
# Labor and Mandatory Arbitration Agreements: Background and Discussion

**Jon O. Shimabukuro**
Legislative Attorney

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# Summary

In response to the rising number of discrimination claims brought under federal civil rights statutes, many employers have sought to require arbitration for statutory claims by having their employees sign mandatory arbitration agreements. These agreements provide generally that all claims arising out of one's employment will be heard by an arbitrator or panel of arbitrators rather than by a judge or jury. Arbitration is often perceived by employers as a faster and less expensive alternative to litigation. Arbitration agreements also appear in the context of organized labor as unions and employers negotiate for mandatory arbitration in collective bargaining agreements.

The U.S. Supreme Court's decision in *Wright v. Universal Maritime Service Corp.* is the Court's most recent attempt to explain when a mandatory arbitration agreement will be enforced to require arbitration of a statutory claim. Although the Court found that an arbitration agreement will not be enforced when it does not explicitly require arbitration for statutory claims and when there has not been a "clear and unmistakable" waiver of a judicial forum for such claims, the Court resisted any further discussion about a union's ability to waive a judicial forum for employees.

While the Court recognized the tension between two lines of case law that have developed since two previous Supreme Court cases were decided, it chose to decide *Wright* solely on the basis of its facts. Thus, the question remaining after *Wright* is likely to go unanswered until the Court agrees to review a case with more appropriate facts or Congress chooses to legislate in this area.

Because the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act each provide for judicial relief, some contend that mandatory arbitration agreements undermine the intent of Congress. In addition, others argue that mandatory arbitration agreements support an employer's superior bargaining position as employees are forced to sign such agreements in order to obtain employment. For these reasons, the enforceability of mandatory arbitration agreements is likely to be of interest to Congress.

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The Civil Rights Act of 1991 encourages arbitration for claims brought under the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and Title VII of the Civil Rights Act of 1964 (Title VII).[1] In addition, Section 513 of the ADA encourages arbitration "[w]here appropriate and to the extent authorized by law."[2]

The U.S. Supreme Court's decision in *Wright v. Universal Maritime Service Corp.* attempts to clarify what is needed to enforce a mandatory arbitration clause in a collective bargaining agreement.[3] Although *Wright* provides some guidance for determining when such an agreement will be enforced, it is still uncertain whether a union may actually bargain on behalf of employees for the mandatory arbitration of statutory claims.

Prior to its decision in *Wright*, the Court considered the enforceability of mandatory arbitration agreements in two other cases, *Alexander v. Gardner-Denver* and *Gilmer v. Interstate/Johnson Lane Corp.*[4] This report discusses the Court's mandatory arbitration cases, as well as the varying decisions of the U.S. circuit courts of appeals that have interpreted the Court's opinions. In addition, the report reviews legislative attempts to amend federal civil rights statutes to preclude compulsory arbitration agreements.[5]

## Background

The Supreme Court's decisions in *Gardner-Denver* and *Gilmer* have produced two approaches toward mandatory arbitration agreements. The first approach, typified by *Gardner-Denver*, recognizes an unwaivable right to a judicial forum for statutory claims. In *Gardner-Denver*, a black employee sought relief under Title VII after he was terminated. Although the plaintiff, Mr. Alexander, was told that he was discharged for his poor job performance, he alleged that his termination was racially motivated. Alexander filed a grievance in accordance with the collective bargaining agreement between his union and the company. The agreement contained a broad arbitration clause covering "any trouble arising in the plant."[6] After receiving an adverse judgement in arbitration, Alexander sought relief in federal court. However, the district court

[1] U.S.C. § 1981 note (1994), Pub. L. 102-166, § 118.

[2] U.S.C. § 12212 (1994).

[3] *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998).

[4] 5 U.S. 36 (1974); 500 U.S. 20 (1990).

[5] *See* S. 121, 106th Cong. (1999); H.R. 872, 106th Cong. (1999). The Civil Rights Procedures Protection Act of 1999 was introduced to amend Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), the Age Discrimination in Employment Act (29 U.S.C. § 621 et seq.), the Rehabilitation Act (29 U.S.C. § 701 et seq.), the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.), § 1977 of the Revised Statutes (42 U.S.C. § 1981), the Equal Pay Act (29 U.S.C. § 206d), and the Family and Medical Leave Act (29 U.S.C. § 2601 et seq.).

[6] 5 U.S., at 40.

dismissed the action and found that Alexander was bound by the arbitral decision.[7] The court stated that because Alexander elected voluntarily to pursue his grievance to final arbitration under the agreement, he was precluded from suing his employer under Title VII. The Tenth Circuit affirmed the ruling of the district court, but the Supreme Court reversed that decision.

After reviewing the purpose and procedures of Title VII, the Court concluded that an individual does not forfeit his private cause of action even if he first pursues his grievance to final arbitration under a collective bargaining agreement.[8] The Court recognized that "legislative enactments in this area" have evinced a general interest in providing parallel or overlapping remedies against discrimination.[9] Thus, it was not inappropriate for Alexander to seek relief through arbitration and then in court. In addition, the Court distinguished contractual rights under a collective bargaining agreement from statutory rights that are created by Title VII and other federal statutes. While the Court acknowledged that some statutory rights, like the right to strike, can be waived by a union, other statutory rights like those granted under Title VII cannot be waived prospectively: "Title VII. . . stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities."[10] The Court further stated that the rights conferred by Title VII cannot form any part of the collective bargaining process because waiver of those rights would defeat the congressional purpose behind Title VII.[11]

The second approach toward mandatory arbitration agreements has its origin in *Gilmer*. This approach recognizes arbitration as a suitable method of obtaining relief for statutory claims even when the language in a mandatory arbitration agreement is broad and does not specify arbitration for such claims. In *Gilmer*, an employer sought to compel arbitration of a terminated employee's claim under the ADEA. As a securities representative, Gilmer was required to register with several stock exchanges, including the New York Stock Exchange (NYSE). Consequently, Gilmer became bound by the rules of the NYSE. One NYSE rule requires securities employees to arbitrate any controversy arising out of a registered representative's employment or termination of employment.[12] The rule makes no specific reference to the ADEA or any other federal anti-discrimination statute. Nevertheless, the Court concluded that Gilmer's claim could be subject to compulsory arbitration.

Where the Court previously recognized a congressional interest in providing parallel remedies against discrimination in *Gardner-Denver*, the Court in *Gilmer* contended that such remedies evinced merely a "flexible approach to resolution of claims."[13] Rather than providing for both arbitration and judicial relief, this flexible approach permitted arbitration to be a suitable remedy on its own. The Court reasoned that Congress would have explicitly precluded arbitration in the ADEA had it not wanted arbitration to be an appropriate method of attaining relief. In addition, the Court offered three distinctions between *Gilmer* and *Gardner-Denver*. First, the Court stated that the two cases presented different issues. While *Gardner-Denver* was concerned with whether the arbitration of contractual claims precluded subsequent judicial review of statutory claims, *Gilmer* offered a situation where contractual and statutory claims could both be subject to

[7] *Alexander v. Gardner-Denver*, 346 F. Supp. 1012 (D. Colo. 1971).

[8] 5 U.S., at 49

[9] 5 U.S., at 47.

[10] 415 U.S. at 51.

[11] *Id.*

[12] 500 U.S., at 23.

[13] 500 U.S., at 29.

arbitration under the NYSE rule. Second, *Gilmer* did not involve a collective bargaining agreement that was enforced by a union. Thus, there was no "tension between collective representation and individual statutory rights."[14] Presumably, Gilmer understood that he was agreeing to arbitrate all of his claims when he completed the registration application. Third, the agreement in *Gilmer* was subject to the Federal Arbitration Act of 1947 (FAA).[15] The Court noted that the FAA reflects a federal policy favoring arbitration agreements. In contrast, the Court found previously that the collective bargaining agreement in *Gardner-Denver* was not subject to the FAA.

## Circuit Court Cases

Despite the two Supreme Court cases, the courts of appeals have differed in their recognition of mandatory arbitration agreements. In general, they have chosen to follow either *Gardner-Denver* or *Gilmer*. Further, the courts of appeals have considered the issue in reference to the ADA, as well as Title VII and the ADEA.

In *Pryner v. Tractor Supply Co.*, the Seventh Circuit held that a mandatory arbitration clause in a collective bargaining agreement was not enforceable against two employees alleging violations of Title VII, the ADA, and the ADEA.[16] Although the court contended that a worker's statutory rights could be arbitrable if the worker consented to having such rights arbitrated, it found that a union could not consent for the employee by signing a collective bargaining agreement that left the enforcement of statutory rights to the union-controlled grievance and arbitration system created by the agreement. The court feared that a union may not pursue an employee's claim as vigorously as the employee in a private action. In addition, the court believed that the union may decline to prosecute a claim for strategic reasons; that is, the union may avoid pursuing a claim because it wanted to maintain a cordial relationship with the employer.[17] Although the court was reluctant to favor either *Gardner-Denver* or *Gilmer*, it did find Pryner's case to be closer to *Gardner-Denver*. Further, the court expressed its belief in maintaining a plaintiff's right to sue.[18]

In *Varner v. National Super Markets, Inc.*, the Eighth Circuit held that an employee did not have to exhaust the grievance procedures in a collective bargaining agreement before filing a Title VII lawsuit.[19] Although Varner did not participate in any part of the grievance and arbitration procedures under the collective bargaining agreement, the court contended that exhaustion of these procedures was not necessary to file suit. Following *Gardner-Denver*, the court reasoned that if a plaintiff was permitted to file suit after binding arbitration, she should be permitted to file suit even if she chooses not to participate in the grievance process.

In *Harrison v. Eddy Potash, Inc.*, the Tenth Circuit found similarly that a Title VII claimant did not have to exhaust the grievance procedures in a collective bargaining agreement.[20] In rejecting the employer's claim of mandatory arbitration, the court focused on the context in which the

[14] 500 U.S., at 35.

[15] 9 U.S.C. § 1 et seq. (1994).

[16] 103 F.3d 354 (7th Cir. 1997).

[17] *Id.*, at 362.

[18] 103 F.3d, at 365.

[19] 94 F.3d 1209 (8th Cir. 1996).

[20] 112 F.3d 1437 (10th Cir. 1997).

arbitration clause arose. The Court distinguished arbitration clauses contained in collective bargaining agreements from those in individual contracts. While an individual contract contains terms that were agreed upon by the employee, a collective bargaining agreement binds an employee to terms negotiated by the union. Thus, an employee governed by an individual contract would have understood that her statutory claims were subject to arbitration. Alternatively, an employee governed by a collective bargaining agreement would probably not have the same understanding. Further, the court recognized that the collective bargaining agreement was not subject to the FAA. Section 1 of the FAA excludes employment contracts of seamen, railroad employees, and other workers engaged in foreign or interstate commerce from its reach.[21] The Tenth Circuit has stated that § 1's exclusion encompasses collective bargaining agreements.[22] Thus, the FAA provided no support for arbitration.[23]

In *Brisentine v. Stone & Webster Engineering Corporation*, the Eleventh Circuit found that a mandatory arbitration clause would not bar litigation of a statutory claim unless three requirements were met.[24] First, the employee must have agreed to arbitration in an individual contract; that is, the arbitration clause cannot be part of a collective bargaining agreement. Second, the mandatory arbitration agreement must authorize the arbitration of statutory claims, as well as contractual claims. Third, the agreement must give the employee the right to insist on arbitration. Thus, arbitration cannot be left to the union's sole discretion.

Brisentine alleged that Stone & Webster denied him employment because he was unable to engage in heavy lifting or repetitive bending. Brisentine had been previously injured when he fell from a scaffold. Although Brisentine had not been hired by Stone & Webster, he became a probationary employee subject to the collective bargaining agreement between Brisentine's union and Stone & Webster when he was referred for employment. The collective bargaining agreement contained a provision that prohibited discrimination on the basis of race, sex, national origin, age, and handicap. In addition, the agreement provided a grievance and arbitration procedure for unfavorable resolutions. After being told by a labor relations manager at Stone & Webster that he was denied employment because of his disabilities, Brisentine contacted the union to inquire about filing a grievance in accordance with the agreement. However, the union told Brisentine that he should file a complaint with the Equal Employment Opportunity Commission (EEOC) rather than pursue his claim through the grievance procedures because his dispute centered around his disabilities. After receiving a right to sue letter, Brisentine filed a lawsuit alleging a violation of the ADA. The district court dismissed the case on the basis of Brisentine's failure to exhaust the agreement's grievance procedures.

After reviewing the agreement, the Eleventh Circuit concluded that the three requirements for barring litigation were not met. First, the grievance and arbitration clause was part of a collective bargaining agreement. Second, although the agreement included nondiscrimination language, it made no explicit reference to statutory claims. Further, while Brisentine did have the option of

[21] 9 U.S.C. § 1 (1994).

[22] *United Food & Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940 (10th Cir. 1989).

[23] It is still unclear whether all collective bargaining agreements are excluded from the FAA's purview. Although the Tenth Circuit has found the FAA not to be applicable to collective bargaining agreements, the Seventh Circuit has recognized such applicability. The Fourth Circuit also does not recognize the FAA as being applicable to collective bargaining agreements.

[24] 117 F.3d 519 (11th Cir. 1997).

seeking arbitration, he was told by the union to pursue his claim with the EEOC. Thus, the third requirement was met, but was not enforced.

While the Seventh, Eighth, Tenth, and Eleventh Circuits have followed *Gardner-Denver*, other circuits have followed *Gilmer* and construed arbitration agreements to require the arbitration of statutory claims. Among the circuits that have followed *Gilmer*, arbitration has been considered in the context of the securities industry.

In *Seus v. John Nuveen & Co., Inc.*, the Third Circuit upheld the validity of an arbitration clause that required Seus, a former broker, to arbitrate "any dispute, claim or controversy that may arise between [Seus] and [her] firm."[25] The arbitration clause appeared in a registration application that Seus was required to complete as a part of her employment. The application, the Uniform Application for Securities Industry Registration or Transfer, commonly referred to as Form U-4, was the same application at issue in *Gilmer*. Following *Gilmer*, the court noted that Form U-4 was among the contracts to be governed by the FAA. The court stated that the registration application was a "contract evidencing a transaction in commerce" rather than one of the contracts excluded from the scope of the Act.[26] Thus, the FAA on its face authorized the enforcement of Form U-4's arbitration clause. Further, the court rejected Seus's argument that she did not act knowingly or voluntarily when she completed the application. Because Seus could not show fraud, duress, mistake, or some other ground for invalidating the agreement, the court was compelled to require arbitration for her Title VII and ADEA claims.

In *Willis v. Dean Witter Reynolds, Inc.*, the Sixth Circuit upheld similarly the validity of Form U-4's arbitration clause.[27] Willis, an account executive, was required to complete Form U-4 as part of her employment. Willis alleged that during the last two years of her employment at Dean Witter, she was subject to a hostile work environment and was forced to resign because of her sex. The court maintained that Form U-4 was a contract "evidencing a transaction involving commerce" rather than a contract of employment that would be excluded from the FAA's purview. Thus, the FAA could require arbitration for Willis's Title VII claim.

In *Prudential Insurance Co. Of America v. Lai*, the Ninth Circuit held that the arbitration clause in Form U-4 was not enforceable against two former sales representatives because they were unaware of the clause at the time they signed the registration application.[28] The former employees argued that at the time they completed Form U-4 they were told by Prudential that they were simply applying to take a test that was required for employment. The former employees were never given an opportunity to read Form U-4 and were not given an employment manual that contained the actual arbitration terms. Although the court found that the former employees' Title VII claims were not subject to mandatory arbitration, it did state that statutory claims could be arbitrable if an employee knowingly agrees to submit her claims to arbitration.

The Ninth Circuit revisited Form U-4's arbitration clause in *Duffield v. Robertson Stephens & Co.*.[29] Duffield alleged sexual discrimination and sexual harassment in violation of Title VII. Robertson Stephens contended that Duffield was required under Form U-4 to arbitrate her claim.

[25] 146 F.3d 175, 177 (3d Cir. 1998).

[26] 146 F.3d, at 178.

[27] 948 F.2d 305 (6th Cir. 1991).

[28] 42 F.3d 1299 (9th Cir. 1994).

[29] 144 F.3d 1182 (9th Cir. 1998).

Acknowledging its decision in *Lai*, the court perceived the issue in *Duffield* to be of greater complexity; that is, whether a mandatory arbitration provision that precludes judicial relief for statutory claims is enforceable when it is a condition of employment. In reaching its conclusion, the court considered the legislative history of the Civil Rights Act of 1991 (CRA). The CRA was enacted almost simultaneously with *Gilmer* and spoke directly to the arbitration of Title VII claims.[30] The CRA provides that arbitration and other forms of alternative dispute resolution are encouraged "[w]here appropriate and to the extent authorized by law."[31] After reviewing numerous congressional reports, the court discovered that Congress specifically rejected a proposal that would have allowed employers to enforce mandatory arbitration agreements.[32] Further, the court interpreted the language of the CRA to mean that arbitration and alternative dispute resolution were appropriate only when they afforded victims of discrimination an opportunity to present their claims in a desirable alternative forum.[33] The language in the CRA was not meant to force an unwanted forum on claimants.[34]

One week before issuing its decision in *Wright*, the Supreme Court denied an appeal by Robertson Stephens. The Court made its decision without comment or dissent. Although Duffield had argued against the appeal on numerous grounds, she emphasized changes in the securities industry that would no longer require arbitration for statutory claims of discrimination. For example, the National Association of Securities Dealers (NASD) has already amended its rules to eliminate the mandatory arbitration requirement.

## Wright v. Universal Maritime Service Corp.

The Supreme Court's decision in *Wright* indicated that statutory claims would not be presumed to be arbitrable absent explicit language in an arbitration agreement. Because the arbitration clause in *Wright* was so vague, the Court concluded that it could decide against enforcing the clause without resolving the question of whether the union could have waived judicial relief for the employee's ADA claim.

Wright had been employed as a longshoreman in the Port of Charleston since 1970. In 1992, Wright shattered his right heel and injured his back when he fell from the top of a freight container. These injuries prevented Wright from engaging in any type of waterfront employment for an extended period. In May, 1994, Wright settled a workers' compensation claim and other claims for permanent and total disability. As part of this settlement, Wright received $250,000.

Wright had been a member of Local 1422 of the International Longshoremen's Association, AFL-CIO since the beginning of his employment. After his physical condition improved dramatically in July, 1994, Wright obtained permission from his physician to return to work. In January, 1995, Wright returned to the hiring hall of Local 1422 to obtain employment. He presented himself as having no restrictions and needing no accommodation. Between January 2, 1995 and January 11, 1995, Wright was referred by Local 1422 to work for several stevedoring companies, including

[30] *Id.*, at 1189.

[31] *Civil Rights Act of 1991*, *supra* note 1.

[32] 144 F.3d, at 1196. *See also* H.R. Rep. No. 40(I), at 104 (1991) (Use of compulsory arbitration provisions would force American workers to choose between their jobs and their civil rights).

[33] 144 F.3d, at 1194.

[34] *Id.*

respondents Universal Maritime Corp., Ryan-Walsh, Inc., Strachan Shipping Company, and Ceres Marine Terminals. Wright performed all of the duties assigned to him. None of the respondents complained or objected to Wright's performance. However, the respondents later informed the President of Local 1422 that they would no longer accept Wright on any work referrals from the local. In letters to the President of Local 1422, the respondents stated in nearly identical language that an individual is no longer qualified to perform longshore work of any kind once he has been certified as permanently and totally disabled.[35]

Wright argued that the respondents violated the ADA by denying him employment based on their perception that he was physically unable to do stevedoring work. Wright maintained that he was able to perform the essential elements of the jobs that would be referred to him by Local 1422.

The respondents denied any violation of the ADA and contended that Wright failed to exhaust the remedies and procedures available to him under the collective bargaining agreement between Local 1422 and the South Carolina Stevedores Association (SCSA). The SCSA is the collective bargaining representative of the respondent stevedoring companies. Clause 15(B) of the collective bargaining agreement between Local 1422 and the SCSA provides for a three-tiered review process for employee grievances.[36] Grievances that cannot be resolved between the local and a covered employer are submitted first to a Port Grievance Committee. If the Committee cannot reach an agreement within a specified time, a written record of the dispute is referred to a Joint Negotiating Committee. If this Committee is unable to achieve a majority decision, it is directed by the agreement to employ a professional arbitrator. Clause 15(F) of the agreement states that it is intended to cover "all matters affecting wages, hours, and other terms and conditions of employment. . .".[37] The respondents maintained that Wright's ADA claim was within the scope of matters that must be arbitrated in accordance with the agreement.[38]

On January 12, 1996, the president of Local 1422 wrote to Universal Maritime Service Corp. to express his concern over the interpretation of the agreement. A copy of this letter was sent to the SCSA. In his letter, the president characterized the respondents' refusal to employ Wright as a "lock-out" in violation of a separate provision of the agreement.[39] Nevertheless, the local did not file a grievance for Wright. Instead, Wright filed a complaint with the EEOC and sought relief in federal court after receiving a right to sue letter.

The district court dismissed Wright's claim without prejudice. Although Wright argued that the arbitration clause should not be enforced because it failed to specify arbitration for statutory claims, the court concluded that arbitration is appropriate even when an agreement does not identify specific statutes or grievances.

The Fourth Circuit affirmed the district court's decision. It found that an arbitration agreement does not need to specify every possible dispute to be binding.[40] The court compared Wright's

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[35] Brief for Petitioner at 3, *Wright v. Universal Maritime Service Corp*., 525 U.S. 70 (1998) (No. 97-889).

[36] Joint Appendix at 43a, *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998) (No. 97-889).

[37] Joint Appendix at 45a, *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998) (No. 97-889).

[38] Wright was also subject to the Longshore Seniority Plan, which contained a similar grievance provision. Because this Plan's arbitration language resembles the language in the collective bargaining agreement, this discussion will focus mainly on the agreement.

[39] *Wright v. Universal Maritime Service Corp.*, No. 2:96-0165-18AJ (D. S.C. 1996) (report and recommendation).

[40] *Wright v. Universal Maritime Service Corp.*, No. 96-2850, slip op. (4th Cir. 1997).

agreement to the mandatory arbitration rule in *Gilmer*. Following *Gilmer,* the Fourth Circuit made a similar determination that an employer does not have to provide a "laundry list of potential disputes" for them to be covered by a mandatory arbitration clause.[41]

The Supreme Court reversed the decision of the Fourth Circuit. Writing for a unanimous Court, Justice Scalia indicated that the general arbitration clause in the agreement between Local 1422 and the SCSA did not require Wright to arbitrate his ADA claim. The Court found that the agreement did not create a presumption of arbitration for Wright's ADA claim; that is, the broad language of Clause 15(F) could not support the belief that mandatory arbitration was the only option available for resolving statutory claims.

In reaching the Court's conclusion, Justice Scalia discussed the two lines of case law that have developed from the Court's prior decisions in *Gilmer* and *Gardner-Denver*.[42] Although the Court recognized the tension between *Gilmer* and *Gardner-Denver*, it resisted any kind of reconciliation of the two cases. Instead, the Court chose to respond only to the facts presented by *Wright*. The Court provided little guidance for a situation in which an arbitration clause in a collective bargaining agreement explicitly requires arbitration of statutory claims. In this situation, it remains unclear whether the union may waive a judicial forum for its members. While the Court did articulate a "clear and unmistakable waiver" standard for determining when statutory claims could be subject to arbitration, whether the union can agree to such a waiver on behalf of its members is a lingering question. The Court stated simply that because the agreement did not specify arbitration for statutory claims, there could not have been a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination.[43] Thus, the tension between collective representation and individual statutory rights that was discussed in both *Gardner-Denver* and *Gilmer* remains.

## Legislative Action

The enforceability of mandatory arbitration agreements could be addressed legislatively thereby resolving the question left unanswered by *Wright*. The Civil Rights Procedures Protection Act, has been introduced during every Congress since the 103rd Congress to respond to the concerns raised by mandatory arbitration agreements.[44] In the 107th Congress, S. 163 was introduced on January 24, 2001 by Senators Feingold, Leahy, Kennedy, and Torricelli. The House version of the Act, H.R. 1489, was introduced on April 4, 2001 by Representative Markey and twenty-four co-sponsors. The Act would amend seven civil rights statutes to guarantee access to federal court for a plaintiff alleging discriminatory conduct.[45] Supporters believe that the Act would ensure against an employer using his or her superior bargaining position to coerce prospective employees into any agreement that requires arbitration for statutory claims.[46]

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[41] *Id.*

[42] 415 U.S. 36 (1974).

[43] *Wright*, 525 U.S. at 81-2.

[44] *See* S. 163, 107th Cong. (2001); H.R. 1489, 107th Cong. (2001); S. 121, 106th Cong. (1999); H.R. 872, 106th Cong. (1999); S. 63, 105th Cong. (1997); H.R. 983, 105th Cong. (1997); S. 366, 104th Cong. (1995); H.R. 3748, 104th Cong. (1995); S. 2405, 103rd Cong. (1994); H.R. 4981, 103rd Cong. (1994).

[45] *Id.*

[46] *Oversight Hearing on Mandatory Arbitration Agreements in Employee Contracts in the Securities Industry*, 105th Cong. (statement of Senator Russell Feingold), http://www.senate.gov/~banking/98_07hrg/072898/witness/feingold.htm (1997).

Three other bills that address arbitration and employment disputes have been introduced during the 107th Congress. The Preservation of Civil Rights Protections Act of 2001, H.R. 2282, was introduced on June 21, 2001 by Representative Kucinich and thirty-six co-sponsors. A similar measure, S. 2435, the Preservation of Civil Rights Protections Act of 2002, was introduced on May 1, 2002 by Senators Kennedy and Feingold. The Acts provide that a mandatory arbitration clause in an agreement between an employer and an employee shall not be enforceable unless the parties consent to arbitration after a dispute has arisen.

H.R. 815, to amend Title 9 of the U.S. Code, was introduced on March 1, 2001 by Representative Andrews. H.R. 815 would add a new section to the FAA to allow arbitration related to an employment dispute only if arbitration is agreed to after a dispute has arisen. An employer could not require an employee to arbitrate a dispute as a condition of employment.

During the 105th Congress, the Senate Banking Committee conducted an oversight hearing on mandatory arbitration agreements in the securities industry.[47] While the committee was aware of the NASD's rule change, it heard testimony on the continued need for federal legislation in the securities industry. Representative Markey, the House sponsor of the Act, feared that the rule change would not deter securities firms from imposing individual mandatory arbitration contracts on their employees.[48] An individual contract that requires arbitration for statutory claims may be permissible under *Gilmer* and *Wright*. Such a contract would be analogous to the registration application in *Gilmer*. Consequently, the agreement could be enforceable pursuant to the FAA. Because the agreement would be executed between the individual employee and the employer, there would be no tension between collective representation and individual rights. Further, it is likely that the clear and unmistakable waiver of judicial relief standard required by *Wright* would be satisfied by such an agreement.

While the oversight hearing focused primarily on the securities industry, there was recognition of mandatory arbitration agreements being considered in other industries.[49] Without federal legislation that guarantees judicial relief for statutory claims, employment agreements that limit an employee to arbitration are likely to be similarly enforceable.

In *Gilmer*, the Court based its decision in part on Gilmer's failure to find a legislative intent in the ADEA to preclude the enforcement of a mandatory arbitration agreement. Without such an indication of Congress' intent, the Court concluded that a mandatory arbitration agreement should be enforced. Interpreting *Gilmer*, the Ninth Circuit reviewed the legislative history of the CRA and concluded that Congress believed simply that arbitration was one method of resolving a Title VII claim. The Ninth Circuit contended that claimants should not be forced into an unwanted forum.

While the ADA contains language that encourages the use of arbitration and other methods of alternative dispute resolution, the legislative history of the ADA indicates that judicial relief was not meant to be limited by a mandatory arbitration agreement. The House Report accompanying the ADA states that "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the

[47] *Oversight Hearing*, *supra* note 46.

[48] *Oversight Hearing*, *supra* note 46 (statement of Representative Markey).

[49] *Oversight Hearing*, *supra* note 46 (statement of Patricia Ireland, President, National Organization of Women).

affected person from seeking relief under the enforcement provisions of this Act."[50] The House Report demonstrates that there was a legislative intent to preclude the enforcement of mandatory arbitration agreements in such a manner as to exclude resort to judicial relief. Nevertheless, an amendment of the ADA and other civil rights statutes could resolve definitively whether such an agreement may be enforced.

Those who support arbitration maintain that it is a fast and economical alternative to litigation. Opponents respond that arbitration denies claimants the benefits of discovery and a written record of the proceedings. In addition, opponents also contend that arbitrators are often not trained adequately to resolve statutory claims. The uncertainty that remains after *Wright* will continue pending further case law development or action by Congress.

## Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@cr s.loc.gov, 7-....

[50] H.Rept. 101-485, 101st Cong., 2d Sess., pt. 3, at 76 (1990).