Arbitration and Mediation of Employment and Consumer Disputes

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The Center for Labor and Employment Law is a program established at New York University School of Law. Professor Samuel Estreicher, Professor of Law at New York University and an internationally recognized expert on labor and employment law, serves as the Center's Director.

The objectives of the Center are (a) to promote workplace efficiency and productivity, while at the same time recognizing the need for justice and safety in the workplace and respecting the dignity of work and employees; (b) to promote independent, nonpartisan research that would improve understanding of employment issues generally, with particular emphasis on the connections between human resources decisions and organizational performance; and (c) to provide a forum for bringing together leaders from unions, employees and employers, as well as government officials and representatives of plaintiff and defense perspectives, for informal discussion exploring new frameworks for labor-management relations, workplace justice, fair and efficient resolution of employment disputes and representation in the workplace.

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This volume sits at the intersection of labor law, employment law, and alternative dispute resolution.

Arbitration has long been central to resolving disputes in the labor law context. However, in non-unionized settings, arbitration represents an alternate path for disputes otherwise destined for court. It is perhaps surprising then, that the National Labor Relations Board represents the last holdout against Supreme Court precedent favoring enforcement of arbitration agreements containing class action waivers.

Supreme Court jurisprudence on class action waivers in arbitration has trended towards enforcement. In the employment context, the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp*,[1] established that employees can be forced to arbitrate statutory employment claims through arbitration agreements. More recently, in *AT&T v. Concepcion*[2] and *American Express v. Italian Colors*,[3] the Supreme Court authorized the use of class action waivers in arbitration agreements. In other words, parties can agree that all disputes be resolved in arbitration, and that class or collective actions will be unavailable in any forum. When read in combination with *Gilmer*, *Concepcion* and *Italian Colors* strongly suggest that employees can be bound to arbitration agreements containing class action waivers.

The National Labor Relations Board ("NLRB") has, however, managed to resuscitate the question through its decisions in *D.R. Horton* and *Murphy Oil*. These decisions declare that class action waivers violate Section 7 of the National Labor Relation Act, which guarantees the right of all employees — unionized or not — to engage in concerted activity.[4] Litigation over the NLRB's position has produced a circuit split, which the Supreme Court will decide in *Lewis v. Epic Systems Corp.*,[5] *Murphy Oil*,[6] and *Morris v. Ernst & Young, LLP*.[7]

1. 500 U.S. 20 (1991).
2. 563 U.S. 333 (2011).
3. 570 U.S. 333 (2013).
4. D.R. Horton, 357 N.L.R.B. No. 184 (2012); Murphy Oil USA, Inc., 361 N.L.R.B. No. 72 (2014).
5. Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016) *cert. granted* 2017 WL 125664 (U.S. Jan. 13, 2017) (No. 16-285).
6. Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015), petition *cert. granted*, 2017 WL 125666 (U.S. Jan. 13, 2017) (No. 16-307).
7. Morris v. Ernst & Young LLP, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 2017 WL 125665 (U.S. Jan. 13, 2017) (No. 16-300).

This volume brings together scholars and practitioners from the fields of labor law, employment law, and alternative dispute resolution to share their insights. Acting NLRB Chair, Philip Miscimarra, describes the NLRB's "complicated" relationship with arbitration. Labor lawyers on both sides of the debate (Willis Goldsmith & Blake Pulliam, Jae Chun, and Kalpana Kotagal) offer their perspectives on the upcoming Supreme Court rulings. Labor lawyers Eugene Eisner and Daniel Engelstein then draw upon their considerable experience with labor arbitration to assess the relative benefits and limitations of arbitration in a non-unionized context. Zev Eigen and David Sherwyn then provide a deep dive on how arbitration compares to administrative remedies and litigation in discrimination cases.

Next, scholars advise on legal issues surrounding arbitration. Christopher Drahozal assesses whether arbitration awards have collateral estoppel effect. ADR commentator Lise Gelernter describes the circumstances in which class action waivers are enforceable. Michael Leroy uses the "deflategate" scandal at the NFL to examine judicial review of arbitration awards. And Brian Farkas examines the interaction between non-compete provisions and arbitration provisions.

Practitioners and scholars also describe dispute resolution systems in other contexts. Terry Meginniss & Paul Salvatore discuss a dispute resolution system developed by the parties to the *Pyett* litigation. Jill Rosenberg offers an overview of arbitration in the securities industry. Daniel Hund describes how mediation and arbitration interact with the court system in Europe. David Noll examines the Consumer Financial Protection Bureau's rulemaking regarding arbitration. The volume closes with two articles about dispute resolution in the medical context. Dean Alan Morrison profiles a dispute resolution system used in the medical malpractice context, and David Larson and David Dahl describe the dispute resolution preferences of doctors.

* * *

Thank you to the many contributors for bringing their expertise to bear on these important issues. I am also grateful to Oregon law students Kelly Oshiro and Alena Tipnis for their excellent work.

About the Editors

Elizabeth C. Tippett is an Associate Professor at the University of Oregon School of Law, and the Faculty Co-Director for the Master's Program in Conflict and Dispute Resolution. She researches behavioral ethics, employment law, and decision-making. Her most recent research, published in the *Yale Journal of Law and Technology*, examined how timekeeping software erodes compliance with wage and hour law. She also recently completed a study on harassment training practices, which was profiled on NPR's *Marketplace*.

Professor Tippett's research on disparate impact litigation was cited in two opinions from the United States Court of Appeals and by the Iowa Supreme Court. She has also testified before the House Judiciary Subcommittee on the Constitution and Civil Justice. She is a co-author, with Samuel Estreicher and Michael Harper, of a casebook on employment law and employment discrimination. Before joining the Oregon faculty, Professor Tippett was a practicing employment lawyer at Wilson Sonsini Goodrich & Rosati. She received her undergraduate and law degrees at Harvard University.

Her writing has appeared in the *Washington Post*, *The LA Times*, *The Chicago Tribune*, *The New Republic*, *Slate*, *Newsweek*, and *Fast Company*, among others. She has also appeared on the BBC, Sirius Satellite Ratio, and in the *Wall Street Journal*.

Samuel Estreicher is New York University Dwight D. Opperman Professor of Law, Director of the Center for Labor and Employment Law, and Co-Director of the Dwight D. Opperman Institute of Judicial Administration.

Samuel Estreicher has published more than a dozen books, including Beyond Elite Law: Access to Civil Justice in America (Cambridge University Press 2016) (with Joy Radice) and leading casebooks on labor law and employment discrimination and employment law; and authored more than 150 articles in professional and academic journals. He served as Chief Reporter for the Restatement of Employment Law (American Law Institute 2015). After clerking for Judge Harold Leventhal of the US Court of Appeals for the DC Circuit, practice in labor law firm, and clerking for Justice Lewis F. Powell Jr. of the US Supreme Court, Estreicher joined the NYU School of Law faculty in 1978. He is the former secretary of the Labor and Employment Law Section of the American Bar Association, a former chair of the Committee on Labor and Employment Law of the Association of the Bar of the City of New York. Estreicher served as Chief Reporter of the American Law Institute's Restatement of Employment Law (2015) project. In addition, he maintains an active appellate and arbitration-

mediation practice. The Labor and Employment Research Association awarded him its 2010 Susan C. Eaton Award for Outstanding Scholar-Practitioner. In recent years, Estreicher has published work in public international law and authored several briefs in the Supreme Court and US courts of appeals on international issues. Estreicher received his BA from Columbia College, his MS in industrial relations from Cornell University, and his JD from Columbia Law School, where he was editor-in-chief of the Columbia Law Review.