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## **The Idea of the “General Clause” in American Labor Law**

**Abstract:** European legal systems have long encompassed the concept of the “general clause”, particularly in contract and labor law. The general clause includes unwritten legal norms such as good faith and public morality, and these principles are duly incorporated in the process of construing civil and labor contracts. While the general clause itself is formally absent in common law systems, its principles have found their way into modern British and American law. Two primary examples include the doctrines of good faith and unconscionability. In a broader sense, the idea of introducing rather indeterminate legal norms to be construed and interpreted by judges appears to be well-suited to a common law system. However, as applied to American labor law, the very indeterminacy of these terms has had rather negative effects on the rights of employees and the labor unions that represent them. Specifically, this article examines the good faith requirement in collective bargaining under the National Labor Relations Act (NLRA) and the doctrine of unconscionability in employment arbitration agreements, and concludes that they both should be supplemented by more definite standards in order to effectively protect employees.

**Keywords:** arbitration, collective bargaining, general clause, good faith, unconscionability

### **Introduction**

It is difficult to precisely define the concept of the general clause in European law, in large part due to its inherently amorphous nature. In the context of contract law, one of the best attempts at definition described it as follows: “General clauses or standards (Generalklauseln, clauses generales) are legal rules which are not precisely formulated, terms and concepts which in fact do not even have a clear core. They are often applied in varying degrees in various legal systems to a rather wide range of contract cases when certain issues arise issues such as abuse of rights, unfairness, good faith, fairness of duty or loyalty or honesty, duty of care, and other such contract

terms not lending themselves readily to clear or permanent definition.”<sup>1</sup> The general clause has had a long history in continental Europe, and has been applied to both contract and labor law. However, it has not been as readily embraced by common law systems.<sup>2</sup> As an initial matter, the term “general clause” is not commonly used in English and American jurisprudence to express the definition provided above. Nevertheless, the *concepts* embedded in the general clause – such as good faith, public morals, among others – have slowly been incorporated into English and American law, despite some resistance.<sup>3</sup> This resistance could be traced to a reluctance in Anglo-Saxon doctrine to go outside of the terms of the contract to resolve a case; the matter should stand or fall on the terms written into the contract itself, and not upon external social considerations.<sup>4</sup> In modern times, particularly in the U.S., this recalcitrance has finally given way. For example, in contract law, the Uniform Commercial Code (UCC) in the United States imposes an obligation of good faith and fair dealing in the interpretation and performance of contracts for the sale of goods.<sup>5</sup>

In American labor law, these concepts have also taken root. After an explanation of the basic framework of U.S. labor law and the space provided for standards found in general clauses, this article will focus on two main examples: the duty of employers and unions to collectively bargain in good faith under the National Labor Relations Act (NLRA)<sup>6</sup>, and the application of the common law doctrine of unconscionability to employment arbitration agreements. In both cases, the precise scope of the application of good faith and unconscionability, respectively, will be provided. With respect to the duty to bargain in good faith in the collective bargaining context, case law (in the form of judicial and administrative decisions) has created more specific rules as to what this term does and does not mean. Essentially, employers and unions must meet at reasonable times to try to reach an agreement over wages, hours and

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1 S. Grundmann, D. Mazeaud, General Clauses and Standards in European Contract Law: Comparative Law, EC Law and Contract Law Codification, The Hague 2005, p. 6.

2 D. Wielsch, Relational Justice, “Law & Contemp. Probs.” 2013, vol. 76, p. 208 n. 72.

3 B. Cremades, Good Faith in International Arbitration, “Am. U. Int’l L. Rev.” 2012, vol. 27, pp. 773–774.

4 *Ibid.*; see also A. Von Mehren, The Death of Contract, “Colum. L. Rev.” 1974, vol. 75, p. 1412 (book review). Another view is that, at least in the case of English law, the historical rejection of a good faith requirement in contract law has more to do with “different cultural norms, about what constitutes good faith and fair dealing in some contractual contexts rather than a refusal to recognize that good faith and fair dealing are required.” M. A. Hogg, The Implication of Terms in Fact: Good Faith, Contextualism and Interpretation, “Geo. Wash. L. Rev.” 2017, vol. 85, p. 1665 n. 21, quoting Yam Seng [2013] EWHC [151] (quoting *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] 1 QB 433 (CA) at 439 (Lord Bingham LJ) (appeal taken from Lambeth Cty. Ct.) (Eng.)).

5 U.C.C. § 1–304

6 29 U.S.C. § 158(d)

other terms and conditions of employment.<sup>7</sup> There is no requirement for one side or another to agree to a specific proposal, but they must at least listen and keep an open mind to what the other side has to say.<sup>8</sup>

In terms of employment arbitration agreements, the contract law doctrine of unconscionability has been applied to determine whether or not such agreements are enforceable.<sup>9</sup> Generally, if an agreement is unconscionable – i.e., it is so unfair as to shock the conscience – it is unenforceable.<sup>10</sup> Such dramatic unfairness may exist where there is a gross disparity of bargaining power between the two parties (here, employer and employee), the terms were hidden in fine print, the relative sophistication of the parties, and the terms themselves are grossly unbalanced in favor of the stronger side (the employer).<sup>11</sup> In general, employers have more bargaining power than an individual employee, and arbitration agreements – where the employee agrees to waive their right to the court and have any employment related disputes decided by a private arbitrator instead – present numerous advantages to employers. The legal question is whether or not these considerations make arbitration agreements unconscionable, and thus unenforceable, in the employment context.

These determinations of good faith and unconscionability are made on a case by case basis.<sup>12</sup> Whether or not an employer is bargaining in good faith, or a given employment arbitration agreement is unconscionable, depends on the facts and circumstances of the specific situation. On one hand, this kind of analysis plays into the strength of the common law system. Courts and administrative bodies have flexibility in construing such general terms as good faith and unconscionability, and the law can bend to meet and address new societal conditions. But on the other hand, the inherent indeterminacy of these terms and their case by case application present some special problems in the labor law context. There is often a fine line between

7 *Id.*; *McKinney v. Creative Vision Resources, LLC* 2013 WL 351655 (E.D. La. 2013), \*25.

8 29 U.S.C. § 158(d); *Drivers, Warehouse & Dairy Employees Union, Local No. 75 v. N.L.R.B.* 866 F.2d 1537 (D.C. Cir. 1989); *Rivera-Vega v. ConAgra, Inc.* 876 F.Supp. 1350, 1363 (D. P.R. 1995).

9 See e.g. *Harrington v. Atlantic Sounding Co., Inc.*, 602 F.3d 113, 126 n.7 (2<sup>nd</sup> Cir. 2010) (applying “shocks the conscience” standard to attempt to avoid an arbitration agreement under an unconscionability argument); *Salley v. Option One Mortg. Corp.*, 925 A.2d 115, 592 Pa. 323 (Pa. 2007); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 2006 PA Super. 346 (Pa. Super. Ct. 2006).

10 *Harrington, supra*, 602 F.3d at 126, n.7.

11 *Ashford v. PricewaterhouseCoopers LLP*, 954 F.3d 678, 684–85 (4<sup>th</sup> Cir. 2020) (restating New York law, which requires the employee to show procedural unconscionability (“whether deceptive or high-pressured tactics were employed, the use of fine print in contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power”) and substantive unconscionability (focusing on “the substance of the bargain to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged [.]”).

12 *Barrasso v. Macy’s Retail Holdings, Inc.* 2016 WL 1449567 (D. Mass. 2016), \*5 (unconscionability); *Fallbrook Hosp. Corp. v. N.L.R.B.*, 785 F.3d 729, 734 (2015) (NLRA- “the statutory standard of “good faith” bargaining is determined by the facts of each case...”).

lawful hard bargaining and unlawful bad faith bargaining,<sup>13</sup> and it may take years of litigation to determine the answer to this question. At the end, even if the employer did bargain in bad faith, the remedy is often only an order to go back and bargain in good faith this time.<sup>14</sup> Likewise, case by case determinations of unconscionability may take quite some time. For employers, having the matter tied up in the courts defeats the purpose of the arbitration agreement, and employees have the additional costs and expense of trying to escape such agreements in the often false hope that they can prevail.<sup>15</sup>

In both situations, it is argued that the standards of good faith and unconscionability should be supplemented by bright-line legislative or judicial rules to provide more predictability and more efficiency in the American system of labor law. The duty to bargain in good faith should be augmented by a provision allowing a neutral arbitrator to decide the terms of a collective bargaining agreement where the parties' negotiations have not been successful. In the case of employment arbitration agreements, in lieu of unconscionability determinations, a bright-line rule should be introduced making them generally illegal where the agreement was reached before the dispute arose. Instead, as in EU consumer law, only post-dispute arbitration agreements should be lawful in the employment context. Alternatively, new qualification and selection standards for arbitrators should be mandated in employment arbitration case to restore some fairness and balance to the process, or, through collective action, employers should be persuaded to voluntarily abandon the use of individual employment arbitration agreements.

## 1. General Clauses and American Labor Law: Preliminary Issues

While the principles contained in the idea of general clauses are found in American labor law (if not the term itself), they are often applied in a different way than in European legal systems. This is because of the radically different foundations of U.S. labor law, the basis of which is the employment at will doctrine. Under the common law employment at will doctrine, employment is "at the will of" both the employer and employee. That is, an employer may keep an employee as long it wishes. If the employer at any point wishes to end this employment relationship, it has the complete freedom to do so. Consequently, an employee may be terminated for any

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13 D. Ray, *Doing Well by Being Good: How U.S. Labor Law Encourages Employer Good Faith Behavior*, "Intercultural Hum. Rts. L. Rev." 2019, vol. 14, p. 236.

14 C. Fisk, A. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, "La. L. Re." 2009, vol. 70, p. 56.

15 X.-T. Nguyen, *Disrupting Adhesion Contracts with #Metoo Innovators* "Va. J. Soc. Pol'y & L." 2019, vol. 26, p. 197-99 (noting futility of employees pursuing unconscionability claims in arbitration cases).

or no reason -his or her continued employment is entirely up to the employer.<sup>16</sup> At the same time, the reverse is true: the employee is likewise free to end his or her employment at any time, with or without notice, for any or no reason.<sup>17</sup>

This common law doctrine has been legislatively and judicially modified over time, and presently there are some important exceptions to an employer's unfettered ability to end someone's employment. Most importantly, due to federal anti-discrimination legislation, it is illegal for an employer to terminate an employee for discriminatory reasons, based on his or her status as a member of a protected class (age, sex, disability, race, national origin, religion, genetic background).<sup>18</sup> Federal and state statutes also often make it illegal to fire an employee in retaliation for making a complaint under the statute (for example, reporting a violation of workplace safety laws)<sup>19</sup> or more generally for complaining about the employer's illegal activities (known as "whistleblowing").<sup>20</sup>

The common law itself also recognizes a contract exception to employment at will. If an employment contract exists (whether it be an individual or a collective agreement), the employment at will doctrine no longer applies, and the employer can only fire the employee for a good reason. While at first glance this appears to be a rather gaping exception, in fact it is quite narrow.<sup>21</sup> Employers and employees are certainly free to agree upon an employment contract, but they are not required by law to do so, and in fact the vast majority of American workers do not have any such contract. Approximately 12% of the workforce is covered by a collective bargaining agreement between an employer and a union, and a very limited number of high income workers with unique skills (such as corporate executives) have individual

16 C. Summers, *Employment at Will in the United States: The Divine Right of Employers*, "U. Pa. J. Lab. & Emp. L." 2000, vol. 3, p. 70.

17 K. Varner, K. Hosak, *Blogging: Can Employers and Employees Avoid Getting Caught in the Web?*, "Midwest L.J." 2008, vol. 22, p. 36.

18 42 U.S.C. Section 2000e et seq. (Title VII of the Civil Rights Act, prohibiting discrimination on the basis of religion, gender, race and national origin); 29 U.S.C. §§ 621–634 (Age Discrimination in Employment Act); 42 U.S.C. Section 12101 et seq. (Americans with Disabilities Act); 42 U.S.C. Section 2000ff (Genetic Information Non-discrimination Act).

19 E. Dahlstrom, *ERISA Section 510 should be Interpreted to Cover Internal, Unsolicited Employee Complaints*, "ABA J. Lab. & Emp. L." 2011, vol. 26, pp. 488–89 (summarizing federal statutory anti-retaliation provisions).

20 S. Wynne, M. Vaughn, *Silencing Matters of Public Concern: An Analysis of State Legislative Protection of Whistleblowers in Light of the Supreme Court's Ruling in Garcetti v. Ceballos*, "Ala. C.R. & C.L. L. Rev." 2017, vol. 8, p. 239 (providing summary of whistleblowing laws in all 50 states).

21 R. Andrews, R. Moroko, *Employment-At-Will in New York Remains Essentially Unchanged after a Century of Refinements*, "N.Y. St. B.J." 1999, vol. 71-OCT, p. 9 (express contractual limitations to the employment at will doctrine are rare).

employment contracts.<sup>22</sup> The overwhelming majority of the remaining 88% of employees work without a contract, and therefore remain covered by the general rules of employment at will.

Other exceptions include various constitutional and statutory civil service protections for public sector employees (those working for federal, state and local government)<sup>23</sup>, and the judicially created public policy exception, which prohibits a discharge in the rare event it would conflict with state public policy.<sup>24</sup> An example of this exception would be where an employer fired an employee for serving on jury duty- if employers were free to fire every employee who served on a jury, it would undermine the American justice system, which depends upon citizens serving on juries that decide the outcome of both civil and criminal cases.<sup>25</sup> Finally, one state, Montana, has abandoned the employment at will doctrine, and requires an employer to have good cause to fire an employee.<sup>26</sup>

Consequently, notwithstanding these exceptions, 49 out of 50 states still apply the employment at will doctrine, and the overwhelming majority of American workers are still covered by it in most situations. Given this fact, concepts covered by the general clause, such as good faith, public morality, and societal values, that may apply to discharge cases in Europe (where the employee has an employment contract), would not apply in the U.S. Good faith does not exist in employment at will- the employee can be fired for any or no reason, except for a legislatively prohibited reason, such as discrimination. Therefore, ideas encompassed within the general clause generally would only apply, if at all, to the limited cases where the employer and employee have a contractual relationship (including a collective bargaining relationship) with one another.

It is important to note, however, that “contractual relationship” may mean something other than a formal employment contract. Many employees with no employment contract (and thus subject to employment at will) nevertheless have other contracts with their employer that cover other issues that may arise out of the employment relationship. These types of ancillary contracts typically include arbitration agreements<sup>27</sup>, covenants not to compete<sup>28</sup>, and confidentiality

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22 Union Member Summary, Bureau of Labor Statistics (BLS), January 22, 2021, at <https://www.bls.gov/news.release/union2.nr0.htm> (15.04.2021).

23 W. Corbett, “You’re Fired!”: The Common Law Should Respond with the Refashioned Tort of Abusive Discharge, *“Berkeley J. Emp. & Lab. L.”* 2020, vol. 41, pp. 77–78.

24 *Weaver v. Harpster*, 975 A.2d 555, 562–563 (Pa. 2009).

25 *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. 1978).

26 MONT.CODE ANN. § 39–2-904 (1993, as amended 2001).

27 Y. Li, Applying the Doctrine Of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Action/Arbitration Waivers, *“Whittier L. Rev.”* 2010, vol. 31, p. 665.

28 E. Dalrymple, Would You Like Fries with that Non-Compete? Why Restrictive Covenants Should not be Enforced Against Low Wage Workers, *“Wayne St. U. J. Bus. L.”* 2020, vol. 3, pp. 73–75 (providing overview of covenants not to compete in employment).

agreements<sup>29</sup>. In most cases, these agreements cover situations where the worker’s employment has ended. Thus, arbitration agreements require the employee to bring any claims (given the employment at will rule, typically these claims fall under the discrimination exception) they may have against the employer to a private arbitrator rather than a court, and non-competition and confidentiality agreements prohibit the former employee from working for a competitor and disclosing any trade secrets, respectively. In these types of agreements, the application of general clause concepts such as good faith, a duty of loyalty, and unconscionability may come into play.<sup>30</sup>

Given this context, as noted earlier, this article will focus not on good faith and related concepts to employment termination per se, but instead on their application to collective bargaining and employment arbitration agreements.

## 2. The Application of the Principle of Good Faith in U.S. Labor Law

### A. The Duty to Bargain in Good Faith under the National Labor Relations Act

Despite the reputation of the United States as a bastion of unrestrained capitalism at the beginning of the 20<sup>th</sup> century (or indeed, perhaps because of it), a strong labor movement did emerge in the country by that time to try to protect workers and give them some security through collective bargaining. Strikes by labor unions sometimes took a violent turn and near open warfare broke out between employer security firms (such as Pinkerton) and workers.<sup>31</sup> As the Great Depression of the early 1930s threatened to cause even more labor and economic instability, the Wagner Act was passed in 1935 as a means of protecting the rights of unions and providing some structure and a legal framework for labor relations in the U.S.<sup>32</sup> As later amended by the Taft-Hartley Act in 1947, this Act became the National Labor Relations Act (NLRA), the primary federal law regulating relations between unions and employers in the U.S.<sup>33</sup>

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29 J. Gordon, Silence for Sale, “Ala. L. Rev.” 2020, vol. 71, p. 1123 (reviewing the law of confidentiality or non-disclosure agreements in the employment context).

30 N. Enger, Offers You Can’t Refuse: Post-Hire Noncompete Agreement Insertions and Procedural Unconscionability Doctrine, “Wis. L. Rev.” 2020, vol. 2020, p. 769 (applying unconscionability doctrine to covenants not to compete); Li, Applying..., *op. cit.*, p. 665.

31 A. Gardner, George R.R. Martin’s Faith Militant in Modern America: The Establishment Clause and a State’s Ability to Delegate Policing Powers to Private Police Forces Operated by Religious Institutions, “Wm. & Mary Bill Rts. J.” 2020, vol. 29, p. 220 (commenting on the violence associated with the use of private security firms such as Pinkerton to suppress strikes).

32 J. Morlath, Individual Rights vs. A Seat at the Table: The Guffey Act as an Alternative Model to the Wagner Act, “Geo. J. on Poverty L. & Pol’y” 2013, vol. 21, pp. 125–140 (providing extensive background on the passage and purpose of the Wagner Act).

33 29 U.S.C. Section 151 et seq.

The NLRA sets forth the rights of private sector employees to engage in concerted activities, including the right to strike, form a union and collectively bargain.<sup>34</sup> A special administrative agency, the National Labor Relations Board (NLRB), is charged with enforcing the NLRA.<sup>35</sup> Among other duties, the NLRB administers elections at the workplace where employees vote on whether they would like a union to be their exclusive bargaining representative. If 50% +1 of the employees taking part in the election vote in favor of the union, the union is certified by the NLRB as their exclusive representative.<sup>36</sup> At that point, the union begins the process of negotiating with the employer for a new collective bargaining agreement. The union has at least one year to negotiate such an agreement, before employees who may be dissatisfied can ask the NLRB for a second election to decertify the union as their representative.<sup>37</sup> A key part of the NLRA is the duty placed upon both unions and employers to bargain in good faith over wages, hours and other terms and conditions of employment.<sup>38</sup> It is an unfair labor practice for both employers and unions to violate this duty.<sup>39</sup>

The concept of good faith under the NLRA is a classic form of general clause- it is not clearly defined by law, and left largely to administrative interpretation. Over time, the NLRB and the courts did develop a framework for determining the scope of the obligation to bargain in good faith, and some concrete principles emerged. First, the duty to bargain in good faith did not mean that the parties were forced to agree on any particular term or proposal. Either side always had the right to say no and to reject a proposal.<sup>40</sup> However, the parties did have an obligation to listen and to try to reach an agreement and to that end, had to meet at reasonable times and places in order to bargain.<sup>41</sup> Refusing to meet and talk to the other side obviously would make negotiations impossible and therefore violated the duty to bargain in good faith.<sup>42</sup>

Likewise, a party would act in bad faith if it refused to even listen to or consider a proposal over a mandatory subject of bargaining (i.e., wages, hours and other terms

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34 *Ibid.* at Sections 157, 163.

35 *Ibid.* at Section 153.

36 M. Rubenstein, Attorney Labor Unions, "N.Y. St. B.J." 2007, vol. 79-JAN, p. 23, n. 4.

37 29 U.S.C. Section 159(c)(3).

38 *Ibid.* at Section 158(d).

39 *Ibid.* at Section 158(a)(5) & (b)(3).

40 *Altura Communication Solutions, LLC*, 369 NLRB No. 85, \*1 (2020) ("Section 8(d) of the Act provides that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession").

41 *Richfield Hospitality, Inc.* 369 NLRB No. 111 (2020) (Section 8(d) of the Act requires "the employer to meet at reasonable times with the representative of its employees and confer in good faith with respect to wages, hours, and other terms and conditions of employment."); *In Re Konig*, 318 NLRB 901, 905 (1995) ("An employer's good-faith obligation includes a statutory duty to make its authorized representative available for negotiations at reasonable times and places").

42 *Arbah Hotel Corp.*, 368 NLRB No. 119 (2019) ("A refusal to meet and bargain in good faith violates Sections 8(a)(5) and (1) of the Act.").

and conditions of employment). While the proposal could ultimately be rejected, the other side should at least have the opportunity to present and explain it; it could not be absolutely foreclosed in advance.<sup>43</sup>

Depending on the circumstances, regressive bargaining could be evidence of a lack of good faith. Regressive bargaining occurs when the employer makes progressively worse offers as the negotiations continue. There may be legitimate reasons for such conduct, especially when there are certain economic time pressures, but taken as a whole they could also indicate that the employer has no intention of ever reaching an agreement.<sup>44</sup>

Where one side formally meets the other for negotiations, but never makes any concessions or modifications to their original proposals, it may be considered to be “surface” bargaining and in bad faith. Arguably that side is simply going through the motions of bargaining, rather than engaging in actual negotiations.<sup>45</sup> At the same time, neither side is required to make a concession during bargaining, and so whether a party is engaging in surface bargaining or lawful hard bargaining is often difficult to discern.<sup>46</sup> What is more clear is that engaging in a pattern of give and take during negotiations, including offering some concessions or accepting some of the other side’s proposals, is considered positive evidence of good faith.<sup>47</sup>

On the employer’s side, bargaining in good faith also requires it not to make unilateral changes to wages, hours and other terms and conditions of employment during the course of negotiations. In essence, from the time the union wins an election and is certified by the NLRB, working conditions are frozen and may only be changed (with few exceptions) if the union agrees. Logically, if the employer could unilaterally lower wages at its discretion, negotiations on that subject with the union would be meaningless. Therefore, the act of making unilateral changes is itself a failure to bargain in good faith. An important exception to this rule is the right

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43 *Great Lakes Coal Co.*, 268 NLRB 1207, 1215 (1984), quoting *NLRB v. Cable Vision, Inc.*, 660 F.2d 1, 4 (1st Cir. 1981) (“an attitude of open mindedness is a hallmark of good faith bargaining”).

44 *Brinks USA*, 354 NLRB 312, 325 (2009) (defining regressive bargaining, which is not per se illegal but can be evidence of a lack of good faith where the circumstances do not explain a legitimate rational for it).

45 *Midwest Casting*, 194 NLRB 523 n. 13 (1971) (“surface bargaining by definition is a technique of going through the motions or appearance of bargaining on all subjects”).

46 *K Mart Corp.* 242 NLRB 855, 876 (1979) (noting “the subtle distinction between “surface bargaining” and “hard bargaining”).

47 *Stuart Radiator Core Manufacturing Co., Inc.*, 173 NLRB 125, 130 (1968) (“an employer is not required to make any concessions whatever to establish its good faith in bargaining, and the absence of concessions alone may not ground a finding of a refusal to bargain, but such concessions as an employer does make during negotiations may properly be weighed to determine whether they constitute affirmative evidence of good faith bargaining”); *Apt Medical Transportation, Inc.*, 333 NLRB 760, 767 (2001) (the employer’s agreement on some issues and record of making concessions is evidence of good faith bargaining).

to make unilateral changes after an impasse in negotiations takes place.<sup>48</sup> Impasse is a legal concept, and only takes place when it is absolutely clear that both sides are not willing to make any more concessions and have reached their respective limits in negotiations. There are no fixed time thresholds that must be passed in making a determination that the parties are at impasse, but the longer the parties have not made any movement whatsoever in negotiations makes a finding of an impasse more and more likely.<sup>49</sup>

### **B. Enforcement of the Duty to Bargain in Good Faith**

If the union believes the employer is not bargaining in good faith in violation of the NLRA, it may file an unfair labor practice charge against the employer with the NLRB. The NLRB then does an investigation to determine if the employer did actually violate the Act. If the investigation supports the union's claims, the NLRB issues a formal complaint against the employer. Assuming the matter is not informally resolved, it proceeds to a hearing before an administrative law judge (ALJ), where the NLRB acts as a kind of prosecutor. After the ALJ makes a recommended decision, it may be accepted by the parties (the union, employer and the NLRB) or appealed by one or all of them. This appeal goes to a special five (5) member board in Washington DC (confusingly also known as the NLRB) whose members are appointed by the President of the United States for fixed terms.<sup>50</sup> In the past 35 years, the NLRB has become increasingly political, with Republican appointees supporting employers and Democratic appointees more oriented towards supporting unions.<sup>51</sup> The parties may appeal the NLRB's decision to a Federal Court of Appeals, and in turn, they may further appeal the Court of Appeal's decision to the U.S. Supreme Court. However, under the rules of the Supreme Court, there is no automatic right of appeal, and the Court may choose to hear the appeal (or not) at its discretion.<sup>52</sup>

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48 *CP Anchorage Hotel 2, LLC, D/B/A Hilton Anchorage* 370 NLRB No. 83 (2021) ("During contract negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole").

49 *Triumph Aerostructures, Vought Aircraft Division*, 369 NLRB No. 123 (2020).

50 29 U.S.C. § 153.

51 M. Bodah; M. Schneider, *Politics, Ideology, and Adjudication: The German Federal Labor Court and the U.S. National Labor Relations Board*, "Comp. Lab. L. & Pol'y J." 2014, vol. 36, p. 1; A. Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions Through The Clinton And Bush II Years*, "Berkeley J. Emp. & Lab. L.", 2016, vol. 37, p. 223.

52 U.S. Supreme Court Rule 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons"). The entire unfair labor practice charge process is helpfully laid out in a chart prepared by the NLRB. See *Unfair Labor Practice Process Chart*, <https://www.nlr.gov/resources/nlr-process/unfair-labor-practice-process-chart> (15.04.2021).

Critically, the entire investigative, adjudicatory and appeal process may take several years or longer to complete. Unfortunately, if at the end of this process it is determined that the employer violated the NLRA by failing to bargain in good faith, there are very limited remedies available for the union. Consistent with the general principle that a party cannot be required to agree to any proposal in collective bargaining, the most common remedy is an affirmative order that the employer return to the bargaining table and commence negotiating in good faith. In the worst cases this can result in a circular process where a new charge is filed and the NLRB once again starts the process of determining whether there was a renewed failure to bargain in good faith. In the meantime, there is no collective bargaining agreement in place.<sup>53</sup>

Where an employer has violated the duty to bargain in good faith by making unilateral changes, more concrete remedies may be available. The employer must rescind the change and, in the case it caused economic harm to the employees (as in the case of a wage cut), restitution must be paid.<sup>54</sup> Where the employer's change involved increases in salary or benefits, formally it also should be rescinded, but in such cases the union typically waives this requirement as it has no interest in upsetting employees by taking money away from them.<sup>55</sup> Consequently in these instances the union's bargaining authority is effectively undermined and there is no real remedy.

During President Obama's administration the NLRB began to expand the remedies available for failing to bargain in good faith. It began to award bargaining expenses incurred by the union during the period the employer was bargaining in bad faith.<sup>56</sup> The greater part of these expenses often consisted of the value of the union lawyers' time spent in fruitless negotiations, and these costs were not necessarily minimal. Beyond awarding these kinds of compensatory damages, however, there was little more the NLRB could do absent new legislation. This is because the remedies under the NLRA are designed to be equitable in nature, to restore the status quo ante that existed before the violation occurred. Unlike other American

53 H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 "Cornell J.L. & Pub. Pol'y" 2009, vol. 19, p. 108; Fisk and Pulver, *First Contract...*, *op. cit.*, p. 80 (giving example of seven (7) year delay in final ruling in bad faith bargaining case). However, an employer which fails to bargain in good faith after a court has ruled against it would risk being found in contempt of court, which could carry the risk of fines.

54 *HTH Corp.*, 361 NLRB 709, 716 (2014) ("The standard affirmative remedy for unlawful unilateral changes to the terms and conditions of employment is immediate rescission of the offending changes to the status quo ex ante" and to compensate the employees for any losses, such as back pay).

55 *Scepter Ingot Castings, Inc.*, 341 NLRB 997 (2004) (unilateral change granting wage increases would not be rescinded unless requested by the union).

56 J. Wilson and A. Laird, *Practicing before the NLRB*, "The Advoc. (Texas)" 2014, vol. 69, p. 79 (noting NLRB General Counsel Memorandums from 2011 and 2014 calling for such remedies in bad faith bargaining cases where union is seeking first contract).

employment legislation (particularly anti-discrimination law), there are no fines or punitive damages awarded under the NLRA. There is a certain logic behind this rule, because one of the goals of the NLRA is to look after the collective interests and rights of the workers.<sup>57</sup> If the employer was forced to go into bankruptcy and close because of paying high damages for labor law violations, in the end the workers would all lose their jobs. Nevertheless, it does create serious difficulties in enforcing the duty to bargain in good faith.

Finally, as in the case of committing any other unfair labor practice, the NLRB can require that the employer post a notice to its employees that it has violated the NLRA by failing to bargain in good faith with the union. This notice posting remedy provides a small moral victory of the union, in that that the employer is in effect admitting to the workforce that it violated the law.<sup>58</sup> Sometimes this can be used by the union to mobilize the continued support of the workers it represents, i.e., that the slow progress in negotiations is the result of the employer's illegal conduct, and not the fault of the union.

In sum the good faith bargaining requirement is difficult to enforce. Any determination of what is the fine distinction between hard bargaining and bad faith bargaining must be done on a case by case basis. The litigation of such cases may take years and the end result may be no more than an order to return to the bargaining table and negotiate – this time – in good faith. As a result, employers intent on not reaching an agreement with a union can usually achieve their goal with impunity.<sup>59</sup> Ultimately, the employees become impatient with the lack of progress in negotiation and begin to turn on and blame the union. Eventually, they may even decide to decertify the union as their bargaining representative.<sup>60</sup>

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57 R. Worster, *If it's Hardly Worth Doing, it's Hardly Worth Doing Right: How the NLRA's Goals are Defeated Through Inadequate Remedies*, "U. Rich. L. Rev." 2004, vol. 38, p. 1091 (observing that the NLRA has extremely limited penalties available, "since "the NLRA's goal is the achieving of workplace peace...neither labor nor management should be too harshly penalized."); R. Steber, *Alternative Remedies for Undocumented Workers Left Behind in a Post-Hoffman Plastic Era*, "Cath. U. L. Rev." 2019, vol. 68, p. 774 (NLRB precluded from ordering punitive damages and fines).

58 T. Barnes, *Making the Bird Sing: Remedial Notice Reading Requirements and the Efficacy of NLRB Remedies*, "Berkeley J. Emp. & Lab. L." 2015, vol. 36, pp. 353–360 (2015) (reviewing the purposes and value of notice posting as a remedy for unfair labor practices).

59 M. Malin, *Labor Law Reform: Waiting for Congress?* "Chi.-Kent L. Rev." 1994, vol. 69, pp. 286–287 (employers can effectively engage in surface bargaining with impunity).

60 C. Meeker, *Defining "Ministerial Aid": Union Decertification under the National Labor Relations Act* "U. Chi. L. Rev." 1999, vol. 66, pp. 1000–1001 ("As a corollary of the employees' freedom to choose a union, the Act also grants employees the qualified right to oust an incumbent union through decertification.... The decertification procedure seems simple. At least 30 percent of the represented employees must sign either a petition or individual cards asserting that they no longer want to be represented by the union. They must file this petition with the NLRB. The NLRB

### C. Suggestions for Reform

There are two main problems with the NLRA’s duty to bargain in good faith: 1) It is ambiguous and 2) lacks effective enforcement. Of these two problems, the first-ambiguity – is less significant. Of course, by its very nature, the term good faith is indeterminate.<sup>61</sup> An employer with a strong negotiating position that does not offer any or few concessions during bargaining may still be acting in good faith depending on all the facts and circumstances. As a result, the NLRB and ultimately the courts must painstakingly analyze all the facts before making a determination whether the employer was or was not acting in good faith.<sup>62</sup> This takes time and also occupies the resources of the NLRB (in its investigative and prosecutorial role) and the union in proving their case. A case by case approach to resolve the ambiguity of good faith likewise does not provide employers and unions with a clear signal of what precise behavior is or is not bad faith, so it could be identified and avoided in the future.

These issues, however, are difficult to correct. Any general clause idea, such as good faith, is not precise and lends itself to judicial interpretation. This is not a problem unique to labor law. In common law systems such as the U.S., over time a body of administrative and case law develops, interpreting the contours of the good faith requirement based on the cases that are litigated to their conclusion. This body of case law – in this example, the precedent of the NLRB, Federal Courts of Appeals and the Supreme Court – provides general guidance to the parties as to what is and is not good faith in labor negotiations. While each case is technically unique, they may collectively fall into certain categories of behavior and this in turn provides a measure of clarity.<sup>63</sup>

Perhaps, within the developing precedent, the NLRB could introduce more “bright line” principles about what constitutes bad faith bargaining instead of relying

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verifies the veracity and validity of the petition and schedules an election; if the union receives 50 percent or less of the votes, decertification is complete”).

61 M. Harper, *Judicial Control of the National Labor Relations Board’s Lawmaking in the Age of Chevron and Brand X*, “B.U. L. Rev.” 2009, vol. 89, p. 189 n. 123 (Recognizing the ambiguity of the duty to bargain in good faith); J. Hedlund, *An Economic Case for Mandatory Bargaining over Partial Termination and Plant Collection Decisions*, “Yale L.J.” 1986, vol. 95, p. 949 n. 89 (noting ambiguous nature of good faith and impasse under the NLRA); A. Strom, *Caught in a Vicious Cycle: A Weak Labor Movement Emboldens the Ruling Class*, “U. St. Thomas L.J.” 2019, vol. 16, p. 32 (“Congress provided that employers must ‘meet at reasonable times and confer in good faith’, but it provides no further details about an employer’s bargaining obligation”).

62 D. Ray, C. Cameron, *Revisiting the Offensive Bargaining Lockout on the Fiftieth Anniversary of American Ship Building Company v. NLRB*, “ABA J. Lab. & Emp. L.” 2016, vol. 31, p. 348 (“There are few bright lines for assessing the legality of bargaining”).

63 D. Koplów, *Long Arms and Chemical Arms: Extraterritoriality and the Draft Chemical Weapons Convention*, “Yale J. Int’l L.” 1990, vol. 15, p. 1 n. 352 (Winter, 1990) (analogizing to the NLRA and observing that commentaries and case law provide “meaningful interpretation” on the scope of the ambiguous term “good faith”).

upon the totality of circumstances to reach a decision.<sup>64</sup> In effect, this could lead to a more structured pattern of negotiations – the number and length of required bargaining sessions, restrictions on regressive proposals, for example – and therefore represents something of a trade-off in terms of both sides' flexibility.

More significant than defining good faith is enforcing it in the context of collective bargaining. The existing enforcement mechanisms leave much to be desired. There is rarely an effective remedy and the cases themselves take far too long to be resolved. In such circumstances the good faith requirement can be rendered meaningless in many situations.<sup>65</sup> To correct this problem, a number of reforms have been suggested. These range from relatively minor ones to larger, structural reforms of the NLRA itself. They include: banning employers guilty of repeated unfair labor practices (including bargaining in bad faith) from bidding on federal contracts<sup>66</sup>; revising the definition of impasse to delay or even prohibit the employer's right to make unilateral changes<sup>67</sup>; penalizing employers with monetary fines for failing to bargain in good faith<sup>68</sup>; and

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64 W. Corbett, A Proposal for Procedural Limitations on Hiring Permanent Striker Replacements: "A Far, Far Better Thing" than the Workplace Fairness Act, "N.C.L. Rev." 1994, vol. 72, p. 813 n. 170 (citing professor Douglas Ray for the conclusion that under the NLRA "there is no bright line between good faith and bad faith bargaining"); J. Cook, Sizing Up Labor Relations Down Under: What Australia's Fair Work Commission Can Teach the National Labor Relations Board, "Wis. Int'l L.J." 2018, vol. 36, pp. 147–148 (pointing out that Australia's Fair Work Act's requirements for good faith bargaining are a "more detailed codification" as compared to the NLRA).

65 M. Malin, *Labor Law...*, *op. cit.*, p. 286 (Weak remedies under the NLRA negate "much of the economic incentive for an employer to bargain in good faith.").

66 As far back as the 1970s, legislation was introduced in Congress "providing for debarment from federal contracts of persons who willfully violate final Board or court orders", but it was never enacted. D. Nolan, R. Lehr, Improving NLRB Unfair Labor Practice Procedures, "Tex. L. Rev." 1978, vol. 57, p. 47 n.7. At the state level, Wisconsin had debarred contractors who repeatedly violated the NLRA, but this law was held by the Supreme Court to be preempted by federal labor law. *Wis. Dep't of Indus. Labor and Human Rel. v. Gould*, 475 U.S. 282, 289 (1986). President Clinton signed an executive order which would have debarred employers who hired permanent strike replacements from federal contracts, but this order was likewise held to be preempted in *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996). More recently President Obama signed an Executive Order which would have required federal contractors to report certain federal labor law violations, see July 2014 Fair Pay and Safe Workplaces Executive Order 13673, but this was in large part blocked by a court injunction and then overturned by Executive Order 13782 in 2017 after the election of President Trump. U.S. Dept. of Labor, Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces" at <https://www.federalregister.gov/documents/2017/11/06/2017-23588/guidance-for-executive-order-13673-fair-pay-and-safe-workplaces> (15.04.2021).

67 E. Dannin, From Dictator Game to Ultimatum Game . . . and Back Again: The Judicial Impasse Amendments, "U. Pa. J. Lab. & Emp. L." 2004, vol. 6, p. 241.

68 L. Compa, Not Dead Yet: Preserving Labor Law Strengths while Exploring New Labor Law Strategies, "UC Irvine L. Rev." 2014, vol. 4, p. 609 (calling for "substantial fines for repeat NLRA violators."); R. LaJeunesse, Jr., The Controversial "Card-Check" Bill, Stalled in the United States Congress, Presents Serious Legal and Policy Issues, "Tex. Rev. L. & Pol." 2010, vol. 14, p. 215 (the

introducing an interest arbitration requirement where the parties fail to reach an agreement during negotiations.<sup>69</sup> Each proposal will be dealt with in turn below.

As noted above, remedies for failing to bargain in good faith tend to fall into the category of cease and desist – the ruling requires the employer to stop its bad behavior and return to negotiations in good faith. The recent actions of the NLRB awarding bargaining costs to the union cause somewhat more pain to the employer, and therefore may act as more of a deterrent, though not always. Unions do not always retain expensive lawyers to conduct negotiations on their behalf, and in many cases of bad faith bargaining there are not that many negotiation sessions in the first place from which costs may be recovered. Even where these costs exist, the benefits derived from refusing to negotiate in good faith – effectively destroying the union and avoiding a collective bargaining agreement – greatly outweigh them. All of the proposals for reform increase, to some extent, the costs for the employer for breaking the law and incentivize it to bargain in good faith according to the NLRA.

Prohibiting repeat labor law violators from bidding on federal contracts can be a significant penalty for some employers. This is especially true for those employers who rely on such contracts for a substantial part of their revenue. If an employer repeatedly refused to bargain in good faith with labor unions, it could find itself subject to such a ban, and the lost revenue from such contracts might even outweigh the increased labor costs associated with reaching a new collective bargaining agreement with the union. Certainly, this would be a helpful step, but it has some inherent limitations. It would only impact employers that have substantial federal contracts, and therefore would have no effect on other employers not involved in federal contracting. In addition, its effectiveness would be linked to precisely how an employer would be designated as a repeat labor law violator. If a large number of unfair labor practice violations were required to reach this status, it would only effect the most abusive employers which regularly violate the NLRA. Other union-free employers, who might only deal with a union once or twice after an election, would be less at risk for being designated as a repeat violator. Still, even in these cases, such a provision could at least induce employers who fall into these categories to bargain in good faith with a new union, and therefore would be a valuable step in

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proposed Employee Free Choice Act (EFCA) would have “imposed fines of up to \$20,000 for each unfair labor practice committed by employers who “willfully or repeatedly” engage in unlawful conduct”); and the current Protecting the Right to Organize (PRO) Act legislation, passed by the House of Representatives but pending in the Senate, H.R. 2474, which would permit fines of up to \$50,000-\$100,000 for unfair labor practices in certain circumstances, and fines of up to \$10,000 for violating an order of the NLRB. See <https://www.congress.gov/bill/117th-congress/house-bill/842/text> (15.04.2021).

69 Interest arbitration provisions were found in the earlier proposed EFCA, LaJeunesse, *The Controversial...*, *op. cit.* p. 215, and are present in the current PRO Act. <https://www.congress.gov/bill/117th-congress/house-bill/842/text> (15.04.2021).

the right direction. By itself, however, it is unlikely to entirely correct the problem of enforcement and change employers' behavior.

Changing the rules of impasse would also provide motivation for employers to negotiate in good faith. The unilateral change rule, wherein employers cannot make changes to wages, hours and other terms and conditions of employment during the pendency of negotiations without the union's agreement, does promote good faith bargaining. Perhaps an employer would like to restructure the workforce, change the salary structure of certain positions, or increase employee co-payments for health insurance. The union might agree with one or even all of these ideas, of course in exchange for benefits in other areas. As a result, the rule stimulates movement in each side's negotiating positions, and brings the parties closer to a collective bargaining agreement.<sup>70</sup> However, there are two limitations to the rule which make it less effective. First, an employer is always free to implement unilateral changes after an impasse in negotiations is reached, i.e., where there is no movement on either side and a deadlock has occurred. An employer intent on not reaching an agreement might even come to an impasse sooner than one acting in good faith, and thereafter would be free to make whatever changes it saw fit.<sup>71</sup> Second, the remedy for an illegal unilateral change is simply restoring the status quo ante, and therefore is only punitive in the case of negative economic changes, i.e., reducing wages. In other areas, returning to the status quo is less problematic. Revising the legal standards for reaching impasse, making it more difficult to attain, would at least address the first problem. It would encourage employers to negotiate with the union in good faith in order to implement any needed changes, with the knowledge that impasse would not occur any time soon.

There are, however, some obstacles to revising the standards on determining when an impasse occurs to make it stricter. The NLRB would have to provide a reasonable justification to this change, as the impasse standards have been rooted for a long time in both NLRB and Supreme Court precedent. Theoretically, there could be some difficulty in making such a justification. Arguably, impasse either exists or it does not. If there is no movement in negotiations and no hope for a breakthrough, in that situation it would be unreasonable for the NLRB to now rule that this does not constitute an impasse. Of course, the NLRB could reasonably tighten its standards for less absolute situations, where the situation is not as clear, making it more difficult to reach an impasse. Another possible solution is to simply eliminate the impasse rule, and prohibit any unilateral changes until both sides agree to them during collective

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70 H. Drummonds, Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy, "La. L. Rev." 2009, vol. 70, p. 97 n. 107 (acknowledging that the unilateral change rule is one area where "NLRA remedies do bite").

71 E. Dannin, From Dictator..., *op. cit.*, p. 264 (noting advantage employer has in being able to implement changes after impasse).

bargaining. This would obviate the need to create a complex standard that would only delay impasse. While such a change would be less realistic than incrementally making the standards for impasse more difficult to satisfy, it has the advantage of clarity and would likewise force the employer to bargain in good faith in order to achieve their business and organizational needs.<sup>72</sup>

Introducing monetary fines for employers which violate the NLRA by bargaining in bad faith might also be an effective incentive to correct their behavior. Administrative fines are not unheard of in American labor law. The Occupational Health and Safety Administration (OSHA) levies fines against employers who violate federal health and safety laws, and in fact this is the primary means of getting employers to comply with these laws.<sup>73</sup> As proposed in the PRO Act legislation currently pending before the Senate, the NLRA could likewise be amended to provide for various degrees of fines for violating that law, including for violations of the duty to bargain in good faith. Fines would also avoid the danger associated with punitive damages; while excessive punitive damages could bankrupt a firm, the NLRB could tailor the amount of fines to ensure that they would not have that extreme an effect. Whether or not fines would solve the enforceability of the duty to bargain in good faith would in large part be determined by their amount and how often they were imposed. Giving a cautionary example from the Covid 19 pandemic, OSHA only levied a nominal amount of fines against employers in the meat packing industry for gross safety violations, which in turn had no impact in improving worker safety at such a critical time.<sup>74</sup>

The most effective change might be the largest and most dramatic. This would be the creation of a system of interest arbitration in the NLRA. In interest arbitration, a neutral arbitrator would decide the terms of the collective bargaining agreement if the parties were unable to do so, after either a certain fixed point in time or after impasse has been reached in negotiations. Normally, the relative economic power of the parties determines how and whether a collective bargaining agreement will be reached, and how equitable the terms of that agreement will be. This economic power can be expressed by the union through strikes, and by an employer by lockouts and its ability to sustain its business during a strike. Ideally, both sides feel a degree of pain and discomfort – the union because the workers are not receiving a salary during

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72 *Ibid.* (arguing for the abrogation of the impasse rule in collective bargaining).

73 W. Viscusi, *The Fatal Failure of the Regulatory State*, “Wm. & Mary L. Rev.” 2018, vol. 60, pp. 594–600 (outlining how fines are used by OSHA, but criticizing the limitations placed on the amounts of these fines).

74 J. Brudney, *Forsaken Heroes: Covid-19 and Frontline Essential Workers*, “Fordham Urb. L.J.” 2020, vol. 48, p. 23 (“While OSHA issued a handful of subsequent citations in early September - to two meatpacking plants and several healthcare facilities--for failure to protect workers from the coronavirus, the limited nature of these citations, the de minimis remedies, and the belated timing are all problematic”).

the course of the strike, and the employer through economic losses caused by the absence of its workforce and a possible shutdown of or reduction in its operations. This will prompt them to negotiate in good faith and find some middle ground upon which to base a new agreement.<sup>75</sup> However, in the past special situations existed for certain categories of workers where the role of strikes and application of economic power did not apply. Specifically, this included public safety workers, such as police and firefighters, who by law did not have a right to strike (since such strikes would endanger public safety). Without a right to strike, police and firefighter unions had limited means to apply pressure on their employers to reach a favorable agreement. In response, some states introduced an interest arbitration requirement for negotiations with public safety employees. Whatever issues the parties could not agree upon in collective bargaining would be decided by an interest arbitrator. In reaching his or her decision, the arbitrator would primarily look to comparable workers at other similarly situated localities and review their wages and other employment conditions, the financial health of the employer, and any special circumstances that might exist (i.e., police working in a city with an especially high violent crime rate). In his or her arbitration award, the arbitrator would craft the terms of the collective bargaining agreement to ensure all these factors were taken into account.<sup>76</sup>

An idea that has been gaining some momentum is to import the interest arbitration system used for public safety employees into the NLRA, at least in the cases where the parties are negotiating an initial collective bargaining agreement.<sup>77</sup> In such situations, the union, for its part, would give up its right to strike. While giving up the right to strike may seem to be an enormous sacrifice – after all, it is a core principle of almost every labor law system – in the United States it would be one worth making. One of the practical reasons for the breakdown of good faith collective bargaining in the U.S. has been the evisceration of the right to strike. Strikers may be permanently replaced by their employers, and therefore every strike carries the risk of them losing their jobs not just for the duration of the strike, but forever. Unions themselves are becoming more and more a rarity in American workplaces, and in 2021 only represented 6.4% of private sector workers (declining from a high

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75 J. Gross, *Yet Another Reappraisal of the Taft-Hartley Act Emergency Injunctions*, “U. Pa. J. Lab. & Emp. L.” 2005, vol. 7, p. 309 (Explaining that under the original Wagner Act, “The economic weapons of both employers and unions were left unfettered, providing an economic incentive to bargain in good faith. Justice Brennan explained that good faith bargaining and economic pressure exist “side by side”).

76 M. Malin, *Two Models of Interest Arbitration*, “Ohio St. J. on Disp. Resol.” 2013, vol. 28, p. 145 (providing an overview of interest arbitration in the public sector).

77 K. Andrias, B. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, “Yale L.J. 546” 2021, vol. 130, p. 624 (making this as one suggestion for labor law reform).

of 30–35% in the 1950s<sup>78</sup>). Calling unsuccessful strikes would put existing unions further at risk. For these reasons, the number of strikes has progressively declined in the U.S. and by 2021 are few and far between.<sup>79</sup> Consequently, in these conditions, employers recognize that there is little danger of the union resorting to a strike during negotiations. The union has little leverage to persuade the employer to agree to its demands or to offer any concessions. This fact encourages employers to take an aggressive stance in bargaining that may cross the line into bad faith bargaining.

Arguably, interest arbitration would restore this balance. An employer that continuously rejected all union proposals and otherwise made any negotiations difficult would not be, in the end, rewarded by this conduct by avoiding both the union and a collective bargaining agreement. Instead, an interest arbitrator would award a new contract with reasonable terms based in large part on what comparable employers are providing. If the employer has special concerns or issues it needs addressed, it would do well to negotiate these terms with the union before an arbitrator imposes his or her own terms. In other words, the pendency of interest arbitration creates the impetus for the employer to negotiate in good faith.<sup>80</sup> When unions were stronger, this role was fulfilled by the threat of a strike, but this is no longer the case today.

Drawing from the experience of the use of interest arbitration for police and firefighters, there is a possibility that its introduction in the private sector would actually reduce the importance of bargaining in good faith as a means of reaching an agreement. Because the parties know they will have an agreement ultimately awarded by the interest arbitrator, irrespective of whether or not they make any progress in negotiations, they may actually lack any incentive to engage in serious bargaining beforehand. There is some truth to this argument<sup>81</sup>, although its application to the private sector is somewhat negated by the unique conditions present in public sector labor negotiations. Public sector employers have a motive to simply let the interest arbitrator to decide everything, since they can then blame the arbitrator for any excessive wages and benefits awarded in the collective bargaining agreement. In contrast, if a city (for example) agreed to such increases voluntarily during

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78 M. Bodie, Labor Interests and Corporate Power, “B.U. L. Rev.” 2019, vol. 99, p. 1123 n. 1.

79 U.S. Bureau of Labor Statistics, Work Stoppages Summary (only 8 major work stoppages in 2020, third lowest total since 1947) (February 19, 2021) <https://www.bls.gov/news.release/wkstp.nr0.htm> (15.04.2021).

80 E. Dannin, NLRA Values, Labor Values, American Values, “Berkeley J. Emp. & Lab. L.” 2005, vol. 26, p. 235 (arguing for the introduction of interest arbitration as a remedy for bad faith bargaining, and contending it would give an employer an incentive to negotiate in good faith).

81 M. Malin, Two Models..., *op. cit.*, p. 145, noting this point, but also observing that in some states more contracts are reached through collective bargaining than through interest arbitration, and in some forms of interest arbitration – particularly the tripartite model, where the union and the employer appoint their own arbitrator- a form of negotiation (between the arbitrators) continues to take place within the arbitration process.

bargaining, the electorate may hold the mayor and other elected officials accountable at the ballot box.<sup>82</sup> Likewise, public sector unions sometimes have a disincentive to actively negotiate prior to the interest arbitration process. Statewide unions may have an advantage over smaller towns and public entities in the arbitration process, due to the repeat player effect in arbitration. The repeat player problem occurs where one side is a frequent user of arbitration services, and the other party is a one-time user.<sup>83</sup> As the arbitrator is a private person, he or she is paid by the parties rather than the state, and is likely to get much more future arbitration work from a repeat player in the arbitration process. Because of this fact, the arbitrator intentionally or even unconsciously may give more favorable awards to the repeat player (the statewide union) rather than to the one time user (here, the town).<sup>84</sup> In the private sector, however, both of these considerations are not present. There are no election concerns for a company, and multinational companies would be just as much a repeat player in arbitration as international unions.

There has also been a suggestion that interest arbitration should only be used as a *remedy* for bad faith bargaining, rather than a default rule for all initial collective bargaining agreements.<sup>85</sup> That is, interest arbitration would only take place after a finding was made that the employer bargained in bad faith, where the arbitrator would fill in terms of the contract in areas where no agreement has been reached. However, this would be an inferior solution. The parties would be forced to engage in drawn out, time consuming litigation to determine whether or not the employer was bargaining in good or bad faith, which, as has been pointed out, is often a very fine line. A default rule avoids this problem and the parties both know that if an agreement is not reached the terms of the contract will be determined in interest arbitration.

The PRO Act introduced in the United States Congress contains a number of these reforms, particularly the opening the possibility of monetary fines for violating the Act and most importantly for the introduction of interest arbitration. As a result of the November, 2020 elections, the Democratic party, which has traditionally sympathized with labor unions, now holds both chambers of Congress (the House and the Senate) as well as the Presidency. President Joe Biden has publicly supported the passage of the PRO Act and there is speculation that with the Democrats in control of Congress that it actually has some chance of passage and becoming law. Unfortunately, this is probably an overly optimistic scenario. While both the House

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82 *Ibid.* at pp. 150–151 (interest arbitration is a popular way to avoid accountability in the public sector).

83 L. Bingham, On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards, “McGeorge L. Rev.” 1998, vol. 29, p. 224 (showing the disadvantages “one shotters” face in employment arbitration).

84 A. Colvin, An Empirical Study of Employment Arbitration: Case Outcomes and Processes, “J. of Empirical Legal Stud.” 2011, vol. 8, pp. 12, 14–15 (potential arbitrator bias).

85 L. Compa, Not Dead..., *op. cit.* p. 609; Cook, Sizing Up..., *op. cit.*, p. 147–48.

and Senate must pass a bill for it to be sent to the President for his signature and become law, the Senate has a traditional “filibuster” rule that requires most legislation to pass by 60 (out of 100) votes. The Democrats only have 50 votes in the Senate, and therefore do not have the votes to pass the PRO Act. There is some discussion, however, of the Senate abolishing the filibuster rule so it may advance its legislative agenda, including the PRO Act, and so the end result is not clear at the time of writing.<sup>86</sup> Even if it is not successful in 2021, the idea of interest arbitration should be revived, as it represents the best chance to breathe new life into the good faith bargaining requirement set forth in the NLRA.

### **3. The Application of the Doctrine of Unconscionability to Employment Arbitration Agreements**

#### **A. The Existing Legal Framework**

##### **1. The Purpose of Individual Employment Arbitration Agreements**

While individual employment contracts are rare in the U.S., certain ancillary types of contracts that often deal with post-employment situations are quite popular. The most common of these is an agreement to arbitrate any legal disputes that may arise out of the employment relationship. As the vast majority of employment relationships are covered by the employment at will doctrine, where the employee may be fired for any or no reason, the legal disputes referred to are mostly targeted towards statutory employment discrimination and wage claims. Such statutory labor claims are outside the scope of employment at will, and have the potential for high damage awards. Individual wage claims may not have a high value in and of themselves, but there has been a trend for them to be combined in collective or class actions, where their value may reach hundreds of millions of dollars or more (i.e., consider the scenario of 100,000 employees each claiming \$1,000 in unpaid wages).<sup>87</sup> Discrimination claims have a higher value than wage claims in most individual cases, because they involve lost wages and both compensatory and punitive damages.<sup>88</sup> They

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86 E. Mueller and S. Ferris, House Passes Labor Overhaul, Pitting Unions against the Filibuster (9.03.2021) <https://www.politico.com/news/2021/03/09/house-pro-act-labor-unions-474941> (15.04.2021).

87 J. Prats, Are Arbitration Agreements Necessary for Class-Action Waivers to be Enforceable? “Fla. B.J.” 2018, vol. 92-DEC, p. 64 n. 7 (wage and hour class action settlements had a value of \$1.2 billion dollars in 2018).

88 42 U.S.C. § 1981a(b) (2012) (Title VII provides for up to \$300,000 in punitive and compensatory damages in employment discrimination claims). Even larger punitive damage awards are available for violation of state anti-discrimination laws. S. Davidson, Determining Employment Discrimination Case Merits under State And Federal Law, “Aspatore”, 2012, vol. 2012 WL 3058210, p.\*4 (“For example, the NJ LAD [New Jersey Law Against Discrimination] does not cap compensatory or punitive damages.”).

also may be brought as class actions in certain circumstances (for example, a policy of discrimination that was applied to minorities in the workforce), multiplying their value exponentially.<sup>89</sup>

Requiring employees to arbitrate these and any other employment-related claims that may arise, rather than litigate them in court, presents the employer with a number of potential advantages. First, in the courts, the merits of these claims would be ultimately decided by a jury. The jury is typically composed of 12 ordinary people from the community or region. At the trial, they hear testimony and review the evidence to make a determination whether the employer, for example, committed unlawful discrimination by terminating the employee. While there is some contradictory evidence on this point, the common perception is that jurors would be much more sympathetic towards an individual employee as opposed to a large, multinational corporation. Therefore, by arbitrating such claims, the employer avoids the case being decided by a jury. A professional arbitrator is perceived to be much more neutral from the perspective of the employer, and even in cases where the employer is guilty, he or she is much more likely than a jury not to make an excessive damage award.<sup>90</sup>

Second, and relatedly, the arbitrator may even be more than simply neutral. Employers, particularly larger ones, are repeat players in the arbitration process. They generate numerous arbitration cases each year and therefore have a need to use (and pay for) the services of employment arbitrators on a regular basis. Individual employees, in contrast, are mostly one time users of arbitration services. They may have one arbitration case and never have the occasion to have a second one. As a result, arbitrators may be at least implicitly biased in favor of the employer when deciding the case, since that employer may reward them with more arbitration work in the future.<sup>91</sup>

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89 G. Maatman, Annual Workplace Class Action Litigation Report: An Overview of 2020 in Workplace Class Action Litigation, "Lab. Law J." 2021, vol. 889127 (C.C.H.), 2021 WL 889127 ("Relative to private plaintiff discrimination class actions, the monetary value of the top ten private plaintiff settlements in 2020 sky-rocketed to \$422.68 million...").

90 J. Murray, The Uncertain Legacy Of Gilmer: Mandatory Arbitration Of Federal Employment Discrimination Claims, "Fordham Urb. L.J." 1999, vol. 26, p. 298 ("A chief benefit of arbitration to employers is the protection it provides from inconsistent liability in the form of large, emotion-influenced jury awards and settlements").

91 J. Giesbrecht-McKee, The Fairness Problem: Mandatory Arbitration in Employment Contracts, "Willamette L. Rev." 2014, vol. 50, p. 266 ("Employers also recognize their advantage in arbitration as the repeat player....[T]he arbitrator becomes "a paid piper who plays the tune" the employer calls."); M. Malin, Privatizing Justice — But by how Much? Questions Gilmer did not Answer, "Ohio St. J. on Disp. Resol." 2001, vol. 16, p. 594 (noting the point "that employees are one-shot players while employers are repeat players. This may produce overt or subtle unconscious bias toward the only party who offers arbitrators the prospect of repeat business."); A. Hodges, Employee Voice In Arbitration, "Employee Rts. & Emp. Pol'y J." 2018, vol. 22, p. 239.

Third, employment arbitration agreements typically provide that claims may not be combined in a class action format. Instead, each arbitration case must be brought individually. This provides an enormous benefit to the employer, as it avoids the potential for financially crippling wage or discrimination class action claims.<sup>92</sup>

Finally, there are the usual benefits associated with the use of alternative dispute resolution (ADR) methods. These include time savings, better quality and confidentiality. Arbitration is procedurally less complex than a court case, and takes less time to complete. Moreover, there is no right of appeal in arbitration, and therefore the employer can avoid years of appellate litigation in the event the employee loses the case. Employment arbitrators are specialists and experts in the field of labor law, and in that sense may be better qualified than a generalist judge who hears a wide range of different types of civil cases. The arbitration process is also confidential, which may benefit employers in embarrassing and graphic cases involving sexual harassment, for example.<sup>93</sup>

Conversely, for the same reasons arbitration offers few benefits – and mostly disadvantages – for employees. Workers only sign arbitration agreements because they are presented as a condition of employment; if the person does not agree, he or she will not be employed with the firm. Moreover at the stage of the initial employment offer or the first week on the job, the employee is not concerned with future problems or litigation that may never even occur. At that moment the most important thing is to get the job, start work and make a good impression. The arbitration agreement is not perceived as an important matter that demands their careful focus and attention. It is only at that point, when something indeed goes wrong and the employee is fired, that the employee refocuses their attention on the arbitration agreement and tries to invalidate it.<sup>94</sup>

92 K. Poe, Arbitration Agreements--What is the Employee Actually Signing up for?, “J. Bus. Entrepreneurship & L.” 2019, vol. 12, pp. 103–104 (generally describing benefits of arbitration class action waivers for employers). The legality of class action waivers incorporated into an individual employment arbitration agreement was upheld by the U.S. Supreme Court in *Epic Systems v. Lewis*, 584 U.S., 138 S. Ct. 1612 (2018).

93 F. Rios, Mandatory Arbitration Agreements: Do They Protect Employers from Adjudicating Title VII Claims? “St. Mary’s L.J.” 1999, vol. 31, pp. 216–218 (listing confidentiality and finality – the lack of appeals in arbitration – as employer advantages); D. Kaspar, L. Stallworth, The Impact of a Grievant’s Offer of Apology and The Decision-Making Process of Labor Arbitrators: A Case Analysis, “Harv. Negot. L. Rev.” 2012, vol. 17, p. 1 n.8 (specialized expertise of the arbitrator is an advantage to the employer in arbitration); A. Hodges, Trilogy Redux: Using Arbitration to Rebuild the Labor Movement, “Minn. L. Rev.” 2014, vol. 98, p. 1690 (speed of arbitration is an advantage).

94 D. Zalesne, The Consentability of Mandatory Employment Arbitration Clauses, “Loy. L. Rev.” 2020, vol. 66, p. 132 (Spring 2020) (“To an employee starting a new job, who does not expect legal disputes, an arbitration agreement might not seem important. But if an employee’s rights are later violated at work, that arbitration agreement might mean the difference between winning or losing the case”); J. Sternlight, Mandatory Arbitration Stymies Progress Towards Justice in Employment

## 2. The Federal Arbitration Act and the Doctrine of Unconscionability: Gateways to Challenging Such Agreements

The starting point to any challenge to the legality of an employment arbitration agreement is the Federal Arbitration Act (“FAA”)<sup>95</sup>. Pursuant to the FAA, arbitration agreements are presumptively valid and enforceable as a matter of federal law.<sup>96</sup> The FAA itself was enacted in response to the hostility of state courts to arbitration. Traditionally, judges felt that arbitration was a means of circumventing the authority of the court, and substituting it with an inferior means of resolving the dispute. One of the goals of the FAA was to correct this misperception and put arbitration agreements on an equal plain with any other type of contract in terms of its enforceability.<sup>97</sup> While this meant that arbitration agreements could not be treated in a discriminatory way vis-à-vis other contracts, it was still possible to argue that the arbitration agreement was invalid based on any generally applicable contract law theory.<sup>98</sup>

Initially, there was some doubt whether the FAA’s protections applied to employment arbitration agreements, as a clause in the FAA specifically excluded contracts for seamen, transportation workers, and other employees engaged in interstate commerce from its scope. Ultimately, however, the Supreme Court ruled that this exception from coverage only narrowly applied to workers actually engaged in transporting goods, and not more generally to any worker involved in commerce (which in its broadest sense could almost encompass any employee).<sup>99</sup>

The first major challenge to individual employment arbitration agreements was decided by the U.S. Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>100</sup> In that case, the plaintiff, Gilmer, was a stock broker, and as part of the process of obtaining his license to sell stocks, he agreed to arbitration any and all claims arising out of his employment with members of the stock exchange. Subsequently, he was terminated from employment, allegedly because of age discrimination in violation of the Age Discrimination in Employment Act (ADEA). When he sought to bring a claim in court alleging a violation of the ADEA, however, the employer argued the case should be dismissed because he agreed to bring any such claim to arbitration.

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Law: Where to, #Metoo? “Harv. C.R.-C.L. L. Rev.” 2019, vol. 54, p. 155 (“vulnerable” employees are particularly disadvantaged by arbitration).

95 9 U.S.C. §§ 1–16 (1994).

96 *Ibid.* at § 2.

97 L. Hengemuhle, Striving for Consistency: The Battle of Jurisdiction in Enforcing Arbitration Awards, “B.C. L. Rev. E-Supplement” 2018, vol. 59, p. 501.

98 9 U.S.C. §§ 2, 9.

99 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); L. Eaton, Arbitration Agreements in Labor and Employment Contracts: Well within the Reach of the FAA, “J. Disp. Resol.” 2002, vol. 2002, p. 193 (2002).

100 500 U.S. 20 (1991).

In response, the plaintiff argued that the arbitration agreement was invalid and unlawful.<sup>101</sup>

Specifically, Gilmer argued that the arbitration agreement amounted to an unlawful waiver of his rights under the ADEA. The Supreme Court rejected this contention, explaining that he did not waive his substantive rights to bring a discrimination claim under the ADEA. Rather, he simply agreed to bring any such claims in a different forum, i.e., arbitration. The discrimination claim itself was not waived, it would just be decided by an arbitrator rather than a court.<sup>102</sup> He did not lose any substantive rights, as the arbitrator was empowered to order any remedies offered by the provisions of the ADEA.<sup>103</sup> According to the Supreme Court, the essence of his claim was that arbitration was an inferior forum to bring his ADEA discrimination case, and it was precisely this type of unreasonable hostility to arbitration that the FAA was designed to stop from taking place.

Gilmer also raised the common law contract defense (permissible under the FAA) that the arbitration agreement was invalid given the disparity of bargaining power between the stock exchange and him as an individual employee. This was rejected by the Supreme Court, which explained that Gilmer was a sophisticated, educated person employed as a highly paid stock broker, and therefore both was free to enter into the arbitration agreement and understood what he was signing. The fact that there was not equal bargaining power between the stock exchange and Gilmer was not enough to make out a claim of unconscionability.<sup>104</sup>

Subsequent to the *Gilmer* decision, numerous legal theories have been advanced by employees in support of their arguments that these arbitration agreements are invalid. While the focus here is on the theory that the agreements violate the doctrine of unconscionability, it is worth to first quickly review some of the other contentions, the majority of which have been rejected by the courts. Most notably, some employees have argued that their arbitration agreements fail for lack of consideration. Under the common law, a contract is only valid if consideration – something of value – is exchanged by both parties. Once again, any defenses generally available under contract law are permissible under the FAA in an attempt to invalidate an arbitration agreement. In the employment context, as noted earlier, the employee receives arguably nothing in exchange for agreeing to bring his or her employment claims in arbitration, which is less advantageous to him or her. However, the courts have generally rejected this argument, finding that the employee’s continued employment constitutes sufficient consideration. Under the employment at will doctrine, the employer has no obligation to continue to employ anyone from one day to the next,

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101 *Ibid.* at 23–24.

102 *Ibid.* at 28–29.

103 *Ibid.* at 32.

104 *Ibid.* at 33–34.

and so by retaining the employee after their signing the arbitration agreement – even for one more day – constitutes giving something of value to the employee.<sup>105</sup> Other courts have held that even apart from continued employment, the mutual promise to submit claims to arbitration itself is consideration (both sides are agreeing to something that they are not otherwise required to do).<sup>106</sup>

Another interesting contention was made by the NLRB, which argued that arbitration agreements which prohibited class actions violated the right under Section 7 of the NLRA to engage in concerted activity. Section 7 provided employees not only with the right to strike and to join a labor union, but also the right to take other collective actions designed to protect co-workers. Banding together in a class action employment lawsuit, likewise, could also be considered an action taken for mutual aid or protection under Section 7. An arbitration agreement that prohibited employment class actions would therefore run afoul of Section 7, according to the NLRB. The question ultimately went to the Supreme Court, which decided that – with parallels to *Gilmer* – that class actions were procedural devices governed by civil law rather than substantive rights grounded in labor law. Employees could still support each other in their arbitration claims, but under the FAA were free to sign arbitration agreements precluding them from bringing their claims as class actions in the court system.<sup>107</sup>

However, the primary legal theory advanced by employees challenging their arbitration agreements is that they are unconscionable.<sup>108</sup> Under the unconscionability doctrine, a contract may be invalidated if it is so manifestly unfair that it would shock the conscious of an reasonable person. There are two types of unconscionability claims: procedural unconscionability, and substantive unconscionability. For procedural unconscionability, a party must show that there was a massive disparity in bargaining power and sophistication between the two

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105 C. Iannaccone, G. Spada, R. Silversten, *Arbitration and Employment Disputes: Drafting to Maximize Employer Protection*, “ACCA Docket” 2000, vol. 18, no. 2, p. 28 (“[C]ourts have rejected arguments that arbitration agreements fail for lack of consideration. Courts have commonly found that continued employment and mutual agreement to arbitrate constitute sufficient consideration to uphold enforcement”). This position is not universal, however, and some state courts – for example, Missouri - have arrived at a different conclusion. R. Byrd, *When Arbitration Agreement Provisions Time Travel: Illusory Promises And Continued At-Will Employment In Baker*, “Mo. L. Rev.” 2015, vol. 80, p. 519.

106 *In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419, 424 (Tex. 2010); R. Arnow-Richman, *Modifying At-Will Employment Contracts*, “B.C. L. Rev.” 2016, vol. 57, pp. 446–448 (also noting that some courts have found that the mutual promise to arbitrate plus continued employment both constitute adequate consideration). In this case, however, where the employer reserves the right to unilaterally modify the arbitration agreement, there is no mutuality in consideration. Arnow-Richman, *Modifying...*, *op. cit.*, pp. 446–448.

107 *Epic Systems v. Lewis*, 584 U.S., 138 S. Ct. 1612 (2018).

108 X.-T. Nguyen, *Disrupting ...*, *op. cit.*, pp. 195–196.

sides, and that this power was used to force the weaker side to agree to unbalanced terms. For substantive unconscionability, a party must prove that the terms of the contract itself are so unfair that no person could be held to them. Both procedural and substantive unconscionability must be established for the arbitration agreement to be unenforceable. However, some states use a “sliding scale” approach, where severe procedural unconscionability can offset weak substantive unconscionability, and vice versa.<sup>109</sup>

Comparatively speaking, arguments based on this theory have also brought the most success, but it is important to emphasize that success is relative. In the vast majority of cases courts have rejected unconscionability arguments brought by employees, and this only compares favorably to other legal theories which have been rejected close to 100% of the time. In general, arguments about relative lack of bargaining power, lack of sophistication and that arbitration itself is an unfair and unbalanced term since is an inferior mechanism to vindicate their statutory rights, have not been successful.<sup>110</sup> Instead, the courts have been only sympathetic to arguments centered on the gross unfairness of specific terms of the arbitration agreement. Specifically, where the arbitration agreement does not allow the employee to have any role in the arbitrator selection process, or an illusory role (such as selecting an arbitrator from a list prepared by the employer), the agreement will be invalid. In such situation the arbitrator may be biased and the fairness of the whole process is potentially undermined.<sup>111</sup> Another possibility is where the employee must pay a prohibitive share of the costs of arbitration pursuant to the terms of the agreement. In that case, the employee effectively loses the right to bring his or her claim in any forum, if they cannot even afford to pay a share of the arbitrator’s fee.<sup>112</sup> When the arbitration agreement itself only limits the employee to pursue claims in arbitration, but not the employer, this has also been found to be an unconscionable term; the arbitration obligations should apply equally to both sides.<sup>113</sup> Finally, where

109 M. Lonegrass, Finding Room For Fairness In Formalism--The Sliding Scale Approach To Unconscionability, “Loy. U. Chi. L.J.” 2012, vol. 44, pp. 6–12.

110 Only in extreme cases will procedural unconscionability exist, such as in the case of an illiterate temporary employee who could not read English and otherwise did not understand the arbitration agreement. *Delfingen US-Tex., L.P. v. Valenzuela*, 407 S.W.3d 791, 794 (Tex. App.--El Paso 2013, no pet.). Indeed, even in that case the court noted that an inability to read English by itself would not be enough to evade the arbitration agreement; instead the employee’s illiteracy taken together with other factors made the agreement unconscionable. *Ibid.* at 801–803.

111 R. Frankel, Concepcion And Mis-Concepcion: Why Unconscionability Survives The Supreme Court’s Arbitration Jurisprudence, “J. Disp. Resol.” 2014, vol. 2014, p. 249; *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999).

112 Frankel, Concepcion..., *op. cit.*, pp. 245–246.

113 T. Wolfson and B. King, Even after Concepcion and Italian Colors, Some Arbitration Agreements are Not Enforceable, “Fed. Law.” 2015, vol. 62-FEB, p. 20 (“Examples of substantively unconscionable provisions include... litigation rights by only one party”).

the employer retains the unilateral right to change or alter the arbitration procedure, it is likewise a generally unconscionable term.<sup>114</sup>

Unconscionability, and contract law as a whole, is typically a matter of state law in the United States. As a result, different states have somewhat different standards in applying the doctrine of unconscionability, and results may differ depending on the state in which the claim is brought. California, in particular, has a somewhat broader and more generous interpretation of the doctrine of unconscionability, and employees have been slightly more successful invalidating their arbitration agreements in the California courts.<sup>115</sup> At the same time, under the U.S. Constitution's Supremacy Clause, federal law preempts inconsistent state law, and the FAA has been used to vacate state court decisions where the states have unreasonably applied the unconscionability doctrine as a means of expressing their bias against arbitration. Therefore, the FAA places some limits on how far unconscionability may be expanded as a way for states to void employment arbitration agreements.<sup>116</sup>

In any case, employers can easily avoid these specific problems with unconscionability by taking some basic preemptive steps. Issues connected with arbitrator selection and procedure can be solved by the employer using a reputable third party ADR service provider, such as the American Arbitration Association (AAA), to handle this entire process. The AAA has special rules for employment arbitration cases designed to make the process more fair, and has a roster of experienced, neutral employment arbitrators from which the parties may select an arbitrator for their dispute.<sup>117</sup> Challenges to the unfairness of the high cost of arbitration may be foreclosed by the employer paying the entire costs of arbitration, or having the employee only pay a nominal fee.

From the employees' perspective, the availability of the unconscionability argument to possibly defeat an employment arbitration agreement is a double-edged sword. In a positive sense, the doctrine may be used to prevent employers from using most the extreme and unfair arbitration agreements, and therefore creates

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114 M. DeMichele and R. Bales, *Unilateral-Modification Provisions in Employment Arbitration Agreements*, "Hofstra Lab. & Emp. L.J." 2006, vol. 24, p. 64 (2006).

115 X.-T. Nguyen, *Disrupting...*, *op. cit.*, p. 198 ("California courts are more sympathetic to the unconscionability defense in employment arbitration contracts"); S. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, "Hastings Bus. L.J." 2006, vol. 3, p. 39 (discussing generally the problem of California overusing the doctrine of unconscionability in arbitration cases).

116 L. Norris, *The Parity Principle*, "N.Y.U. L. Rev." 2018, vol. 93, p. 265 (in part due to FAA preemption, "unconscionability has withered as a limiting tool" in employment arbitration cases).

117 D. Horton, *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, "Minn. L. Rev." 2020, vol. 105, pp. 641, 650 (AAA and other arbitration service providers have adopted fairer rules for employment cases, designed to withstand judicial challenges; this in turn has prompted companies to choose AAA "in the knowledge that their clauses and awards will be upheld").

a check on employer abuses of arbitration. On the other hand, it creates a sense of false hope for employees. Since unconscionability is determined on a case by case basis, employees go into litigation believing their particular case is special and that they have a reasonable chance to prevail. But overall, they have a very small chance of actually winning, since most unconscionability arguments do not succeed. This false hope leads them to waste time and money in the court, only to ultimately return to arbitration most of the time.

### **B. Proposals for Reform**

Changing this state of affairs is difficult. The legal framework is somewhat rigid – the FAA favors arbitration agreements and limits the ability of state courts to invalidate them. State unconscionability law still may be used to invalidate the most unfair arbitration agreements, but in most cases the parties will be ordered to proceed to arbitration. Other creative arguments, for example that employees cannot give up their right to bring a claim as a class action under the NLRA, have been conclusively rejected by the Supreme Court. So there is not much room for legal maneuver. In this context, two solutions may be offered—new legislation supplementing or amending the FAA to prohibit or otherwise restrict employment arbitration agreements, or to cause employers to undergo a paradigm shift in their thinking and persuade them to abandon the use of arbitration agreements in their respective workforces.

Separate legislation has already been introduced in Congress that would prohibit or otherwise restrict individual employment arbitration agreements, but it has not advanced and there is no current prospects for it to be passed.<sup>118</sup> This, of course, is not to say that the idea could be revised, particularly if public support could be mobilized behind it. A comprehensive ban on this type of employment arbitration, by amending the FAA, would be the simplest and most direct solution. Alternatively, as proposed in the previous legislation, a prohibition on pre-dispute employment arbitration agreements would also be effective. Parallels may be drawn with elements of the European Union's (EU) consumer ADR Directive.<sup>119</sup> Pursuant to that Directive, consumers can only agree to arbitrate disputes with traders *after* the dispute has arisen.<sup>120</sup> This avoids the problem found in consumer and employment arbitration alike, that when individuals are opening a bank account, making a purchase or

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118 E. Spitko, Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements, "U.C. Davis L. Rev." 2009, vol. 43, p. 591 (discussing two unsuccessful bills which would have invalidated certain pre-dispute employment arbitration agreements, the Arbitration Fairness Act of 2009, and the Preservation of Civil Rights Protections Act of 2008); M. Malin, The Arbitration Fairness Act: It Need not and Should not be an All or Nothing Proposition, "Ind. L.J." 2012, vol. 87, p. 289.

119 Directive 2013/11 of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes (Consumer ADR Directive).

120 *Ibid.* at Article 10(1).

starting a job, they are not concerned at that point about what may go wrong in the future. Moreover, in the case of a job or an essential service, like a bank account or phone contract, there is not really an option to say “no”. Under the Directive’s rule, a consumer who feels that arbitration is really a superior option as compared to the courts is free to choose that option after the dispute surfaces. It is actually a free choice at that point, since there is no connected pressure to arbitrate as a condition of obtaining the service or goods- by that point, the consumer already has them. Instead, it is a decision that can be made on its merits and in that context is more of a free choice. This rule, permitting post-dispute agreements to arbitrate but not pre-dispute agreements, should be a key part of any new law restricting individual employment arbitration. If such legislation were passed, it would obviate the need for employees to argue that their arbitration agreements are unconscionable, since they freely entered into the agreements of their own will after the dispute arose.

To the extent a ban on employment arbitration (or at least pre-dispute employment arbitration contracts) is not feasible for the foreseeable future, a second key component of the Consumer ADR Directive could be incorporated in any new employment arbitration legislation in the U.S. as an alternative to make the process more fair. Pursuant to the Directive, arbitrators whose fees are paid by the traders may only serve in consumer cases when they are jointly appointed by a panel of merchants and consumer rights organizations; have a fixed term appointment; and a limited ban on future employment with the merchant after their term of appointment has expired.<sup>121</sup> As adapted to employment arbitration, the selection process could be made jointly by employers and unions or other employee-rights organizations. This would have the intended effect of limiting the impact of the repeat player problem, because in order to be appointed as an employment arbitrator the person would also have to obtain the support of unions/employee rights organizations. If the arbitrator had a track record of clearly favoring employers, unions would never agree to her or his appointment.<sup>122</sup>

The other potential solution is to radically change employers’ attitudes towards requiring employment arbitration agreements from their workforces. This is likewise a difficult task because on its face it would be against their interests to do so-employers have a number of procedural and other advantages in arbitration, as compared to contesting a case before a jury in the federal or state courts. However, these advantages may be outweighed by other considerations in certain circumstances,

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121 *Ibid.* at Article 6(3) (so long as the Member States agree; the default rule is that traders cannot pay the fees of the mediators or arbitrators. However, Member States may allow mediators and arbitrators to be paid by the traders so long as the safeguards set forth in Article 6(3) are applied).

122 L. Bingham, *Employment Arbitration: The Repeat Player Effect*, “Employee Rts. & Emp. Pol’y J.” 1997, vol. 1, p. 202 (“In labor arbitration, where both employer and union are repeat players, traditional outcome measures reveal a rough parity in outcomes”).

where negative public pressure on keeping such agreements creates even higher costs. There are two notable intertwined examples of this occurring: the backlash against the confidentiality provisions of arbitration agreements brought about by the #Metoo movement, and collective resistance to signing such agreements by highly skilled tech workers.

The #Metoo movement was brought about by a widespread practice of sexual harassment in the workplace, that was nevertheless regularly concealed by employers. The Harvey Weinstein case was the catalyst for the formation and expansion of this movement. Weinstein, a famous and successful film producer, allegedly routinely pressured young actresses and other women to have sex with him as a quid pro quo for getting better acting roles and otherwise advancing in Hollywood. Some women did complain, and even filed lawsuits, but the cases were quickly settled with strong confidentiality agreements. As a result, future female employees of Weinstein’s production company were never put on notice that they were going to work for a serial sexual harasser, and a number of them ultimately became his victims. When one of the women, Rose McGowan, finally publicly broke her confidentiality agreement and revealed the abuses she suffered, the proverbial floodgates were opened and numerous women came forward with similar stories, i.e., by using the phrase “me too”, they expressed that they also were victims.<sup>123</sup>

As the #Metoo movement grew, confidentiality agreements in sexual harassment settlements came into greater focus and scrutiny. One of the advantages of arbitration to employers is that the proceedings and result are confidential, and so graphic allegations of sexual harassment – whether they are proven or not – will not reach the public eye and cause potential harm to its reputation. But as #Metoo revealed, strict confidentiality also harms female employees and job applicants since they are unaware that they might be working with (or for) a serial sexual abuser. Pressure therefore arose for employers to eliminate confidentiality clauses in sexual harassment settlements and in private arbitration proceedings. Some state legislatures even went so far as proposing to make at least confidentiality agreements themselves illegal.<sup>124</sup>

With respect to arbitration clauses, the heaviest pressure on employers to change their practices came in the tech sector in Silicon Valley. Women in tech and engineering worked in a traditionally male dominated field, and unfortunately also

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123 L. Wexler, J. Robbennolt, C. Murphy, #Metoo, Time’s Up, and Theories of Justice, “U. Ill. L. Rev.” 2019, vol. 2019, pp. 49–50 (along with the Weinstein case, giving other examples which led to the development of the “#Metoo” movement); E. Tippet, The Legal Implications of the Metoo Movement, “Minn. L. Rev.” 2018, vol. 103, pp. 230–232 (providing a general background).

124 M. Glynn, #Timesup for Confidential Employment Arbitration of Sexual Harassment Claims, “Geo. Wash. L. Rev.” 2020, vol. 88, p. 1042 (2020); E. Otte, Toxic Secrecy: Non-Disclosure Agreements and #Metoo “U. Kan. L. Rev.” 2021, vol. 69, p. 545; M. Weston, Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #Metoo Era, “U. Ill. L. Rev.” 2021, vol. 2021, p. 507.

experienced a pattern of sexual harassment. With the rise of the #Metoo movement, these women organized protests against their employers (including most notably Google) and demanded that arbitration agreements in sex discrimination and sexual harassment cases be discontinued. The protests generated much publicity, and the tech employers were especially sensitive to being labeled bad actors as it hurt their progressive image. Indeed, Google's famous corporate motto was "don't be evil."<sup>125</sup> Moreover, tech workers were in high demand and employers could not afford to risk losing this type of talent. As a result of the convergence of these factors, first Google agreed to withdraw and no longer require employment arbitration agreements which covered sexual harassment and sex discrimination claims.<sup>126</sup> This had a domino effect, and shortly thereafter numerous other tech employers, such as Airbnb, followed Google's lead.<sup>127</sup> The quick success achieved here lies in stark contrast to previous efforts of employees relying on the unconscionability doctrine in the courts. As Professor Nguyen observed, "In a very short time, innovators have successfully forced their companies to remove mandatory arbitration clauses from their employment contracts. On the other hand, for decades, contract scholars, judges, and other advocates relied unsuccessfully on the doctrine of unconscionability to reign in the use of mandatory arbitration clauses in employment contracts."<sup>128</sup>

It is difficult to say if this success can be replicated outside of the tech industry and beyond the context of sex discrimination and harassment claims. However, the spark that led to this achievement was women's collective action, i.e., a walkout of employees at Google. If employees in other sectors band together, as a union or otherwise, they also may be able to use the leverage of collective action to persuade other employers to drop their use of employment arbitration agreements.

## Conclusion

While formally the use of the term "general clause" is not known in American labor law, the principles that form the basis of that doctrine – such as good faith and fairness – are applied to collective bargaining and individual employment agreements in the U.S. Consequently, the idea of the general clause does exist in American labor law, although applied in slightly different circumstances than it would be in Europe. Because of the employment at will doctrine generally applicable in the U.S., where

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125 S. Ghaffary and A. Kantrowitz, "Don't be evil" isn't a normal company value. But Google isn't a normal company. Vox (16.02.2021), <https://www.vox.com/recode/2021/2/16/22280502/google-dont-be-evil-land-of-the-giants-podcast> (15.04.2021).

126 D. Thompson, S. Supina, What Ethical & Strategic Employers Should Do About Arbitration, 14 "Va. L. & Bus. Rev." 2020, vol. 14, p. 252; X.-T. Nguyen, *Disrupting...*, *op. cit.*, pp. 187–192.

127 D. Thompson, S. Supina, What Ethical..., *op. cit.*, p. 252; X.-T. Nguyen, *Disrupting...*, *op. cit.*, p. 190.

128 X.-T. Nguyen, *Disrupting...*, *op. cit.*, p. 192.

employers may terminate employees for any or no reason, in most discharge cases questions of good faith and fairness are irrelevant. Instead, these principles are mostly applied in the context of collective bargaining and in ancillary individual employment agreements, dealing with arbitration, trade secrets and covenants not to compete.

More specifically, two prominent examples of their application are 1) the duty to bargain in good faith under the NLRA, and 2) the application of the doctrine of unconscionability to employment arbitration agreements. In each example, case law has provided certain parameters to these rather general terms. The duty to bargain in good faith obliges both parties to meet at reasonable times to negotiate wages, hours and other terms and conditions of employment.<sup>129</sup> While there is no requirement to agree on any point, there is an obligation to listen to the other side with an open mind and consider their proposals.<sup>130</sup> Rules concerning supplying information during bargaining and refraining from making any unilateral changes in working conditions until impasse is reached both operate to support the process of negotiating in good faith.<sup>131</sup>

The doctrine of unconscionability is a contract law theory that invalidates certain contracts that have grossly unfair terms (substantive unconscionability) and which were negotiated by parties with disproportionate bargaining power (procedural unconscionability).<sup>132</sup> While the FAA broadly provides for the enforceability of arbitration agreements and the presumption of their legality, generally applicable contract law defenses, such as unconscionability, may still be used to argue that a given arbitration agreement is invalid.<sup>133</sup>

In practice, however, both good faith and unconscionability have not proved to be particularly effective in upholding workers' rights. With respect to collective bargaining, the problem lies in the enforcement of the duty to bargain in good faith. As no party is required to agree on any point in collective bargaining, the remedy for bad faith bargain has essentially been to order the parties to restart negotiations and bargain in good faith. This rather impotent remedy leads to a weakening of the union's authority and encourages recalcitrant employers to engage in illegal bad faith bargaining.<sup>134</sup> For its part, unconscionability has been the argument of choice used by employees to avoid oppressive arbitration agreements. Even so, in practice, it is an argument that mostly ends in failure.<sup>135</sup> Typically only unfair arbitration terms that

129 29 U.S.C. Section 158(d).

130 *Altura Communication Solutions*, *op. cit.*, 369 NLRB at \*1; *Great Lakes Coal Co.*, *op. cit.*, 268 NLRB at 1215.

131 D. Ray, *Doing Well...*, *op. cit.*, pp. 237–238.

132 M. Lonegrass, *Finding Room...*, *op. cit.*, pp. 6–12.

133 9 U.S.C. §§ 2, 9.

134 M. Malin, *Labor Law*, *op. cit.*, p. 286.

135 X.-T. Nguyen, *Disrupting...*, *op. cit.*, p. 192.

govern the selection of arbitrators or the cost of the arbitration process are held to be unconscionable by the courts; apart from these scenarios, the arbitration agreements are generally upheld.

Several reforms are suggested herein to correct this situation. Most importantly, a system of interest arbitration – where an independent arbitrator decides the term of a new, first collective bargaining agreement where negotiations have been unsuccessful – should be introduced to the NLRA.<sup>136</sup> This would prompt good faith negotiations as envisioned by the NLRA, since there would be a definite consequence if this duty was ignored, i.e., a third party would impose his or her own terms. For employment arbitration agreements, legislation should be introduced (for example, by amending the FAA) to create a bright-line rule prohibiting them, at least in situations where they were signed before the dispute arose. If such a ban is not realistic in the near future, legislation modeled on Article 6 of the EU Consumer ADR Directive could be introduced, so that employment arbitrators must be selected by a joint panel of employers and unions or employee rights organizations. Alternatively, public pressure should be put upon employers to resign from using arbitration agreements. In the context of the #Metoo movement, female employee applied collective pressure against Google and the tech industry to stop the use of such agreements, which due to their confidential nature, made it difficult for women to be aware of the dangers of sexual harassment present at the workplace. At least in that industry, these efforts were successful, and perhaps this could be replicated elsewhere. In any event, either reform would be superior than continuing to rely upon unconscionability arguments in the courts.

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136 As noted earlier, such an interest arbitration provision is contained in the PRO Act, which was passed by the House of Representatives and is pending before the Senate at the time of writing.

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