met. First, the waiver must be negotiated with valid consideration on both sides.<sup>364</sup> Valid consideration might include granting a right to just-cause dismissal in exchange for one dispute-resolution mechanism. This is the bargain that unions and employers strike just about every time they negotiate a collective-bargaining agreement.<sup>365</sup> If those RPs are acting rationally, then that solution, which has stood the test of time, is likely to be fair.

*B. Peer Advocates and Weingarten Rights: A Partial Solution to Nonunion Arbitration*

There is still a problem, however, with exchanging arbitration for just-cause dismissal. If the Galanter study is correct,<sup>366</sup> then this trade-off is fair if employees have some institutional representation independent of management. This is essentially the union case. But there may be nonunion models that could work.

One model is to extend *Weingarten* rights to nonunion employees. In *NLRB v. J. Weingarten, Inc.*, the Supreme Court upheld the administrative creation of an employee's right to refuse to submit, without union representation, to an investigatory interview that the employee "reasonably believe[s] . . . will result in disciplinary action."<sup>367</sup> The Court held that the statutory right to union representation "inheres in [NLRA Section] 7's guarantee of the right of employees to act in concert for mutual aid and protection."<sup>368</sup> The Court further explained that the "action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of [Section 7's mutual aid or protection clause]."<sup>369</sup>

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<sup>363</sup> For a discussion of rights and duties, see *Some Fundamental Legal Conceptions*, *supra* note 28; *Judicial Reasoning*, *supra* note 28.

<sup>364</sup> This is the idea behind settlement agreements—money in exchange for waiving further litigation. Both sides receive finality and both sides mutually agreed to the disputes value. See Alfred W. Blumrosen, Ruth G. Blumrosen, Marco Carmignani & Thomas Daly, *Downsizing and Employee Rights*, 50 RUTGERS L. REV. 943, 1013–15 (1988) (discussing this concept). See generally J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59 (2016).

<sup>365</sup> See, e.g., *Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962) (holding that a collective-bargaining agreement's arbitration clause is the consideration unions receive in exchange for agreeing to waive their right to strike over arbitral submissions for the duration of the agreement—even in the absence of a no-strike clause).

<sup>366</sup> Galanter, *supra* note 248. The Galanter study concludes that RPs have advantages over OSs in arbitration proceedings.

<sup>367</sup> 420 U.S. 251, 257 (1975).

<sup>368</sup> *Id.* at 256 (citing 29 U.S.C. § 157).

<sup>369</sup> *Id.* at 260.

Because the right to peer representation in disciplinary interviews is a statutory right under the National Labor Relations Act,<sup>370</sup> and because the National Labor Relations Board has been entrusted by Congress to construe the Act in the first instance,<sup>371</sup> courts cannot simply extend *Weingarten* rights to nonunion workers, absent Board adjudication or rule promulgation.<sup>372</sup> The Board has extended and removed *Weingarten* rights to nonunion employees over and over again<sup>373</sup> in a process known as policy oscillation.<sup>374</sup>

In any event, *Weingarten* rights—which, if extended (once again) to nonunion workers, would only permit those workers to have a coworker present at a disciplinary interview—are less effective unless the worker-witness is trained in the mediation/arbitration process. Rather than relying on an administrative agency known for political policy oscillation to oversee such important rights, Congress should extend such rights directly to workers, perhaps as part of a statute that would permit forced arbitration coupled with peer advocates or union advocates, where a union represents the disciplined worker, in exchange for just-cause dismissal. But whether Congress takes such action (exceedingly unlikely), private firms can act. This is to say that the Board’s on-again, off-again policy of not mandating *Weingarten* rights in the nonunion workplace does not prohibit employers from themselves extending *Weingarten* rights to their employees through peer advocates.

### *1. Using Peer Advocates to Resolve Workplace Disputes Does Not Violate Labor and Other Laws if Properly Implemented*

At first blush, it is difficult to discern the problem with peer advocacy. The peer review process dignifies complainants by allowing them to air their grievances in a

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<sup>370</sup> 29 U.S.C. §§ 151–169.

<sup>371</sup> The Court has repeatedly “reaffirmed that the task of defining the scope of § 7 ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come before it,’ and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference.” *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822, 829–30 (1984) (citations omitted); *see also Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978).

<sup>372</sup> *See generally* Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199 (2010) (providing an in-depth discussion of *Weingarten* rights in the union and nonunion workplace).

<sup>373</sup> *See IBM Corp.*, 341 N.L.R.B. 1288 (2004) *overruling* *Epilepsy Found.*, 331 N.L.R.B. 676 (2000); *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, 232 (1985) *overruling* *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982) (holding that the NLRA compels the conclusion that nonunion employees have no *Weingarten* rights); *E. I. du Pont de Nemours & Co.*, 289 N.L.R.B. 627, 630–31 (1988) (disavowing its reasoning in *Sears* that the NLRA compels that conclusion and finding that limiting *Weingarten* rights to union employees “best effectuate[s] the purposes of the [NLRA]”), *enforced in* 876 F.2d 11 (3d Cir. 1989).

<sup>374</sup> *See generally* Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 163–64 (1985) (coining the phrase).

fair hearing, and it dignifies peer advocates by magnifying their voice. Indeed, the collective voice of peer advocates may very well be the authoritative arbiter of workplace disputes. Moreover, employers like the process.<sup>375</sup> So, what is all the fuss about?

The fuss comes down to one of the historical sources of employer coercion of workers that sparked the New Deal Congress to enact the National Labor Relations Act.<sup>376</sup> During the Great Depression of the 1930s, Congress initially passed the National Industrial Recovery Act,<sup>377</sup> which among other things banned yellow-dog contracts<sup>378</sup> and protected employees' right to form unions.<sup>379</sup> Much to the chagrin of NIRA supporters, industrial strife tripled in the immediate aftermath of the NIRA's enactment.<sup>380</sup> Employers motivated by antiunion sentiment responded, in part, by devising non-union employee representation programs to thwart unionization.<sup>381</sup> These plans met fierce opposition from New Dealers who fought for enactment of the NLRA once the Supreme Court declared the NIRA unconstitutional.<sup>382</sup> Armed with two years' experience with the NIRA, Senator Robert Wagner, the main architect of New Deal labor legislation, "and his circle became increasingly committed to the organic solidarity of autonomous unionism

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<sup>375</sup> See EWING, *supra* note 2, at 307.

<sup>376</sup> See generally Orly Lobel & Anne Marie Lofaso, *Systems of Employee Representation at the Enterprise: The US Report*, in SYSTEMS OF EMPLOYEE REPRESENTATION AT THE ENTERPRISE: A COMPARATIVE STUDY (Roger Blainpain, Hiroya Nakakubo & Takashi Araki, eds., 2012).

<sup>377</sup> National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933). In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court declared the NIRA unconstitutional under the non-delegation doctrine, a rationale that is no longer strictly applied.

<sup>378</sup> Yellow-dog contracts are employment contracts where employees agree not to be a member of a labor union as a condition of employment. See *Labor Wars in the U.S.*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/theminewars-labor-wars-us/> [<https://perma.cc/D5S9-EB58>] (last visited July 29, 2022). Section 7(a)(2) of the National Industrial Recovery Act granted employees the following right: "no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing." National Industrial Recovery Act, Pub. L. No. 73-67, § 7(a)(2), 48 Stat. 195, 199 (1933).

<sup>379</sup> See National Industrial Recovery Act, Pub. L. No. 73-67, § 7(a)(1), 48 Stat. 195, 199 (1933) (granting employees "the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.").

<sup>380</sup> See Mark Barenberg, *The Political Economy of the Wagner Act: Power Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1402 n.86 (1993) (citing STANLEY VITTOZ, *NEW DEAL LABOR POLICY AND THE AMERICAN INDUSTRIAL ECONOMY* 138 (1987)).

<sup>381</sup> See generally Theda Skocpol, Kenneth Finegold & Michael Goldfield, *Explaining New Deal Labor Policy*, 84 AM. POL. SCI. REV. 1297 (1990).

<sup>382</sup> See *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 498.

and exclusive representation after they confronted management's deployment of company unionism as a weapon against workers' collective action."<sup>383</sup>

A debate ensued as to whether workers could truly consent to workplace governance absent independent unions.<sup>384</sup> According to one labor scholar, Senator Wagner thought that genuine consent to managerial authority was unachievable sans labor autonomy: "as a normative matter, the company union failed to provide sufficient collective empowerment to eliminate duress and achieve workers' democratic consent to the system of workplace governance in the large-scale enterprise."<sup>385</sup> Other senators believed that worker consent could be achieved even with company unions.<sup>386</sup>

This confluence of circumstances resulted in the enactment of Section 8(a)(2), which makes it "an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."<sup>387</sup> Congress designed Section 8(a)(2) to ensure that employer-dominated groups do not deprive employees of their right to select a representative of their own choosing.<sup>388</sup> Simply put, not only does U.S. federal law fail to provide any formal legal framework for non-union employee-representation systems in the United States, but it also puts any such system into legal doubt. In particular, the very law that legalized labor unions made company unions unlawful.

## 2. *Section 8(a)(2), Which Makes Company Unions Unlawful, Sometimes Captures Other Forms of Alternative Dispute Resolution*

Today, the National Labor Relations Board interprets Section 8(a)(2) as requiring the Board to engage in a two-part inquiry to determine whether an employer has violated its duty to refrain from dominating, interfering, or unlawfully supporting a labor organization:

The first inquiry is whether the entity involved is a "labor organization" as defined in Section 2(5) of the Act. If not, the allegation is dismissed. If so, the second inquiry is whether the [employer's] conduct vis-à-vis this labor organization constitutes domination or interference with the

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<sup>383</sup> See Barenberg, *supra* note 380, at 1402.

<sup>384</sup> For a discussion of the history of the company union, see Wayne E. Babler, *Labor Law: Power of National Labor Relations Board to Order Disestablishment of Company Union*, 36 MICH. L. REV. 1131 (1938).

<sup>385</sup> See Barenberg, *supra* note 380, at 1442. According to Professor Barenberg, Senator Wagner offered several reasons for rejecting company unions, none of which Professor Barenberg finds persuasive. See *id.* at 1443–50.

<sup>386</sup> See *id.* at 1442 n. 286.

<sup>387</sup> See 29 U.S.C. § 158(a)(2).

<sup>388</sup> See *Electromation, Inc. v. Int'l Bhd. of Teamsters, Loc. Union No. 1049*, 309 N.L.R.B. 990, 993–94 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

organization's formation or administration, or unlawful support of the organization.<sup>389</sup>

Simply stated, the Labor Board reviews the following two questions: First, is the entity in question a labor organization? And second, does the employer dominate or interfere with the labor organization formation or administration or has the employer unlawfully supported the labor organization?<sup>390</sup>

NLRA Section 2(5) defines labor organization as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”<sup>391</sup> Notice the broadness of the textual language; it includes “any organization of any kind,” including any “employee representation committee” so long as its purpose is to deal with employers over “grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” Consequently, in determining whether an employee representation committee, such as a peer review panel, is a labor organization within the meaning of NLRA Section 2(5), the Labor Board examines the following factors: (1) Employee participation; (2) the extent to which the entity in question addresses “grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work”; and (3) whether the entity in question “has a purpose, in whole or in part, of ‘dealing with’ the employer about the foregoing subject matters.”<sup>392</sup>

In *Electromation*, the Board clarified that

if the organization has as a purpose the representation of employees, it meets the statutory definition of ‘employee representation committee or plan’ under Section 2(5) and will constitute a labor organization if it also meets the criteria of employee participation and dealing with conditions of work or other statutory subjects.<sup>393</sup>

This is so, even if the committee “lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues.”<sup>394</sup>

Polaroid’s EC and G.E.’s peer review panels readily meet two of the three factors for determining whether such entities are labor organizations. ECs and peer

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<sup>389</sup> Keeler Brass Automotive Group, 317 NLRB 1110, 1112–13 (1995).

<sup>390</sup> See *Electromation, Inc.*, 309 N.L.R.B. at 995 (“A labor organization that is the creation of management, whose structure and function are essentially determined by management, . . . and whose continued existence depends on the fiat of management . . . has been dominated under Section 8(a)(2).”).

<sup>391</sup> See 29 U.S.C. § 152(5).

<sup>392</sup> See *Keeler Brass Automotive Group*, 317 N.L.R.B. at 1113 (quoting *Electromation, Inc.*, 35 F.3d at 1158).

<sup>393</sup> *Electromation, Inc.*, 309 N.L.R.B. at 991.

<sup>394</sup> *Id.*

review panels patently meet the statutory definition of employee representation committee because they “ha[ve] as [their] purpose the representation of employees.”<sup>395</sup> Recall that Polaroid and G.E. devised EC and peer review panels, respectively, keeping in mind that rank-and-file employees should have representation.<sup>396</sup> Though the Polaroid Employees Council peer advocate model closely resembles a traditional union model, and though the G.E. model more closely resembles co-determination, they both resolve grievances.

Accordingly, the question whether ECs and peer review panels are labor organizations distills to the question whether one purpose of such organizations is to deal with the employer about grievances. The Board has explained that *dealing with* involves a “bilateral mechanism,” which “ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required.”<sup>397</sup> For example, in *Simmons Industries, Inc.*, the Board found that a safety committee’s conduct constituted “dealing with” because its members’ proposals “were considered and accepted or rejected by management.”<sup>398</sup>

In *NLRB v. Cabot Carbon*, the Labor Board, with Supreme Court approval, further clarified its construction of the term “dealing with,” explaining that the term is not synonymous with the term collective bargaining but is, in fact, broader than that term.<sup>399</sup> The Board further elaborated on this point in *Electromation*: “an organization whose purpose is limited to performing essentially a managerial or adjudicative function is not a labor organization under Section 2(5). In those circumstances, it is irrelevant if the impetus behind the organization’s creation emanates from the employer.”<sup>400</sup>

In another case, the Board explained that it would not find dealing, and therefore would not find that the peer review panel is a labor organization, where a company “flatly delegate[s] [managerial functions] to employees.”<sup>401</sup> Indeed, the Board reasoned that:

While the employer could withdraw the powers delegated to employees to perform these functions on its behalf, the withdrawal of authority would be wholly unilateral on its part just as was [the employer’s] original delegation. There was no dealing between employer and employee (or employee group) involved in these matters. These functions were just

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<sup>395</sup> *Id.* at 994.

<sup>396</sup> *Id.*

<sup>397</sup> E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 894 (1993).

<sup>398</sup> 321 N.L.R.B. 228, 254 (1996).

<sup>399</sup> See 360 U.S. 203, 211–14 (1959) (concerning a committee composed entirely of employees, without discussing managers).

<sup>400</sup> *Electromation, Inc.*, 309 N.L.R.B. at 994.

<sup>401</sup> General Foods Corp., 231 N.L.R.B. 1232, 1232–33 (1977).

other assignments of job duties, albeit duties not normally granted to rank-and-file personnel.<sup>402</sup>

Under these cases, employers would struggle with designing peer review systems that do not meet the definition of a “labor organization.” To be sure, peer review panels typically do not engage in collective bargaining; but that would not exclude them from the statutory definition of labor organization anyway because “dealing with” encompasses activity other than bargaining. The important inquiry here is two-fold: (1) what is the committee’s or panel’s composition? and (2) are ECs or peer review panels tailored to engage in management functions? Peer advocates are, by definition, nonsupervisory. Moreover, they engage not only in grievance adjustment but also in bilateral dealings with respect to Employee Stock Ownership Plan (ESOP) funds, disciplinary proceedings, medical benefits, and time off for family and medical reasons.<sup>403</sup> While adjusting grievances is quintessentially a supervisory function,<sup>404</sup> peer advocates do not become supervisory by playing that role because they are adjusting grievances not in the interest of the employer but in the interest of the grievant.<sup>405</sup>

By contrast, peer panels have both supervisory and nonsupervisory employees. Accordingly, the question of domination is going to become important in controlling positions. To be sure, employers interested in peer review could avoid Section 8(a)(2) liability altogether by flatly delegating authority to a peer review panel purely composed of peer advocates, like EC panels, with no management representatives. Once management places management representatives on a peer review panel, there is room for management to persuade—and therefore space to deal with—the peer advocates. And once present, management representatives would be in a position to coerce employee representatives. Because management is unlikely to create a system with no management oversight, the question of domination presents a critical issue.

Even if an employee representation committee or other entity can be classified as a labor organization within the meaning of Section 2(5),<sup>406</sup> the employer does not violate Section 8(a)(2) unless it “dominat[es],” “interfere[s] with,” or unlawfully supports that organization.<sup>407</sup> In determining whether peer review panels are labor

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<sup>402</sup> *Id.* at 1235.

<sup>403</sup> *Cf. supra* notes 389–394 and accompanying text. *See also* Polaroid Corp., 329 N.L.R.B. 424, 436 (1999) (finding Section 8(a)(2) violation).

<sup>404</sup> *See* 29 U.S.C. § 152(11) (defining supervisors as those who, among other things, “adjust . . . grievances” “in the interest of the employer” using “independent judgment”).

<sup>405</sup> *See* Health Care & Retirement Corp. of Am. v. NLRB, 511 U.S. 571, 579 (1994) (observing that the statutory language, “in the interest of the employer,” which helps to define supervisor, “ensures, for example, that union stewards who adjust”).

<sup>406</sup> 29 U.S.C. § 152(5).

<sup>407</sup> 29 U.S.C. § 158(a)(2) (making it an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it”).



organizations that are unlawfully dominated, the Board will focus on the concept of “domination.”<sup>408</sup>

The Board in *Electromation*, for example, attempted to shed light on the question whether an employer unlawfully dominates or interferes with the formation or administration of an employee representation committee:

A labor organization that is the creation of management, whose structure and function are essentially determined by management . . . and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2). In such an instance, *actual* domination has been established by virtue of the employer’s specific acts of creating the organization itself and determining its structure and function. However, when the formulation and structure of the organization is determined by employees, domination is not established, even if the employer has the potential ability to influence the structure or effectiveness of the organization. . . . Thus, the Board’s cases following *Cabot Carbon* reflect the view that when the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence independent of the employer’s active involvement, a finding of domination is appropriate if the purpose of the organization is to deal with the employer concerning conditions of employment.<sup>409</sup>

The Board’s formulation of what constitutes domination is hardly a model for clarity, but it does give managers the message that designing peer review programs constitutes an overt act of actual dominance. One way that employers interested in peer review might get around the domination problem is to create peer review panels solely composed of nonsupervisory personnel, but whose decisions are overseen by a management panel. By contrast, the NLRB or reviewing court would not find dominance, where such programs are self-sustaining regardless of employer participation. This is the case with the EC model of peer advocates, where nonsupervisory employees elected other nonsupervisory employees, entirely independent of management.

### 3. *Using Labor Law to Protect Peer Advocates from Retaliation*

The question comes to mind of whether management could retaliate against peer advocates for taking a position that it views as contrary to company policy. Whether the National Labor Relations Act protects an employee rep from such

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<sup>408</sup> *Id.*

<sup>409</sup> See *Electromation, Inc. v. Int’l Bhd. of Teamsters, Loc. Union No. 1049*, 309 N.L.R.B. 990, 993–94 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

retaliation turns on the question whether advocacy is protected concerted activity under Section 7.<sup>410</sup>

Section 7 grants employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . . .”<sup>411</sup> Section 8(a)(1) prohibits an employer from discharging an employee that is engaged in concerted activity that is protected under Section 7.<sup>412</sup> The Board, with court approval, has held that “[i]n general, to find an employee’s activity to be ‘concerted,’ we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”<sup>413</sup> Section 7 presumptively protects employees engaged in concerted activity unless that activity somehow loses its protection where, for example, the conduct violates another federal statute,<sup>414</sup> involves violence or protect destruction,<sup>415</sup> is in breach of a no-strike clause,<sup>416</sup> or is otherwise indefensible because it involves product disparagement or involves communications that are exceedingly “disloyal, reckless or maliciously untrue.”<sup>417</sup>

Applying these principles, the Board could reasonably conclude that Section 7 protects the conduct of EC reps in their service as peer advocates. This conduct would be concerted so long as it is “engaged in with or on the authority of other employees,” who have elected these employees to serve as peer advocates.<sup>418</sup> Nor, in the abstract, is there any reason to believe that acts of peer advocacy could lose their protection.<sup>419</sup> To be sure, an employer could discharge a peer advocate for threatening to harm a manager who refused to rule in favor of an employee. But there is nothing inherent in the pure act of advocacy to believe that it would lose its protection. In short, nonunion peer advocates would have an NLRA claim against any company that fires them for engaging in their advocacy roles.

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<sup>410</sup> 29 U.S.C. § 157.

<sup>411</sup> *Id.*

<sup>412</sup> *Id.* § 158(a)(1).

<sup>413</sup> *Meyers Indus. Inc. v. Prill*, 268 N.L.R.B. 493, 497 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *reaffirmed*, 281 N.L.R.B. 882 (1986), *enforced sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

<sup>414</sup> *See Southern S.S. Co. v. NLRB*, 316 U.S. 31, 38–49 (1942) (holding that Section 7 does not protect seafarers engaged in a strike aboard a ship away from its home port because such conduct constituted a mutiny in violation of federal law).

<sup>415</sup> *See NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (holding that Section 7 does not protect right to strike accompanied by illegal seizure of buildings and acts of force and violence).

<sup>416</sup> *See NLRB v. Local U. No. 1229, IBEW*, 346 U.S. 464, 344 (1953).

<sup>417</sup> *See, e.g., id.*; *Emarco, Inc.*, 284 N.L.R.B. 832, 833 (1987).

<sup>418</sup> *Meyers Indus.*, 268 N.L.R.B. 493 (1984).

<sup>419</sup> For a discussion of how concerted activity can lose its protection, see *NLRB v. Wash. Aluminum*, 370 U.S. 9, 17, nn. 14–17 (1962).

#### 4. *Reducing the Risk of Peer Advocates Engaged in the Unauthorized Practice of Law*

The use of nonlawyer peer advocates raises the question of whether these employee reps would be engaged in the unauthorized practice of law. There is a low-level risk that peer advocates would be viewed as engaging in the unauthorized practice of law, although further research should be done regarding the law of each state.

Model Rule 5.5 regulates the unauthorized practice of law and multi-jurisdictional law practice by focusing on the conduct of lawyers admitted to practice in state A and not admitted to practice in state B but engaging in legal practice in state B.<sup>420</sup> It also focuses on the conduct of nonlawyers who engage in legal-like practice (paralegals, for example), but who are supervised by a lawyer.<sup>421</sup> The failure to properly supervise the nonlawyer may result in state sanction of the supervising lawyer.<sup>422</sup> This leaves us with two questions. First, do states have authority to regulate the nonlawyers themselves? In general, states do have such authority and a state court of last resort could issue a cease-and-desist order against nonlawyers engaged in the unauthorized practice of law.<sup>423</sup> Second, what constitutes the practice of law and, as a corollary, is peer advocacy legal practice? That question is more difficult to answer succinctly because each state has its own definition of legal practice that is typically exclusively within the province of that state's court of last resort.<sup>424</sup> That definition, regardless of jurisdiction, will always include

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<sup>420</sup> See MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS'N 2020).

<sup>421</sup> See *id.* r. 5.3.

<sup>422</sup> See, e.g., *Att'y Grievance Comm'n v. Phillips*, 155 A.3d 476, 480–86, 490–91 (Md. 2017) (lawyer disciplined for establishing law firm with nonlawyer son and ratifying son's representations and conduct); *In re Hrones*, 933 N.E.2d 622, 625–27, 631–32 (Mass. 2010) (lawyer disciplined for allowing unlicensed law school graduate to handle employment discrimination cases with no supervision, sign lawyer's name on appearance forms and administrative complaints, and share fees); *In re Guirard*, 11 So. 3d 1017, 1029–30 (La. 2009) (attorneys disbarred for failing to supervise nonlawyers who advised clients on viability of legal claims and negotiated claims); *Miss. Bar v. Thompson*, 5 So. 3d 330, 337–38 (Miss. 2008) (lawyer disciplined for “giving [paralegal] the position and resources necessary to practice law, and then failing to adequately supervise him”).

<sup>423</sup> See MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 2020) (regulating nonlawyers); *but see id.* r. 5.3 cmt. 2 (stating that nonlawyers “are not subject to professional discipline”).

<sup>424</sup> See, e.g., *In re Town of Little Compton*, 37 A.3d 85, 88, 91 (R.I. 2012); *see also* ABA Comm. on Ethics & Pro. Resp., Informal Op. 1463 (explaining that “the Model Code does not define unauthorized practice,” which “is a question of law and not a question of ethics.” (citing ABA Comm. on Pro. Ethics & Grievances, Formal Op. 198 (1939); ABA Comm. on Pro. Ethics, Formal Op. 316 (1967); ABA Comm. on Ethics & Pro. Resp., Informal Op. 1264 (1973); ABA Comm. on Ethics & Pro. Resp., Informal Op. 1272 (1973))).

representation before judicial tribunals.<sup>425</sup> Therefore, it makes sense to consider whether representation before quasi-judicial tribunals, such as an arbitrator or a management decision maker in a grievance proceeding, is sufficiently like representation before a court to constitute the practice of law.

Whatever the definition of legal practice, it is unlikely that the duties of peer advocates fall within that definition. In *In re Town of Little Compton*,<sup>426</sup> the Supreme Court of Rhode Island was called upon to determine whether a non-lawyer employee representing a union during a labor arbitration was engaged in the unauthorized practice of law. After reviewing the law in Ohio and California as well as U.S. Supreme Court jurisprudence on the nature of arbitration, the court held that the employee was not engaged in the unauthorized practice of law.<sup>427</sup> The court based its decision on the nature of arbitration as compared with judicial proceedings.<sup>428</sup> Indeed, the court noted that the main incentives for using arbitration are to provide parties with “expeditious, inexpensive, and informal” resolution of workplace conflict.<sup>429</sup> The court observed:

[I]n contrast to other types of disputes, labor disputes are unique in that the “law of the shop” rather than strict adherence to legal principles typically controls. Union representatives are often particularly qualified to represent a union based on their familiarity with the multilevel grievance process, their knowledge of the operating procedures, equipment, and training, and their understanding of the formation and evolution of the applicable collective-bargaining agreement. This is not to say that licensed attorneys do not have, or are not able to acquire, such knowledge of, or familiarity with, these matters, but simply to acknowledge why union employees often represent unions in arbitrations.<sup>430</sup>

The court was also concerned with over-formalizing arbitration proceedings, which would result in delay and increased costs for the parties, contrary to ADR principles.<sup>431</sup>

Other states have more expressly excluded participation in resolving labor disputes from the definition of legal practice. For example, Connecticut expressly excludes participation in labor arbitration proceedings as coming within the practice

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<sup>425</sup> ABA Comm. on Ethics & Pro. Resp., Informal Op. 1463 (1981) (explaining since what constitutes the practice of law is a question of law, “state laws, court rules, and court decisions should be consulted to determine what is considered unauthorized practice of law in each jurisdiction where the firm is to perform services”).

<sup>426</sup> *In re Town of Little Compton*, 37 A.3d 85 (R.I. 2012).

<sup>427</sup> *Id.* at 90–91.

<sup>428</sup> *Id.* at 92–95.

<sup>429</sup> *Id.* at 93.

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

of law.<sup>432</sup> Other states, such as Illinois, have expressly excluded union representation of employees at certain administrative hearings from the definition of the practice of law.<sup>433</sup> Ohio allows non-attorney union representatives to represent public employees in termination proceedings.<sup>434</sup>

Courts in these jurisdictions, applying the reasoning of these cases to the context of peer advocates, are unlikely to find peer representation in internal grievance proceedings to constitute the unauthorized practice of law. Indeed, the work of Polaroid's EC before management is even more informal than arbitration, which itself one court distinguished from judicial proceedings. While a state statute expressly excluding such conduct would clearly authorize peer advocacy, such a statute does not seem necessary considering non-lawyer union representation during grievances. Nevertheless, we must proceed with caution as we tread down this road because several jurisdictions have suggested that lawyers, admitted to practice in state A, who wish to participate in an arbitration in state B, must seek permission to participate in state B's arbitration proceedings or risk running afoul of unauthorized practice of law rules.<sup>435</sup>

To eliminate the unauthorized-practice-of-law risk, a company could have in-house counsel supervise peer advocates. That solution seems undesirable, however, from both management's and labor's point of view. From management's vantage point, not only does supervision increase the cost of the internal system, but it also raises potential conflict-of-interest claims.<sup>436</sup> After all, in-house counsel represents management, whose position is, by definition, adverse to that of the grievant. Similarly, the employee rep would likely sense that conflict. Perhaps a way around this conflict would be for the company to hire an ombudsman, who would be a practicing lawyer and would supervise peer advocates. This solution might be expensive and possibly unnecessary, at least in states that have expressly excluded participation before informal tribunals from the definition of legal practice. But if cost-effective, this might be the legally safest route, shy of state legislation expressly permitting non-lawyer peer advocates.

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<sup>432</sup> See *Bysiewicz v. DiNardo*, 2010 WL 1838604, \*35 (Conn. Super. 2010) (citing Practice Book 1998, § 2-44A(b)), *overruled on other grounds by* *Bysiewicz v. Dinardo*, 298 Conn. 748, 6 A.3d 726 (Conn. 2010).

<sup>433</sup> See *Grafner v. Dep't Emp. Sec.*, 393 Ill.App.3d 791, 914 N.E.2d 520 (Ill. App. 1 Dist. 2009) (state statute permitting unions to represent employees at unemployment compensation hearings).

<sup>434</sup> See *Williams v. Cincinnati*, 2009 WL 1152134 (Oh. App. 1 Dist. 2009) (upholding decision to discharge and holding that non-attorney union representative to represent public employee in termination proceedings did not taint proceedings).

<sup>435</sup> See, e.g., Tammy N. Giroux & Jeremy Medeiros, *Proceeding with Caution: The Unauthorized Practice of Law* presented at Twenty-first Annual Northeast Surety and Fidelity Claims Conference (Sept. 24, 2010), <https://www.slideshare.net/mcarruthers/proceeding-with-caution-the-unauthorized-practice-of-law> [https://perma.cc/SYX6-LN6K].

<sup>436</sup> See MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2020).

### 5. Actionable Conduct Under *Goodman v. Lukens*

In *Goodman v. Lukens Steel Company*, the Supreme Court held that a union's refusal to file race discrimination grievances on behalf of its Black members constituted unlawful discrimination under Title VII of the Civil Rights Act. There, the Court upheld a lower court's finding that a union violated Title VII by "failing to challenge discriminatory discharges of probationary employees; failure and refusal to assert racial discrimination as a ground for grievances; and toleration and tacit encouragement of racial harassment."<sup>437</sup> Later courts interpreting *Goodman v. Lukens* have sought to find a pattern of ignoring race-related grievances before holding a union liable under Title VII.<sup>438</sup>

The question whether *Goodman v. Lukens* would apply to peer advocates depends on the answer to the following two questions. Are peer advocates labor organizations for purposes of Title VII? If so, can the disgruntled grievant show that the peer advocates had a policy of ignoring race-related grievances?

The Court in *Jones v. American Postal Workers Union*<sup>439</sup> provides one of the most comprehensive and well-reasoned analyses of the definition of "labor organization" within the meaning of Title VII. There, the court observed that it owed *Chevron* deference<sup>440</sup> to the Equal Employment Opportunity Commission's construction of the statutory term "labor organization" for purposes of Title VII.<sup>441</sup> The question here is whether the EEOC could reasonably interpret Title VII's

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<sup>437</sup> 482 U.S. 656, 664–65 (1987), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5114.

<sup>438</sup> See *Wesley v. Gen. Drivers, Warehousemen & Helpers Local 745*, 660 F.3d 211, 214–15 (5th Cir. 2011) (holding that union member failed to prove that union violated Section 1981 because he could not prove that his complaints about the union were held by any other member or that the union had "adopted a practice of ignoring race-related grievances of members"); *Fragalla v. Douglas Cnty. Sch. Dist.*, 411 F. App'x 140, 159–60 (10th Cir. 2011) (holding that *Goodman* did not support former union member's racial discrimination against her union because she had failed to prove that the union had a "policy or practice of declining to assert discrimination claims").

<sup>439</sup> 192 F.3d 417 (4th Cir.1999). Although *Jones* is a disability discrimination case under the Americans with Disabilities Act, the court noted that the ADA borrows the definition of "labor organization" from Title VII. The court proceeded to analyze Title VII's definition of that statutory term. The fact that *Jones* is a public-sector case is also irrelevant here. In *Jones*, the court was asked to determine whether Title VII covers public-sector unions. There is no question that Title VII covers private-sector unions. *Id.*

<sup>440</sup> *Chevron* deference is a principle of administrative law and statutory construction, which holds that, to the extent that a statute is ambiguous or silent on an issue, courts must defer to an administrative agency's reasonable and permissible construction of those statutes that Congress charged that agency with administering. For example, the courts must defer to the NLRB's reasonable construction of the NLRA but need not give any deference to the NLRB's construction of immigration laws. See *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1983).

<sup>441</sup> *Jones*, 192 F.3d at 427.

definition of labor organization as encompassing peer advocates. Title VII defines labor organization as follows:

The term “labor organization” means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.<sup>442</sup>

The EEOC, which is entitled to judicial deference in its interpretation of the statutory term, labor organization, has explained that,

A labor organization is covered under Title VII, the ADEA, and the ADA if it meets one of the following two tests:

1. It represents the employees of an employer; *and*  
It has 15 or more members (25 or more under the ADEA) *or*  
maintains a hiring hall which procures employees for at least one covered employer  
*or*
2. It is engaged in an industry affecting commerce.<sup>443</sup>

Given the breadth of the EEOC’s definition of labor organization, it seems highly likely that the EEOC and reviewing court would find peer advocates to be labor organizations so long as the firm, as an employer, is covered by Title VII. The question then becomes whether peer advocates would be liable for race discrimination under *Goodman v. Lukens*. That inquiry would depend on the factual context of the case. In Polaroid’s case, where EC reps were known to file all grievances, there would not have been any *Goodman v. Lukens* liability. Moreover, only the company—not the EC—could be liable in Title VII for decisions to take grievances to arbitration to the extent that those decisions were within management’s unilateral control, as was the case at Polaroid.

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<sup>442</sup> 42 U.S.C.A. § 2000e(d).

<sup>443</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL, § 2-III.B.1.c., [http://www.eeoc.gov/policy/docs/threshold.html#N\\_115](http://www.eeoc.gov/policy/docs/threshold.html#N_115) [<https://perma.cc/69E8-BJ38>] (last visited June. 25, 2022).

*C. Voluntary Arbitration: The Case for Preserving Judicial Remedies*

Eliminating forced arbitration as a condition of employment does not preclude the option of voluntary arbitration as a means of resolving a dispute. There remains the policy question of whether we want employees to waive jury trials in some wrongful discharge cases. Perhaps there are some reasons for employer (mis)conduct that we, as a democratic people, believe are so fundamentally bad that preserving litigation as an option is vital. Or perhaps employees and employers wish to preserve their forum choice. One solution to these problems is to preserve judicial remedies where judicial remedies are provided by statute. Polaroid did this in its arbitration program, which mandated arbitration in cases where workers were allegedly in violation of company rules or policies but preserved judicial remedies in statutory cases.<sup>444</sup> This policy is most effective from the employee's point of view where trained peer advocates are employed.

Creating a system of voluntary arbitration, coupled with the exhaustion of internal administrative remedies before a worker could seek court review, could cut down on the number of complaints that are filed in court. A well-developed mediation-grievance-arbitration internal dispute resolution with well-developed and direct lines of communication could allow managers and workers to create a productive, high-trust culture. Such a culture contrasts with shock discharges, where an employer discharges an employee who has no notice that something is wrong. Shock discharges eliminate the possibility of resolving not just the problem underlying that employee's grievance, but also the possibility of resolving a more systemic problem that affects a much larger population.<sup>445</sup>

The most direct way to address mandatory arbitration would be for Congress to amend the Federal Arbitration Act to exempt employment arbitration, or to provide more protection for employee rights in arbitration. For example, with the rise of the #MeToo movement propelling the issue of sexual harassment into the national spotlight, both scholars and lawmakers have begun to reassess forced arbitration agreements, taking careful notice of their deficiencies and ills when it comes to sexual harassment.<sup>446</sup> Arbitration's confidential process not only shields abusers from accountability by allowing both companies and executives to avoid public scrutiny and embarrassment, but it also prevents victims from learning about other occurrences of misconduct and banding together to take on workplace

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<sup>444</sup> See generally EWING, *supra* note 2, at 299–308.

<sup>445</sup> See Ira M. Saxe, *Constructive Discharge Under the ADEA: An Argument for the Intent Standard*, 55 *FORDHAM L. REV.* 963, 984 (1987) (observing, in the context of arguing for an intent standard for age discrimination constructive discharge cases, that “[w]hen an employee resigns, he takes away the employer’s opportunity to use effective methods to resolve problematic situations”).

<sup>446</sup> See DeLange, *supra* note 23, at 230 (2020) (“Arbitration is an inappropriate venue for sexual harassment claims because impermissible sexual conduct occupies a unique place in society and deserves special consideration, as well as the lack of accountability and transparency associated with arbitration, compared to federal litigation, ineffectively vindicates Title VII sexual harassment rights.”).



injustice. Several states, including New York, Maryland, Washington, and Vermont, have enacted legislation banning mandatory arbitration of sexual harassment claims with the federal government following suit earlier this year.<sup>447</sup>

On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which amends the FAA and effectively invalidates pre-dispute arbitration agreements and class action waivers in sexual harassment and assault cases brought by workers.<sup>448</sup> Significantly, the Act gives courts, not arbitrators, the power to determine whether the Act applies.<sup>449</sup> Early support from Senator Lindsey Graham, the topmost Republican on the Judiciary Committee, helped the bill pick up bipartisan support.<sup>450</sup> Congressional lawmakers worked on the bill with former Fox News anchor Gretchen Carlson who sued then-Fox News Chairman and CEO Roger Ailes for sexual harassment.<sup>451</sup> Carlson claims she had no idea that her employment contract with the network mandated that sexual harassment claims be handled in private arbitration until she met with her lawyers to discuss suing Ailes.<sup>452</sup> Carlson ultimately sued the former CEO personally under New York civil rights law, prompting several more women to come out with similar allegations against Ailes.<sup>453</sup>

While the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act limits pre-dispute arbitration agreements with respect to sexual harassment and assault, the law does not apply retroactively to existing disputes.<sup>454</sup> Employers are permitted to enforce mandatory arbitration agreements for claims of sexual harassment and assault that arose before March 3, 2022.<sup>455</sup> The Act also leaves mandatory arbitration agreements that compel arbitration of other employment-related claims unaffected.<sup>456</sup> It is also important to note that the language of the Act prohibits the enforcement of arbitration clauses for sexual harassment and assault “cases” rather than “claims.”<sup>457</sup> So, what happens in lawsuits containing multiple

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<sup>447</sup> Phoebe Bodurtha, *Can States Ban Mandatory Arbitration of Harassment Cases?*, ONLABOR (May 30, 2019), <https://onlabor.org/can-states-ban-mandatory-arbitration-of-harassment-cases/> [<https://perma.cc/S3X2-9ETG>].

<sup>448</sup> See Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022).

<sup>449</sup> *Id.* § 402(b).

<sup>450</sup> Cristina Marcos, *House Passes Bill to End Forced Arbitration in Sexual Misconduct Cases*, THE HILL (Feb. 7, 2022, 7:39 PM), <https://thehill.com/homenews/house/593206-house-passes-bill-to-end-forced-arbitration-in-sexual-misconduct-cases> [<https://perma.cc/RF9P-2M69>].

<sup>451</sup> Amanda Becker, *Bill to End Forced Arbitration of #MeToo Claims Poised to Become Law*, 19TH NEWS (Feb. 10, 2022, 9:22 AM), <https://19thnews.org/2022/02/forced-arbitration-harassment-assault-ban/> [<https://perma.cc/2EEZ-AVBP>].

<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 28 (2022).

<sup>455</sup> *Id.*

<sup>456</sup> *Id.*

<sup>457</sup> *Id.* § 402(a).

claims? Specifically, what happens in a case *involving but not limited to* sexual harassment and/or assault? Courts will have to sort out whether non-covered claims subject to mandatory arbitration can be severed from any sexual harassment or assault claims and sent to arbitration.

While the passage of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act is encouraging, as explained above, forced arbitration is not solely a problem for sexual harassment victims. A ban on forced arbitration in the realm of sexual harassment is only a fragment of the solution needed to rehabilitate workplace grievance procedures and create a fair and amiable workplace environment. Arbitration, when knowingly and voluntarily agreed to, can be an adequate and favorable alternative to formal litigation. However, most present-day mandatory arbitration agreements strip employees of their rights and often lead to costly and time-consuming quasi-judicial legal action arbitration is meant to prevent. Absent further Congressional safeguards protecting employees' choice to pursue litigation, peer-centric internal dispute-resolution procedures remain the most effective way to both preserve fairness and justice for employees and reduce costs and avoid highly publicized dispute for employers.

#### CONCLUSION

We are currently entering an era where compelled arbitration is becoming the norm in resolving workplace disputes. While compelled arbitration might be more efficient than litigation, there are several drawbacks. Forced arbitration facilitates and perpetuates discriminatory practices in the workplace by allowing employers to escape judicial and public scrutiny and, oftentimes, accountability. As Justice Ruth Bader Ginsburg recognized in her dissent in *Epic Systems*, “[e]mployees’ rights to band together to meet their employers’ superior strength would be worth precious little if employers could condition employment on workers signing away those rights.”<sup>458</sup> Preceding arbitration with an internal grievance system that utilizes peer advocates seems to have the advantage of (1) avoiding even the cost of arbitration; and (2) maintaining morale. As we begin to study ways of improving access to justice in a manner that is cost-effective, peer advocacy should receive thoughtful consideration.

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<sup>458</sup> *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1641 (2018) (Ginsburg, J., dissenting).