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## FAIR STANDARDS FOR LABOR ARBITRATION: AN ANALYSIS OF THE FLSA AND FAA\*

### I. INTRODUCTION

Subsequent to a long tradition dedicated to freedom of contract and laissez-faire politics, Congress enacted the Fair Labor Standards Act (FLSA) as part of President Franklin Delano Roosevelt's New Deal package.<sup>1</sup> Through the FLSA, Congress sought to provide American workers with basic statutory rights by implementing minimum standards for employers to follow.<sup>2</sup> To ensure employer compliance, section 216 of the FLSA affords aggrieved employees a cause of action in U.S. district courts, and allows them to pursue claims either individually or as members of a collective action.<sup>3</sup>

Within the past decade, the number of individual FLSA suits and collective actions has risen dramatically.<sup>4</sup> The rise in lawsuits has imposed significant costs on both large and small employers, who assume the expensive and onerous task of confronting employee allegations.<sup>5</sup> To soften the financial blow, many employers settle even frivolous claims to eliminate the public exposure and monetary costs that accompany lengthy litigation.<sup>6</sup> Other employers, hoping to proactively eliminate litigation-related expenses, include arbitration clauses and collective action waivers in their employment contracts.<sup>7</sup>

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1. See *infra* notes 31–42 and accompanying text for a discussion of the Supreme Court's jurisprudence during the *Lochner* era.

2. See *infra* Part II.B.1 for a discussion of employer obligations under the FLSA.

3. See *infra* Part II.B.2 for a discussion of the remedies provided in section 216 of the FLSA.

4. See *infra* Part II.C for a discussion of the rise in FLSA-related litigation.

5. See *Employment Litigation and Dispute Resolution*, U.S. DEPT. LAB., <http://www.dol.gov/sec/media/reports/dunlop/section4.htm> (last visited Nov. 1, 2015) (elaborating on FLSA litigation costs).

6. See Rob Whitman et al., *To Seek or Not to Seek (Court Approval)? That Is the Question*, WAGE & HOUR LITIG. BLOG (June 26, 2014), <http://www.wagehourlitigation.com/settlement/to-see-or-not-to-see-court-approval/> (stating that, in the context of FLSA suits, employers often find themselves dealing with copycat claims of employees who have witnessed or heard about settlements with other employees); see also Chris DiMarco, *Top 10 Most Expensive Wage and Hour Settlements of 2013*, INSIDECOUNSEL (Aug. 4, 2014), <http://www.insidecounsel.com/2014/08/04/top-10-most-expensive-wage-and-hour-settlements-of> (providing a list of the ten most expensive wage and hour settlements of 2013).

7. See *infra* notes 259–63 and accompanying text for a discussion of the purpose of class and collective action waivers.

The Federal Arbitration Act (FAA) governs the rules and policies surrounding arbitral procedure in the United States.<sup>8</sup> Those who drafted the FAA aimed to decrease judicial hostility toward arbitration, as well as provide those frequently engaged in business transactions with a forum for swift and inexpensive resolution of their commercial claims.<sup>9</sup> Since the FAA's enactment, labor advocates have contested the applicability of the FAA to employment contracts.<sup>10</sup> Similarly, empirical research has shown that arbitration may provide employers with certain advantages not mutually realized by employees.<sup>11</sup> Nonetheless, despite disapproval by many, employers have increasingly integrated arbitration clauses in their standard employment agreements.<sup>12</sup> Moreover, because employers frequently embed collective action waivers within arbitration clauses, the contractual obligation to proceed in arbitration will often simultaneously proscribe pursuing claims as a class.<sup>13</sup>

Since the FAA's enactment, judges have grappled with the interplay between the FAA and federal laws that provide redress in U.S. courts. Despite this struggle, Congress has provided minimal guidance regarding how the judiciary should confront this issue.<sup>14</sup> Legislative silence has given the Supreme Court the opportunity and authority to dominate the national discussion in this realm.

Though the Court has generally sanctioned the use of arbitration clauses as well as class and collective action waivers, it has not directly addressed the issue with respect to FLSA claims. By evaluating the arguments of both corporate and labor advocates, this Comment explores the practical problems associated with the rise in FLSA litigation and the fairness issues that accompany employment arbitration. In order to confront those questions, the Overview discusses the text, policy goals, and legislative history of the FLSA. The Overview then

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8. See *infra* Part II.D for a discussion of the FAA.

9. See *infra* Part II.D.1 for a discussion of the aims of the drafters of the FAA.

10. To support their arguments, critics of employment arbitration highlight section 1 of the FAA—referred to as the exemption provision. 9 U.S.C. § 1 (2012). The exemption provision provides that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” *Id.*

11. See *infra* Part II.D.3 for a discussion of the advantages employers maintain in arbitration.

12. Employers who fall under the scope of the FLSA are employers engaged in interstate commerce. See *infra* Part II.B for a discussion of the scope of the FLSA.

13. See *infra* notes 259–88 and accompanying text for a discussion of how collective action waivers operate within arbitration clauses.

14. Legislative silence may be attributed to the impossibility of achieving a congressional consensus regarding labor relations. Pro-business and pro-labor interest groups play a significant role in shaping congressional action. See Peter L. Francia, *Back to the Future? The Effects of Citizens United v. FEC in the 2010 Election*, 44 J. MARSHALL L. REV. 595, 612 (2011) (stating that it was “not surprising that pro-business and labor organizations were among the biggest spenders in the 2010 [congressional] election”). Moreover, these groups also participate in the policy-making process by filing amicus briefs, which inform the Supreme Court's analysis of the topic. See, e.g., Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Petitioner, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (No. 90-18), 1990 WL 10008997. This Comment does not discuss the integral role such groups play, but rather narrows its analysis to the Court's rulings and the effect of the Court's conclusions on lower courts.

comprehensively analyzes the FAA, considers the intent of its drafters, and subsequently explores how Supreme Court interpretations of the statute have shaped judicial assessments of FLSA claims in the courts of appeals.<sup>15</sup>

Subsequent to summarizing the legislative and judicial backdrop in the Overview, the Discussion provides suggestions that aim to streamline FLSA procedures at the trial level.<sup>16</sup> These recommendations seek to encourage earlier settlement and eliminate frivolous suits.<sup>17</sup> The Discussion then proposes amendments to the FAA that intend to evenly distribute the procedural advantages of arbitration to both employers and employees.

## II. OVERVIEW

In order to effectively endorse the reforms suggested in the Discussion, the following Section delineates the status of FLSA litigation and employment arbitration. By providing a history of the Supreme Court's jurisprudence regarding the proper role of the government within the employer-employee relationship,<sup>18</sup> this Overview discusses how the Court's shifting ideology eventually permitted the enactment of various welfare legislation, including the FLSA.<sup>19</sup> This Section focuses on specific provisions of the statute and examines the collective action remedy delineated in section 216. Part II.B outlines the judicially crafted two-step procedure the majority of jurisdictions use to determine whether a group of employees should proceed as a class.<sup>20</sup> Part II.C addresses FLSA litigation, explores possible explanations for the dramatic proliferation of claims, and identifies practical problems associated with this increase.<sup>21</sup>

To properly assess arbitration clauses and collective action waivers, Part II.D discusses the FAA.<sup>22</sup> This analysis considers whether the implementation of arbitration clauses in employment contracts is consistent with the policy goals promulgated by the FAA's advocates, as well as the statute's plain language.<sup>23</sup> Part II.D addresses the nuances of employment arbitration, comparing it—both theoretically and practically—to labor-related litigation.<sup>24</sup> Parts II.E and II.F

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15. See *infra* Part II.D.3 for a discussion of the advantages employers maintain in arbitration.

16. See *infra* Part III.B for a discussion of suggestions that codify and alter the two-step certification process used by a majority of district court judges.

17. See *infra* Part III.B for a discussion of how the newly adapted certification process would promote settlement and discourage frivolous lawsuits.

18. See *infra* notes 31–42 and accompanying text for a discussion of the Supreme Court's jurisprudence during the *Lochner* era.

19. See *infra* Part II.A for a discussion of the Supreme Court's jurisprudential shift in 1937, which allowed the enactment of welfare legislation without the threat of nullification.

20. See *infra* Part II.B.4, which outlines the two-step procedure most district court judges use to oversee collective actions.

21. See *infra* Part II.C for a discussion of the problems associated with the rapid rise in FLSA litigation.

22. See *infra* Part II.D.1 for a discussion of the legislative history of the FAA.

23. See *infra* Part II.D.1 for a discussion of the legislative history of the FAA.

24. See *infra* Parts II.D.2 and II.D.3 for a discussion of employment arbitration.

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review Supreme Court interpretations of arbitration clauses and class and collective action waivers in labor-related and consumer contexts.<sup>25</sup> Lastly, Part II.G examines how the holdings discussed in Parts II.E and II.F have influenced circuit court conclusions regarding the legality of arbitration clauses and collective action waivers that preclude judicial adjudication of claims arising under the FLSA.<sup>26</sup>

A. *Freedom of Contract: Employer-Employee Relationships Before the New Deal*

President Roosevelt's New Deal fundamentally transformed the role of the federal government within the country's economic infrastructure.<sup>27</sup> Distinguished from the laissez-faire approach pursued by its predecessors, the New Deal drastically increased governmental presence and administrative oversight within the daily operations of the nation's industries.<sup>28</sup> Predominantly focused on reshaping conditions within the American workforce, the strategy President Roosevelt embraced demonstrated his appreciation of the interdependent relationship between the social welfare of U.S. workers and the nation's fiscal success. As he relayed to Congress on May 24, 1934:

The overwhelming majority of our population earns its daily bread either in agriculture or in industry. One-third of our population . . . is ill-nourished, ill-clad, and ill-housed. . . .

....

Today, you and I are pledged to take further steps to reduce the lag in the purchasing power of industrial workers and to strengthen and stabilize the markets for the farmers' products. The two go hand in hand. Each depends for its effectiveness upon the other.<sup>29</sup>

New Deal legislation clashed with the political philosophy espoused by the Supreme Court throughout the late nineteenth and early twentieth centuries.<sup>30</sup> The Court's "*Lochner* era" references the period between 1897 and 1937, during which the Court consistently nullified ameliorative public health legislation pursuant to its commitment to freedom of contract.<sup>31</sup> Prevailing interpretations

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25. See *infra* Part II.F for a discussion of the Supreme Court's interpretation of class and collective action waivers in consumer- and employment-related litigation.

26. See *infra* Part II.G for a discussion of interpretations of the permissibility of arbitration clauses and collective action waivers in FLSA litigation in the courts of appeals.

27. See Ernest Gellhorn, *Opening Remarks: Administrative Law in Transition*, 38 ADMIN. L. REV. 107, 108 (1986).

28. *Id.*

29. S. REP. NO. 75-884, at 1-2 (1937).

30. See David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1470-71 (2005).

31. In *Lochner v. New York*, the Supreme Court assessed the constitutionality of a New York labor law, which mandated limitations on the daily and weekly work hours of the state's bakers. 198 U.S. 45, 52-53 (1905). Finding "liberty of contract" as a right implicit in the Due Process Clause of the Fourteenth Amendment, the issue the Court confronted was whether the New York legislation was "a fair, reasonable and appropriate exercise of the police power of the State," or alternatively, "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal

of the Court's jurisprudence during the *Lochner* era can be summarized as follows: Supreme Court Justices, "infected with class bias,"<sup>32</sup> imposed their laissez-faire views on the American polity, favoring large corporations and harming workers.<sup>33</sup> In practice, the Court's blind adherence to contract rights condoned inhumane working conditions and ultimately impeded the progress of the economy.<sup>34</sup> Following Roosevelt's election to the presidency, the Court's stubbornness spurred a standoff between the judicial and executive branches of the federal government.

However in 1937, in *West Coast Hotel Co. v. Parrish*,<sup>35</sup> the Court retreated from *Lochner* and upheld a Washington minimum wage law.<sup>36</sup> In *Parrish*, the majority endorsed governmental regulations that would promote the interests of the broader community.<sup>37</sup> Though the actual effect of President Roosevelt's court-packing scheme remains debated, as well as the historical accuracy of the "switch in time to save [n]ine,"<sup>38</sup> Supreme Court Justice Owen Roberts's

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liberty." *Lochner*, 198 U.S. at 56; see *Martinez v. Goddard*, 521 F. Supp. 2d 1002, 1006-07 (D. Ariz. 2007) (commenting that during the *Lochner* era, the Supreme Court, because it considered freedom of contract a basic right under the Due Process Clause, applied a stringent standard of review to acts regulating economic matters, including laws aimed at protecting workers and consumers); see also Anthony S. McCaskey, *Thesis and Antithesis of Liberty of Contract: Excess in Lochner and Johnson Controls*, 3 SETON HALL CONST. L.J. 409, 441 (1993) (commenting on the Court's stringent standard of review). Over the course of the *Lochner* era, the Court found countless statutes unconstitutional, on the ground that such legislation infringed an individual's freedom of contract. See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 10 (1915) ("The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it."); *Lochner*, 198 U.S. at 57-58 ("The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.").

32. David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 2-3 (2003).

33. *Id.*

34. Jeffrey M. Shaman, *On the 100th Anniversary of Lochner v. New York*, 72 TENN. L. REV. 455, 497 (2005) (stating that "economic regulation became more widely accepted as essential to the well-being of society").

35. 300 U.S. 379 (1937).

36. *Parrish*, 300 U.S. at 400.

37. *Id.* at 392 ("There is no absolute freedom to do as one wills or to contract as one chooses. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." (quoting *Chicago, B. & Q. R. Co. v. McGuire*, 219 U.S. 549, 565 (1911))).

38. Following a "landslide victory in the 1936 presidential election," President Roosevelt "proposed to add an additional justice for each sitting justice over seventy years of age who did not retire." Gregory M. Hall, *Constitutional Law—United We Stand: The Further Compartmentalization of Power Under the Tenth Amendment—Printz v. United States*, 521 U.S. 98 (1997), 32 SUFFOLK U. L. REV. 169, 172-73 n.22 (1998). Subsequent to the President's proposal, the Court switched its views regarding welfare legislation and proceeded to endorse Roosevelt's New Deal programs. *Id.* The "switch in time to save Nine" thus refers to the jurisprudential "switch" that preserved the tradition of nine Supreme Court Justices. *Id.* (quoting John M. Lawlor, Comment, *Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court*, 134 U. PA. L. REV. 967, 974-75 (1986)).

ideological shift provided Congress and state legislatures with the political backdrop necessary to enact welfare legislation without fear of judicial annulment.<sup>39</sup> More specifically, the end of the *Lochner* era paved the way for government regulation of the employee-employer relationship on a national level<sup>40</sup>:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless [sic] against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.<sup>41</sup>

With a nod from the Supreme Court, Congress expanded New Deal welfare reforms to the employment realm and, in 1938, enacted the FLSA.<sup>42</sup>

#### B. *The FLSA: Origins and Remedies*

Congress passed the FLSA pursuant to its constitutional commerce power,<sup>43</sup> declaring that “the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers” leads to various obstructions in the flow of commerce.<sup>44</sup> Thus, through the FLSA, Congress hoped to promote both practical and humanitarian goals: by protecting all covered workers from substandard wages and oppressive working hours, the nation’s industries would run more efficiently; and, by incrementally increasing the wages of many of the country’s workers, a new class of consumers would inundate the market.<sup>45</sup>

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39. See Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 622 (1994).

40. See *Parrish*, 300 U.S. at 391 (“The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law.”); Shaman, *supra* note 34, at 497 (noting that “the Great Depression undermined the idea that a laissez-faire policy led to a social optimum that worked to the good of all”).

41. *Parrish*, 300 U.S. at 399–400.

42. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (“[T]he FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive ‘[a] fair day’s pay for a fair day’s work’ and would be protected from ‘the evil of overwork as well as underpay’” (second alteration in original) (internal quotation marks omitted) (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942))).

43. See U.S. CONST. art. I, § 8 (“Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . .”).

44. 29 U.S.C. § 202(a) (2012).

45. See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2162 (2012); *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706 (1945) (commenting on the FLSA’s legislative history and noting Congress’s intention to protect workers from substandard wages and excessive hours, while also promoting the free flow of goods in interstate commerce).

The FLSA covers enterprises operating in interstate commerce,<sup>46</sup> including those with “employees engaged in commerce or in the production of goods for commerce,” and those that have “employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person.”<sup>47</sup> Covered enterprises must also gross at least \$500,000 annually, either through volume of sales made or other forms of business.<sup>48</sup> Other enterprises falling within the scope of the FLSA, regardless of annual gross volume of sales, include (1) hospitals; (2) “institution[s] primarily engaged in the care of the sick, the aged, [or] the mentally ill”; (3) “school[s] for mentally or physically handicapped or gifted children”; (4) federal, state, and local governments; (5) “preschool[s], elementary and secondary school[s], [and] institution[s] of higher education”; and (6) all public agencies.<sup>49</sup>

The statutory definitions of “employer,” “employ,” and “employee” are intentionally broad to create extensive and comprehensive coverage.<sup>50</sup> Congress defines “employee” as “any individual employed by an employer.”<sup>51</sup> An “employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>52</sup> Finally, “employ includes to suffer or permit to work.”<sup>53</sup>

#### 1. The FLSA: Requirements and Exceptions

The most significant provisions of the FLSA appear in sections 206 and 207, which respectively specify minimum wage and maximum hours guidelines. Within section 207, Congress obligates employers to compensate employees for hours in excess of forty per week, at a rate of one and one-half times the employees’ regular wages.<sup>54</sup> Consistent with the FLSA’s humanitarian and economically motivated aims,<sup>55</sup> Congress sought “to compensate those who labored in excess of the statutory maximum number of hours for the wear and

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46. 29 U.S.C. § 206.

47. *Id.* § 203(s)(1)(A)(i).

48. *Id.* § 203(s)(1)(A)(ii).

49. *Id.* § 203(s)(1)(B)–(C).

50. See *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 329 (5th Cir. 1993) (stating that the “FLSA’s definition of employer must be liberally construed to effectuate Congress’ remedial intent”); *Gionfriddo v. Jason Zink, LLC*, 769 F. Supp. 2d 880, 890 (D. Md. 2011) (“Federal courts almost universally state that this definition is to be interpreted broadly to achieve Congress’s intent to provide a remedy to employees for their employers’ wage and hour violations.”).

51. 29 U.S.C. § 203(e)(1).

52. *Id.* § 203(d) (internal quotation marks omitted).

53. *Id.* § 203(g) (internal quotation marks omitted).

54. *Id.* § 207(a)(1) (“[N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”).

55. See *supra* Part II.B for a discussion of Congress’s aims in enacting the FLSA.

tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost.”<sup>56</sup>

Congress did not attempt to discourage overtime work; rather the overtime provision was “part of a plan to raise sub-standard wages by providing a definite pay for overtime work when such work was required.”<sup>57</sup> Nor did Congress intend to impede the individuality of every employer-employee relationship;<sup>58</sup> it sought to provide basic statutory guidelines that would minimize the risk of employer manipulation.<sup>59</sup> As delineated in the FLSA, Congress entrusts the Wage and Hour Division of the Department of Labor (DOL) with the responsibility of enforcement.<sup>60</sup>

Section 213 contains various exemptions from either the overtime requirements, minimum wage mandates, or both.<sup>61</sup> The exemptions evidence Congress’s recognition of disparities among employment roles. For example, in the first statutory exemption, Congress specifically highlighted executive and intellectual work, which it felt could not be appropriately quantified or commodified through an hourly pay scheme.<sup>62</sup> Thus, through section 213(a)(1), Congress has exempted “bona fide executive, administrative, or professional” employees from the FLSA’s overtime and minimum wage requirements.<sup>63</sup> Section 213(a)(1) is frequently referred to as the “executive, administrative and professional” (EAP) or “white-collar” exemption.<sup>64</sup>

Congress responded to concerns that the existence of exemptions would encourage employers to craft job titles to evade compliance by using duty-based definitions to determine coverage.<sup>65</sup> To qualify for the EAP exemption,

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56. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948).

57. *Olearchick v. Am. Steel Foundries*, 73 F. Supp. 273, 278 (W.D. Pa. 1947).

58. The Department of Labor’s website highlights various aspects of the employer-employee relationship that are not covered by the FLSA. *What Does the Fair Labor Standards Act Not Require?*, U.S. DEP’T LAB., <http://www.dol.gov/elaws/esa/flsa/screen6.asp> (last visited Nov. 1, 2015).

59. *Howard v. City of Springfield, Ill.*, 274 F.3d 1141, 1149 (7th Cir. 2001) (describing how the inclusion of a provision mandating the payment of overtime decreases opportunities for an employer to manipulate its employees).

60. *Wage and Hour Division Mission Statement*, U.S. DEP’T LAB., <http://www.dol.gov/whd/about/mission/whdmiss.htm> (last visited Nov. 1, 2015).

61. 29 U.S.C. § 213 (2012).

62. See Gretchen Agena, *What’s So “Fair” About It?: The Need to Amend the Fair Labor Standards Act*, 39 HOUS. L. REV. 1119, 1122 (2002) (contending that the white-collar exemption may have stemmed from congressional sentiment that executive, administrative, and professional employees already enjoyed higher wages and superior benefits, and thus did not need FLSA protection).

63. 29 U.S.C. § 213(a)(1).

64. See, e.g., Press Release, White House Office of the Press Sec’y, Fact Sheet: Opportunity for All: Rewarding Hard Work by Strengthening Overtime Protections (Mar. 13, 2014), <http://www.whitehouse.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr>.

65. 29 C.F.R. § 541.2 (2015) (“A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee’s salary and duties meet the requirements of the regulations in this part.”).

employees must be paid a salary of at least \$455 per week and maintain particular “primary duties,” defined by the DOL in the Code of Federal Regulations (C.F.R.).<sup>66</sup> Another exemption, section 213(a)(17), applies to “computer systems analyst[s], computer programmer[s], software engineer[s], or other similarly skilled worker[s].”<sup>67</sup> In its current form, section 213(a)(17) exempts such skilled professionals if they are paid at least \$27.63 per hour, or at least \$455 a week, if they are paid a salary.<sup>68</sup> Distinguished from the EAP exemption, the primary duties of those who qualify for the computer professional exemption are provided in the statutory text of section 213(a)(17), rather than left to the determination of the DOL.<sup>69</sup> Disagreements regarding the breadth of the EAP and the computer professional exemptions have not only been the subject of substantial litigation, but also at the center of political discussions regarding FLSA emendation.<sup>70</sup>

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66. 29 C.F.R. §§ 541.100, 541.700. As delineated in the C.F.R., the primary duties of an executive include (1) the “management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof”; (2) the “customary and regular[] direct[ion] [of] the work of two or more other employees”; and (3) “the authority to hire or fire other employees[,] or [the ability to] suggest[] and recommend[] . . . the hiring, firing, advancement, promotion or any other change of status of other employees.” *Id.* § 541.100(a). To qualify for the exemption for administrative employees, the employee’s primary duties must include (1) “the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers,” and (2) “the exercise of discretion and independent judgment with respect to matters of significance.” *Id.* § 541.200. Lastly, to qualify for the exemption for professional employees, the employee’s primary duty is the performance of work (1) “[r]equiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction”; or (2) “[r]equiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.” *Id.* § 541.300.

67. 29 U.S.C. § 213(a)(17).

68. 29 C.F.R. § 541.100(a)(1). Because the exemptions are duty defined, rather than reliant on job titles, Congress eliminated opportunities for employer noncompliance through artfully drafted employment contracts or ambiguous work titles. *See Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706 (1945) (noting that the “[FLSA] was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part”).

69. *See* 29 U.S.C. § 213(a)(17) (“The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to . . . (17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; (B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or (D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills . . .”).

70. *See* Press Release, White House Office of the Press Sec’y, Fact Sheet: Opportunity for All: Rewarding Hard Work by Strengthening Overtime Protections, *supra* note 64 (encouraging the DOL to change the regulations connected with sections 213(a)(1) and 213(a)(17) to decrease the number of employees that qualify for the statutory exemptions).

## 2. Statutory Remedies: Section 216 and the Collective Action Procedure

When employers fail to comply with FLSA requirements, section 216 provides employees with a remedy.<sup>71</sup> Section 216 states, “Any employer . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages.”<sup>72</sup> The FLSA also mandates that employers pay an attorneys’ fee award in addition to any other entitled recovery.<sup>73</sup> The 1938 language of section 216 outlined three separate options to pursue a claim: (1) individually; (2) on one’s own behalf and on behalf of “other employees similarly situated” (collective actions); or (3) through the designation of an outside “agent or representative” to sue on “behalf of all similarly situated employees” (representative actions).<sup>74</sup> The existence of both collective and representative actions reflects the legislature’s intention to provide effective vehicles for redress.<sup>75</sup> In addition, the ability for plaintiffs to aggregate similar claims increases judicial economy and facilitates efficient resolution of FLSA suits.<sup>76</sup>

In 1947, a pro-business shift in Congress prompted amendments to the FLSA.<sup>77</sup> The Portal-to-Portal Act of 1947 added notable pro-employer provisions, including (1) delineated, noncompensable activities (such as travel);<sup>78</sup> (2) a two-year statute of limitations for violations and a three-year statute of limitations for willful violations;<sup>79</sup> and (3) two good faith defenses for

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71. 29 U.S.C. § 216.

72. *Id.* § 216(b).

73. *Id.* (providing that “[a] court . . . shall, in addition to any judgment awarded to the plaintiff . . . allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action”).

74. The original language of § 216(b) permitted claims brought “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.” *Martino v. Mich. Window Cleaning Co.*, 327 U.S. 173, 175 n.1 (1946) (quoting Fair Labor Standards Act, ch. 676, § 16(b), 52 Stat. 1060, 1069 (1938) (codified at 29 U.S.C. § 216(b) (2012))).

75. See *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 338 (1980) (noting that “the class-action . . . may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise”); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 58 (1st Cir. 2007) (“This congressional allowance for [collective] actions recognizes that [collective] actions may be the more effective mechanism for redressing small claims . . .”).

76. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (noting that a collective action provides plaintiffs with “lower individual costs to vindicate rights by the pooling of resources” and benefits the judicial system by facilitating the efficient resolution of multiple claims at once).

77. Republicans won congressional majorities for the first time in fifteen years after the 1946 elections, gaining thirteen Senate seats and fifty-seven House seats. The bicameral composition included 188 Democrats and 246 Republicans. U.S. House of Representatives, *Congress Profiles: 80th Congress*, HIST., ART & ARCHIVES, <http://history.house.gov/Congressional-Overview/Profiles/80th/> (last visited Nov. 1, 2015). The Eightieth Congress is known for its pro-business legislation, such as the Taft-Hartley Labor Management Relations Act, which sought to rein in the power of trade unions. *Id.*

78. 29 U.S.C. § 254(a)(1).

79. *Id.* § 255(a).

employers.<sup>80</sup> In addition, to discourage union exploitation of section 216, the 1947 amendments eliminated representative actions from the options for redress.<sup>81</sup> Thus, in its current form, section 216 of the FLSA permits employees to file only individual claims and collective actions “[o]n behalf of . . . themselves and other employees similarly situated.”<sup>82</sup> Lastly, the amended statute requires plaintiffs, upon receiving notice of the suit,<sup>83</sup> to affirmatively opt into a collective action if they wish to join.<sup>84</sup>

### 3. Alternative Representative Legal Action: Rule 23 Class Actions

Representative legal action has existed in the American legal system since 1833.<sup>85</sup> Rule 23 of the Federal Rules of Civil Procedure governs the most common form of representative legal proceedings: the class action.<sup>86</sup> Enacting Rule 23 the same year as the FLSA, Congress “sought to expand the use of the class construct, believing that allowing more parties to aggregate their claims would accrue efficiency and equity gains that would benefit society.”<sup>87</sup> Rule 23 also provides those who would individually lack the resources to bring a lawsuit with the means to vindicate their rights.<sup>88</sup>

In practice, the 1938 version of Rule 23 proved ambiguous and confusing. Most courts and practitioners consequently lacked the legislative guidance to effectively carry out its policy aims.<sup>89</sup> In 1966, in an effort to standardize class proceedings, Congress amended Rule 23.<sup>90</sup> In its current form, Rule 23 allows one or more individuals to sue as representatives of a class, provided that the

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80. *Id.* §§ 259–260.

81. *Id.* § 216(a); see *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003) (stating that “[b]y identifying ‘employees’ as the only proper parties in a § 216(b) action, the Portal to Portal Act aimed to ban representative actions that previously had been brought by unions on behalf of employees”).

82. 29 U.S.C. § 216(b).

83. See *infra* Part II.B.4 for a discussion of the collective action procedure.

84. Amelia W. Koch et al., *Individualizing the FLSA: Collective Action Waivers and the Split in the Federal Courts*, 13 *ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS* 99, 99 (2012).

85. See James M. Underwood, *Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action*, 46 *S. TEX. L. REV.* 391, 397 (2004) (“In 1833, the first provision for group litigation in federal courts was set forth as Equity Rule 48.”).

86. *Id.* at 397 (reciting the history of class actions).

87. Max Helveston, *Promoting Justice Through Public Interest Advocacy in Class Actions*, 60 *BUFF. L. REV.* 749, 756 (2012); see also Mary J. Davis, *Toward the Proper Role for Mass Tort Actions*, 77 *OR. L. REV.* 157, 169 (1998) (stating that the class action procedure “evolved as a product of concern for the ‘convenient and economical’ provision of justice, coupled with the substantive concern of affording a meaningful remedy to large numbers of otherwise disenfranchised victims of breached obligations” (footnote omitted)).

88. Benjamin Kaplan, *A Prefatory Note*, 10 *B.C. INDUS. & COM. L. REV.* 497, 497 (1969).

89. See Underwood, *supra* note 85, at 400–01.

90. David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 *WASH. U. L. REV.* 587, 588 (2013) (recounting that the current version of the class action went into effect through the 1966 amendments).

class fulfills the rule's required elements of (1) numerosity,<sup>91</sup> (2) commonality,<sup>92</sup> (3) typicality,<sup>93</sup> and (4) adequacy.<sup>94</sup> Upon a satisfactory showing of each, a plaintiff class must demonstrate that the representative action falls within one of the three types of suits delineated within Rule 23(b).<sup>95</sup> The most common type of class action—and that most consistent with section 216—is Rule 23(b)'s third category.<sup>96</sup> Rule 23(b)(3) actions proceed when a court finds (1) “that the questions of law or fact common to class members predominate over any questions affecting only individual members,” and (2) “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>97</sup>

To determine the presence of these requisite characteristics, courts are instructed to consider (1) “the class members’ interests in individually controlling the prosecution or defense of separate actions,” (2) “the extent and nature of any litigation concerning the controversy already begun by or against class members,” (3) “the desirability or undesirability of concentrating the litigation of the claims in the particular forum,” and (4) “the likely difficulties in managing a class action.”<sup>98</sup>

Upon a satisfactory showing of all requirements, courts will certify a class.<sup>99</sup> Subsequent to certification, courts facilitate notice to prospective class members, communicating that their ultimate judgment will bind all members.<sup>100</sup> In addition, the rule provides each putative plaintiff, upon receipt of notice, the option to “opt out” of the proceedings.<sup>101</sup>

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91. FED. R. CIV. P. 23(a)(1) (requiring that “the class is so numerous that joinder of all members is impracticable”).

92. FED. R. CIV. P. 23(a)(2) (requiring the existence of “questions of law or fact common to the class”).

93. FED. R. CIV. P. 23(a)(3) (requiring that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class”).

94. FED. R. CIV. P. 23(a)(4) (necessitating that “the representative parties . . . fairly and adequately protect the interests of the class”).

95. The less common types of representative actions are provided in Rule 23(b)(1) and (b)(2). Rule 23(b)(1) allows for class adjudication in circumstances in which individual suits would risk the existence of inconsistent or varying adjudications, which would have the effect of “establish[ing] incompatible standards of conduct.” FED. R. CIV. P. 23(b)(1). The second type of action arises in circumstances in which “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” FED. R. CIV. P. 23(b)(2). This most often occurs when the assets necessary to satisfy all claims are unavailable.

96. Because the FLSA’s collective action procedure most closely resembles Rule 23(b)(3), this Comment’s discussion addressing judicial interpretations of plaintiffs’ rights in class action suits, and the implications those decisions have had in the context of FLSA collective actions, limits itself to Rule 23(b)(3) class actions.

97. FED. R. CIV. P. 23(b)(3).

98. FED. R. CIV. P. 23(b)(3)(A)–(D).

99. FED. R. CIV. P. 23(c)(1)(A)–(B).

100. FED. R. CIV. P. 23(c)(2)(A)–(B).

101. FED. R. CIV. P. 23(b)(3) advisory committee’s note to 2003 amendment.

#### 4. Collective Action Certification

In contrast, the FLSA provides minimal instruction regarding the role of district courts in overseeing collective actions. Courts have thus adopted their own methods to execute the certification and notification processes.<sup>102</sup> A few courts embrace Rule 23 for guidance, requiring that plaintiffs demonstrate numerosity, commonality, typicality, and adequacy.<sup>103</sup> Most courts, however, find the statutory discrepancies between Rule 23 and section 216 intentionally distinct<sup>104</sup> and use a judicially constructed two-step certification process, summarized as follows:

The first step involves the court making an initial determination to send notice to potential opt-in plaintiffs who may be “similarly situated” to the named plaintiffs with respect to whether a FLSA violation has occurred. The court may send this notice after plaintiffs make a “modest factual showing” that they and potential opt-in plaintiffs “together were victims of a common policy or plan that violated the law.” . . . At the second stage, the district court will, on a fuller record, determine whether a so-called “collective action” may go forward by determining whether the plaintiffs who have opted in are in fact “similarly situated” to the named plaintiffs.<sup>105</sup>

Courts refer to the first phase as “conditional certification” because the decision to certify the class can be reexamined once the case is ready for trial.<sup>106</sup> During this preliminary step, courts require “nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan.”<sup>107</sup> The second stage is prompted by a defendant’s

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102. Matthew Hoffman, Comment, *Fast’s Four Factors: A Solution to Similarly Situated Discovery Disputes in FLSA Collective Actions*, 49 HOUS. L. REV. 491, 502 (2012) (stating that “[d]istrict courts have wrestled for years with the problems posed by the lack of direction from the FLSA regarding section 16(b)’s enforcement provision”).

103. *E.g.*, *Shushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 266 (D. Colo. 1990) (commenting that while the opt-in and opt-out features of the respective procedures differ, section 216 and Rule 23 are not wholly irreconcilable).

104. *E.g.*, *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006) (recognizing that the two-step approach is typically used by courts in suits filed under 29 U.S.C. § 216(b)); *Hipp v. Liberty Nat’l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001) (suggesting that district courts in the Eleventh Circuit adopt the two-tiered approach, deeming it an effective way to manage the complexity of collective actions); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (stating that there is a fundamental, irreconcilable difference between Rule 23 class actions and section 216(b) procedures); *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 1129, 1136 (D. Nev. 1999) (noting that “some courts have concluded that Rule 23 and § 216(b) are two entirely different procedures, and § 216(b) is not to be governed by Rule 23’s principles”).

105. *Dilonez v. Fox Linen Serv. Inc.*, 35 F. Supp. 3d 247, 252 (E.D.N.Y. 2014).

106. *See, e.g.*, *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1261 (11th Cir. 2008).

107. *Davis v. NovaStar Mortg., Inc.*, 408 F. Supp. 2d 811, 812 (W.D. Mo. 2005) (quoting *Schwed v. Gen. Elec. Co.*, 159 F.R.D. 373, 375 (N.D.N.Y. 1995)); *see also Heagney v. European Am. Bank*, 122 F.R.D. 125, 127 (E.D.N.Y. 1988) (stating that a plaintiff needs to describe the potential class only within reasonable limits and provide some identifiable factual basis from which the court can determine if similarly situated plaintiffs exist).

motion to decertify a class.<sup>108</sup> During this stage, following extensive discovery of the parties' factual circumstances, courts require plaintiffs to demonstrate similarity.<sup>109</sup> The factors courts consider include (1) "the disparate factual and employment settings" of the plaintiffs, (2) the possible "defenses available to defendant which appear to be individual to each plaintiff," (3) "fairness and procedural concerns," and (4) whether the plaintiffs complied with administrative filing requirements before they instituted the action.<sup>110</sup>

Following a defendant's motion for decertification, courts will place a substantially higher burden of proof on the plaintiff class than at the conditional certification stage.<sup>111</sup> When plaintiffs fail to meet this more onerous judicial demand—as they often do—courts will grant a defendant's motion and permit plaintiffs to proceed individually.<sup>112</sup> During this phase of litigation, disputes between the parties often arise over the discovery they respectively contend the court should permit.<sup>113</sup> Throughout decertification, defense attorneys frequently request individualized discovery from a large number of opt-in plaintiffs.<sup>114</sup> Plaintiffs' attorneys alternatively advocate for more representative discovery, arguing that individualized discovery—particularly written discovery and depositions—has an overwhelming effect.<sup>115</sup> This is the case not only because of the number of responses that must be prepared, but also because plaintiffs in FLSA actions "cannot ordinarily independently review the questions and requests and prepare draft responses for their counsel as corporate defendants can."<sup>116</sup>

Whether parties pursue representative or individualized discovery rests with the discretion of a district court judge.<sup>117</sup> Considering increasing FLSA litigation,<sup>118</sup> some district courts have attempted to weigh the competing interests of the parties to ensure that the proposed discovery is not unduly burdensome to plaintiffs, but still provides defendants with the information necessary to effectively defend claims.<sup>119</sup> For example, in *Fast v. Applebee's*

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108. *Davis*, 408 F. Supp. 2d 811 at 815.

109. *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 953 (11th Cir. 2007) (commenting on the heightened burden placed on plaintiffs during the second stage of certification).

110. *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001).

111. *Id.* at 1102–03.

112. *E.g.*, *Beauperthuy v. 24 Hour Fitness USA, Inc.*, 772 F. Supp. 2d 1111, 1134–35 (N.D. Cal. 2011) (stating that "after decertification, [p]laintiffs who wish to pursue their individual claims need not file individual lawsuits for relief").

113. *Hoffman*, *supra* note 102, at 495.

114. *Id.*

115. Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1336 (2008).

116. *Id.*

117. *Hoffman*, *supra* note 102, at 495–96.

118. See *infra* Part II.C for a discussion of the current status of FLSA litigation.

119. See, e.g., *White v. 14051 Manchester, Inc.*, No. 4:12-CV-469 JAR, 2013 WL 1867113, at \*2 (E.D. Mo. May 2, 2013).

*International, Inc.*,<sup>120</sup> the District Court for the Western District of Missouri used four factors to determine the permissibility of any potential discovery in the FLSA collective action before it.<sup>121</sup> The court demanded that the discovery (1) not be “sought for the purpose of depriving the opt-in plaintiff of her class status,” (2) be “simple enough that it does not require the assistance of counsel to answer,” (3) “meet[] the standards of Federal Rule of Civil Procedure 26,” and (4) “not otherwise [be] available to the defendant.”<sup>122</sup>

Nonetheless, despite the efforts of some district court judges, the procedural ambiguities associated with collective action certification yields minimal predictability for the litigating parties—decreasing the likelihood of settlement and accordingly increasing legal fees for employers and employees.<sup>123</sup>

### C. *The Current Status of the FLSA: Increased Suits and Employer Response*

In recent years, the number of FLSA actions filed in federal court has reached record highs.<sup>124</sup> A study performed by the U.S. Government Accountability Office (GAO)<sup>125</sup> revealed that between 1991 and 2012 the amount of FLSA lawsuits filed increased by over five hundred percent.<sup>126</sup> In 1991, 1,327 lawsuits were filed;<sup>127</sup> in 2012, the number reached 8,148.<sup>128</sup> An estimated ninety-five percent of the FLSA lawsuits filed in 2012 alleged violations of the FLSA’s overtime provision.<sup>129</sup> Nearly thirty percent of the lawsuits contained allegations that employers required “off-the-clock” work for which employees were never compensated.<sup>130</sup>

The GAO identified increased awareness of FLSA rights and substantial activity on the part of plaintiffs’ attorneys as the predominant reasons for the

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120. No. 06-4146-CV-C-NKL, 2008 WL 5432288 (W.D. Mo. Dec. 31, 2008).

121. *Applebee’s Int’l, Inc.*, 2008 WL 5432288, at \*2.

122. *Id.*

123. Hoffman, *supra* note 102, at 492–93.

124. Michael Spellman & Jeff Slanker, *The Fair Labor Standards Act: Separating Myth from Fact, and Avoiding Common Pitfalls*, TRIAL ADVOC. Q., Spring 2014, at 29, 30 (“Th[e] data indicates an increase of over 347 percent of FLSA cases filed just in the past decade. . . . [T]he number of lawsuits alleging violations of the FLSA has increased every year for the past five years.”).

125. The GAO study analyzed federal district court data from 1991 to 2012 and reviewed selected documents from a representative sample of lawsuits filed in federal district court in 2012. The GAO also reviewed the DOL’s planning and performance documents and interviewed DOL officials, as well as stakeholders, including federal judges, plaintiff and defense attorneys who specialize in FLSA cases, officials from organizations representing workers and employers, and academics who have extensively studied FLSA trends. U.S. GOV’T ACCOUNTABILITY OFFICE, FAIR LABOR STANDARDS ACT: THE DEPARTMENT OF LABOR SHOULD ADOPT A MORE SYSTEMATIC APPROACH TO DEVELOPING ITS GUIDANCE (2013), <http://www.gao.gov/assets/660/659772.pdf> [hereinafter GAO REPORT].

126. *Id.* at 6.

127. *Id.* at 7.

128. *Id.*

129. *Id.* at 14.

130. *Id.* at 15.

increase.<sup>131</sup> Plaintiffs' attorneys interviewed by the GAO noted that financial incentives frequently prompt them to pursue FLSA wage and hour claims on a collective basis.<sup>132</sup> The GAO also highlighted that plaintiffs' attorneys often advertise through various media channels to attract potential plaintiffs.<sup>133</sup> In addition, the report cited evolving case law, namely the Supreme Court's decision in *Hoffmann-La Roche Inc. v. Sperling*,<sup>134</sup> as an impetus for the increase in claims.<sup>135</sup> The Court's ruling, which expanded the already broad discretion of trial courts during the notification process of class-based adjudication, benefitted plaintiffs in FLSA collective actions by increasing judicial assistance in the identification of "similarly situated employees."<sup>136</sup>

The recent recession also factored heavily in the GAO's assessment.<sup>137</sup> Because workers who have been fired do not risk employer retaliation subsequent to filing claims, the GAO stated that recession-related layoffs have incited many former employees to pursue suits.<sup>138</sup> Correspondingly, in times of greater economic difficulty, employers may find it more difficult to comply with FLSA regulations.<sup>139</sup> In addition, ambiguity and confusion in the law and its regulations, especially the statute's exemption provisions, likely lead to inadvertent employer noncompliance.<sup>140</sup> Within the past forty years, the amount of salaried workers qualifying for section 213 exemptions<sup>141</sup> has increased substantially.<sup>142</sup> Today, section 213 excludes eighty-eight percent of salaried workers from coverage, as opposed to thirty-five percent in 1975.<sup>143</sup>

The increase in employment-related lawsuits is not limited to the FLSA.<sup>144</sup> Labor legislation on both state and national levels has spurred ample litigation,

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131. *Id.* at 10.

132. *Id.*

133. *Id.*

134. 493 U.S. 165 (1989).

135. GAO REPORT, *supra* note 125, at 10.

136. *See Hoffmann-La Roche Inc.*, 493 U.S. at 171 (finding that, in an Age Discrimination in Employment Act claim, which has the same collective action procedures as the FLSA, district courts have broad discretion in facilitating notice to potential plaintiffs).

137. GAO REPORT, *supra* note 125, at 11.

138. *Id.*

139. *Id.*

140. *Id.*

141. *See supra* Part II.B.1 for a discussion of the section 213 exemptions.

142. Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, Harkin, Eight Senate Democrats Introduce Bill to Restore Overtime Protections for American Workers (June 18, 2014), <http://www.help.senate.gov/newsroom/press/release/?id=daf9ec85-adbc-4fd6-ae848cf1dfa0bb49&groups=Chair>.

143. *Id.*

144. Other statutes that have given rise to substantial labor litigation include Title VII of the Civil Rights Act, the Employee Retirement Income Security Act, the Age Discrimination in Employment Act, and Worker Adjustment and Retraining Notification. SEYFARTH SHAW, LLP, ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 1-2 (Gerald L. Maatman, Jr. ed., 2013), [http://www.seyfarth.com/dir\\_docs/publications/CAR2013preview.pdf](http://www.seyfarth.com/dir_docs/publications/CAR2013preview.pdf) (citing spikes in employment litigation generally but highlighting that "wage [and] hour litigation continued to out-pace all other types of workplace class actions").

particularly during the country's recent economic hardship.<sup>145</sup> The proliferation of suits and the crippling costs of lengthy litigation have driven many employers to adopt contractual strategies to prevent their employees from pursuing claims in judicial forums.<sup>146</sup> These strategies come predominantly in the form of arbitration agreements and collective action waivers. Discussion of arbitration proceedings in the context of employer-employee relationships necessitates an analysis of the FAA,<sup>147</sup> its legislative history, and the Supreme Court rulings that have dramatically expanded its impact.

In addition, because employers frequently embed collective action waivers within arbitration clauses, the enforceability of a waiver hinges on the validity of an arbitration clause.<sup>148</sup> Neither Congress nor the Supreme Court has directly addressed the permissibility of employer use of an arbitration clause or collective action waiver in the context of an FLSA collective action suit. Thus, interpretations among lower courts have predominately relied on Supreme Court rulings in similar employment and class action contexts.<sup>149</sup>

#### D. *The FAA*

##### 1. Original Goals

Congress enacted the FAA in 1925 to eliminate judicial hostility toward arbitration. Accordingly, the FAA mandates that courts enforce arbitration agreements with the same vehemence as other contractual clauses.<sup>150</sup> An arbitration agreement is a contract between two parties who, by foregoing the right to a judicial forum, shift the traditional fact finding responsibilities of a judge and jury to an arbitrator.<sup>151</sup> Arbitration agreements often limit or wholly

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145. *Id.*

146. Janna Giesbrecht-McKee, Comment, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, 50 WILLAMETTE L. REV. 259, 263–65 (2014) (discussing the expansion of arbitration agreements in the employer-employee context over the last three decades).

147. 9 U.S.C. §§ 1–16 (2012).

148. Thomas W.H. Barlow, *The Enforceability of Class Action Waivers in Arbitration Clauses*, 64 DISP. RESOL. J. 30, 30 (2009) (“Employers are increasingly including in their arbitration agreements a provision waiving the right to bring class action claims in arbitration.”); see *Killion v. KeHE Distribs. LLC*, 761 F.3d 574, 591–92 (6th Cir. 2014) (finding the collective action waiver unenforceable because it was not accompanied by an arbitration agreement, which the court contended would have provided an alternative forum for the effective vindication of the employee’s claim).

149. See *infra* Parts II.E and II.F for a discussion of Supreme Court interpretations of arbitration, collective action waivers, and class action waivers that have impacted judicial interpretations of FLSA litigation on the district and circuit court levels.

150. H.R. REP. NO. 68-96, at 2 (1924) (“The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.”).

151. *Arbitration*, AM. ARB. ASS’N, [https://www.adr.org/aaa/faces/services/disputeresolution/services/arbitration?\\_afLoop=1039430573768451&\\_afWindowMode=0&\\_afWindowId=19n0meomp5\\_50#%40%3F\\_afWindowId%3D19n0meomp5\\_50%26\\_afLoop%3D1039430573768451%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D19n0meomp5\\_104](https://www.adr.org/aaa/faces/services/disputeresolution/services/arbitration?_afLoop=1039430573768451&_afWindowMode=0&_afWindowId=19n0meomp5_50#%40%3F_afWindowId%3D19n0meomp5_50%26_afLoop%3D1039430573768451%26_afWindowMode%3D0%26_adf.ctrl-state%3D19n0meomp5_104) (last visited Nov. 1, 2015).

abrogate many of the procedural niceties of litigation—namely, discovery and opportunities for review.<sup>152</sup> Though lauded for its expediency, arbitration is often criticized for its susceptibility to biased proceedings and unfair results.<sup>153</sup>

Those who drafted the bill—including advocates within the business community, the New York Chamber of Commerce, and members of a committee of the American Bar Association<sup>154</sup>—were primarily concerned with overturning “the common-law rule that denied specific performance of agreements to arbitrate . . . contracts between business entities.”<sup>155</sup> They also aimed to promote the “the principle of *commercial arbitration*.”<sup>156</sup>

FAA supporters emphasized the efficiency of arbitration, particularly in the context of business transactions.<sup>157</sup> As Charles Bernheimer, a prominent figure in the pre-enactment hearings, explained to a subcommittee of the Senate Judiciary Committee, “[M]erchant[s] find[] that arbitration is a very direct and expeditious method,” and preferable to “costly, time-consuming, and troublesome litigation.”<sup>158</sup> By replacing the formality of the judicial forum with contractually agreed upon proceedings, Bernheimer argued that arbitration would “save[] time, save[] trouble, [and] save[] money.”<sup>159</sup> Furthermore, in 1925, the principles of freedom of contract and laissez-faire politics were pervasively

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152. Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857, 878–79 (1999) (delineating certain procedural rights available in a judicial forum but lost in arbitration, such as “the right to appeal an adverse decision, the right to engage in [extensive] discovery[,] . . . and the right to have the admissibility of evidence judged under the Federal Rules of Evidence” (footnotes omitted)).

153. *See id.* at 942.

154. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101 (2006).

155. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 39 (1991) (Stevens, J., dissenting) (“There is little dispute that the primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities. The Act was drafted by a committee of the American Bar Association (ABA), acting upon instructions from the ABA to consider and report upon ‘the further extension of the principle of commercial arbitration.’” (quoting Report of the Forty-Third Annual Meeting of the ABA, 45 A.B.A. REP. 75 (1920))).

156. *Id.* (emphasis added) (quoting Report of the Forty-Third Annual Meeting of the ABA, 45 A.B.A. REP. 75 (1920)).

157. Gabriel Herrmann, Note, *Discovering Policy Under the Federal Arbitration Act*, 88 CORNELL L. REV. 779, 788 (2003) (highlighting benefits of arbitration, including access to an impartial tribunal with a well-developed understanding of the particular industrial or business context in which a dispute arose).

158. David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act’s Legislative History*, 63 BUS. LAW. 55, 59 (Nov. 2007) (quoting *Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 2–3 (1923) (statement of Charles L. Bernheimer, Chairman, Arbitration Committee of the New York Chamber of Commerce)).

159. *Id.* (alteration in original) (quoting *Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 2–3 (1923) (statement of Charles L. Bernheimer, Chairman, Arbitration Committee of the New York Chamber of Commerce)).

entrenched among each branch of the federal government.<sup>160</sup> At the congressional joint hearing, counsel to the American Bar Association committee testified, “[E]verybody . . . feels very strongly that the right of freedom of contract, which the Constitution guarantees to men, includes the right to dispose of any controversy which may arise out of the contract in their own fashion.”<sup>161</sup>

In sum, legislative support of arbitration agreements intended to deny courts the opportunity to interfere with commercial transactions<sup>162</sup> conducted between *two* sophisticated parties.<sup>163</sup> Yet, arbitration clauses now appear not only in multiparty contracts, but also in agreements between individuals and entities of disparate bargaining power.<sup>164</sup>

## 2. The FAA: Employment Agreements

The legislative history of the FAA indicates that Congress intended to cover commercial and transactional agreements.<sup>165</sup> The statutory language accordingly encompasses “any maritime transaction or a contract evidencing a transaction involving commerce.”<sup>166</sup> However, the FAA limits its reach through the inclusion of an exemption provision, which states, “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>167</sup> In 1925, the Supreme Court had not yet expanded Congress’s commerce power to the extent realized today.<sup>168</sup> Therefore, at the time of its enactment, the FAA’s validity relied on limiting its applicability to those agreements constitutionally subject to federal regulatory authority—either through then-existing interpretations of the Commerce Clause or federal admiralty jurisdiction.<sup>169</sup>

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160. See *supra* notes 27–42 and accompanying text for a discussion of laissez-faire politics in the early twentieth century.

161. Clancy & Stein, *supra* note 158, at 61 (quoting *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. (1924) (statement of Julius Henry Cohen)).

162. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 39 (1991) (Stevens, J., dissenting) (“There is little dispute that the primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities.”).

163. H.R. 1020, 111th Cong. § 2(1) (2009) (“The Federal Arbitration Act . . . was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.”).

164. Giesbrecht-McKee, *supra* note 146, at 264 (discussing the expansion of arbitration agreements between parties of unequal bargaining power, specifically in the employment context).

165. See *supra* Part II.D.1 for a discussion of the aims of the FAA’s drafters.

166. 9 U.S.C. § 2 (2012).

167. *Id.* § 1.

168. Matthew Curtin, Note, *Sex, Drugs and Guns: Gonzales v. Raich and the Expanding Scope of the Commerce Power*, 25 QUINNIPIAC L. REV. 887, 896 (2007) (recounting the Supreme Court’s Commerce Clause jurisprudence between 1937 and 1988, during which the Court did not strike down any federal legislation enacted pursuant to the congressional commerce power).

169. Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-Making*, 44 LOY. U. CHI. L.J. 391, 396 (2012).

Thus, critics of compulsory arbitration clauses in employment contracts contend that the exemption provision supports their contention that Congress intended to wholly exclude agreements between employers and employees from the scope of the FAA.<sup>170</sup>

The legislative history of the FAA's enactment also demonstrates the aim of limiting the obligation to arbitrate to "parties presumed to be of approximately equal bargaining strength."<sup>171</sup> To quell concerns regarding the FAA's application to contracts between unequal parties, section 2 of the FAA contains a savings clause, which provides courts with the authority to invalidate arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."<sup>172</sup> Courts will place the burden of proof on the party seeking to invalidate the arbitration agreement.<sup>173</sup> This burden requires the party pursuing nullification to demonstrate the applicability of a "contract defense, such as fraud, duress, or unconscionability."<sup>174</sup>

### 3. Employer Advantages and Employee Disadvantages of Arbitration

The following discussion presumes that employers, as drafters of employment contracts, would not include provisions to arbitrate if arbitration proved prejudicial or detrimental to their interests. As designed, arbitration substantially decreases the costs that both parties would likely incur throughout the course of litigation—namely, legal fees accrued through "pleadings, discovery, motions, trial or hearing, and appeals."<sup>175</sup> Despite the mutual benefit of reduced costs, empirical findings support the theory that employers gain specific advantages by proceeding in arbitration.<sup>176</sup> Principally, statistical data show that arbitration between employers and employees leads to lower monetary awards for employees than in comparable litigation.<sup>177</sup> In addition,

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170. *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 39 (1991) (Stevens, J. dissenting) ("[T]he bill 'is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.'" (second alteration in original) (quoting *Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong., 9 (1923))).

171. *Moses*, *supra* note 154, at 106; *see also Gilmer*, 500 U.S. at 42 (Stevens, J., dissenting) (stating that "[w]hen the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to . . . contracts between parties of unequal bargaining power").

172. 9 U.S.C. § 2 (nullifying an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract"); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (stating that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2").

173. Jerett Yan, Comment, *A Lunatic's Guide to Suing for \$30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After AT&T v. Concepcion*, 32 BERKELEY J. EMP. & LAB. L. 551, 553 (2011).

174. *Id.*

175. Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. DISP. RESOL. 735, 747 (2001).

176. *See supra* Part II.D.1 for a discussion of the advantages of arbitration with respect to efficiency and cost saving.

177. Giesbrecht-McKee, *supra* note 145, at 261, 266–67.

“[s]ince arbitrators . . . are from the business world, corporate defendants may sense ‘a better chance of gaining sympathy, if not straight bias’ from arbitrators.”<sup>178</sup> Relatedly, because an employment contract may designate the arbitrator that will preside over the parties’ dispute, employers often retain the same arbitrator for all of their proceedings, and thus may garner a “repeat player” advantage through their familiarity with a particular arbitrator.<sup>179</sup> Critics of arbitration also contend that extensive procedural limitations impede employees’ efforts to engage in the discovery necessary to prove their claims.<sup>180</sup> Judges also cite the lack of political responsibility arbitrators maintain to act in furtherance of the laws and intentions of Congress—whose enactment of the FLSA evidenced a national policy to protect the American workforce.<sup>181</sup>

Another possible advantage gained by arbitration victors is the statutory limitation placed on court review of arbitration awards, which provides greater finality and predictability than the judicial appellate process. Section 10 of the FAA allows courts to vacate an arbitration award *only* in circumstances where (1) “the award was procured by corruption, fraud, or undue means”; (2) “there was evident partiality or corruption in the arbitrators, or either of them”; (3) “the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy”; (4) the arbitrators were guilty of “any other misbehavior by which the rights of any party have been prejudiced”; or (5) “the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”<sup>182</sup> Section 11 allows judicial modification of awards when (1) “there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award”; (2) “the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted”; or (3) “the award is imperfect in matter of form not affecting the merits of the controversy.”<sup>183</sup>

In their review of arbitration awards, courts have articulated and predominantly applied a “manifest disregard for the law” standard,<sup>184</sup> gleaned

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178. *Id.* at 266 (quoting Kristin McCandless, Note, *Circuit City Stores, Inc. v. Adams: The Debate over Arbitration Agreements in the Employment Context Rages On*, 80 DENV. U. L. REV. 225, 231 (2002)); *see also* *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1476 (D.C. Cir. 1997) (noting that “the employer gains some advantage in having superior knowledge with respect to selection of an arbitrator”).

179. Giesbrecht-McKee, *supra* note 145, at 269.

180. *See, e.g., id.* at 272.

181. *See, e.g., Cole*, 105 F.3d at 1476 (stating that “unlike a judge, an arbitrator is neither publicly chosen nor publicly accountable”).

182. 9 U.S.C. § 10 (2012).

183. *Id.* § 11.

184. *E.g., Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 208 (2d Cir. 2002) (“[A]n arbitral decision may be vacated when an arbitrator has exhibited a ‘manifest disregard of law.’” (quoting *Wilko v. Swan*, 346 U.S. 427, 436 (1953))).

from dicta within the Supreme Court's 1953 *Wilko v. Swan* opinion.<sup>185</sup> The standard requires "a showing that the arbitrators 'knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.'"<sup>186</sup> The Supreme Court has not decided whether the provisions of sections 10 and 11 create an independent statutory standard of review for arbitration awards, or if courts should continue to implement the judicially crafted "manifest disregard" standard.<sup>187</sup> Nonetheless, regardless of the standard courts ultimately choose, the likelihood of overturning an arbitration outcome remains very low. Furthermore, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,<sup>188</sup> the Supreme Court explicitly prohibited arbitration participants from contractually altering the standard for reviewing an award.<sup>189</sup> Thus, if arbitration does in fact produce disparities that advantage employers, the sweeping limitations placed on judicial oversight warrant justifiable concern.

In addition, to further minimize the financial repercussions of alleged FLSA violations, employers often supplement arbitration clauses with provisions that preclude collective proceedings, and accordingly, require individualized arbitration.<sup>190</sup> Consequently, plaintiffs' attorneys, otherwise encouraged by the prospect of favorable jury awards and large settlement offers—especially in the context of collective action litigation—may be less motivated to assist in the filing of FLSA claims.<sup>191</sup> Furthermore, the profitability of representing an employee pursuing a claim in arbitration may be diminished further if the arbitration clause also has the effect of nullifying the FLSA's fee-shifting provision, and the employee lacks the resources to compensate his attorney.<sup>192</sup>

#### E. Supreme Court Interpretations of Employment Arbitration

Between 1974 and 1984, the Supreme Court ruled on three cases that addressed arbitration clauses in the context of collective bargaining agreements

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185. *Wilko*, 346 U.S. at 436–37 (“[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.”).

186. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3 (2010) (alteration in original) (quoting Brief for Respondent at 25, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (No. 08-1198), 2009 WL 3404244).

187. *Id.* (stating that the Court would not decide “whether ‘manifest disregard’ . . . [is] an independent ground for review or . . . a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10”).

188. 552 U.S. 576 (2008).

189. *Mattel, Inc.*, 552 U.S. at 578.

190. See *supra* notes 145–48 and accompanying text for a discussion of employers' use of collective action waivers in arbitration agreements.

191. See *supra* notes 131–33 and accompanying text for a discussion of how plaintiffs' attorneys have contributed to the rise in the amount of FLSA claims filed.

192. See 29 U.S.C. § 216(b) (2012) (providing that “[a] court . . . shall, in addition to any judgment awarded to the plaintiff . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action”).

between employers and the plaintiffs' unions.<sup>193</sup> In *Alexander v. Gardner-Denver Co.*,<sup>194</sup> *Barrentine v. Arkansas-Best Freight System, Inc.*,<sup>195</sup> and *McDonald v. City of West Branch*,<sup>196</sup> the Court focused on whether arbitration clauses contained in union-negotiated collective bargaining agreements could apply to an individual employee's statutory claims. In *Alexander*, a Title VII employment discrimination action, the Court stated, "Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement."<sup>197</sup> Therefore, the Court provided the plaintiff not only with the freedom to choose which forum he wished to pursue his suit, but also the opportunity to vindicate his claim in both a judicial and arbitral proceeding.<sup>198</sup>

In *Barrentine*, which addressed the arbitrability of multiple FLSA wage and hour claims filed against a single employer, the Court first separated the rights provided by the FLSA from the union's collective bargaining process.<sup>199</sup> In so doing, the Court determined that because the statutory rights had "devolved" to the plaintiffs from their status as individual workers, not as members of a collective organization, the union was not in a position to waive those rights.<sup>200</sup> In addition, the Court's interpretation of the FLSA's statutory language, legislative history, and overarching policy aims led it to conclude that Congress intended to give individual employees the opportunity to bring their minimum-wage claims in a judicial forum, which the Court found better protected their congressionally granted rights.<sup>201</sup> Accordingly, the Court ruled that the plaintiffs were permitted to pursue their claims in court, despite previously participating in arbitration.<sup>202</sup>

Lastly, in *McDonald*, the Supreme Court adhered to its rulings in *Alexander* and *Barrentine* to resolve a civil action for deprivation of rights under 42 U.S.C. § 1983.<sup>203</sup> Though acknowledging that arbitration was "well suited to resolv[e] contractual disputes," the Court held that their prior "decisions . . . compel[led] the conclusion that [arbitration] cannot provide an adequate substitute for a judicial proceeding in protecting . . . federal statutory and constitutional rights."<sup>204</sup>

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193. Miriam A. Cherry, Note, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts that Discriminate*, 21 HARV. WOMEN'S L.J. 267, 272-73 (1998).

194. 415 U.S. 36 (1974).

195. 450 U.S. 728 (1981).

196. 466 U.S. 284 (1984).

197. *Alexander*, 415 U.S. at 49.

198. *Id.* at 49-51.

199. *Barrentine*, 450 U.S. at 745.

200. *Id.*

201. *Id.*

202. *Id.* at 745-46.

203. *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

204. *Id.* at 289-90 (1984) (emphasis added).

During the period in which the Court rendered *Alexander, Barrentine*, and *McDonald*, its interpretation of an arbitration clause contained within a construction contract pivotally altered the trajectory of its FAA jurisprudence in cases to come. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*<sup>205</sup> involved a contractual dispute over the construction of a hospital.<sup>206</sup> Prior to commencing the project, the parties had agreed to submit all matters concerning the contract to binding arbitration.<sup>207</sup> When an issue arose, the hospital sought to invalidate the arbitration agreement through a state court proceeding.<sup>208</sup> The contractor responded by filing suit in federal court, seeking an order to compel arbitration.<sup>209</sup> Because the parties presented both courts with a single, identical issue—the arbitrability of the dispute—the federal court, having received the matter later, stayed the proceeding until the issue’s resolution in state court.<sup>210</sup>

On certiorari, the Supreme Court dealt with only the district court’s decision to stay the proceeding.<sup>211</sup> Nevertheless, the Court’s frequently cited dicta has proven to overshadow its resolution of the procedural question at bar—that the district court abused its discretion by failing to compel arbitration.<sup>212</sup> In *Mercury Construction Corp.*, the Court established a “liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”<sup>213</sup> The Court further asserted that “doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”<sup>214</sup>

The Court underscored its deference to the FAA one year later in *Southland Corp. v. Keating*.<sup>215</sup> In *Southland Corp.*, the Court declared that the FAA preempted any state legislation that would frustrate its purpose.<sup>216</sup> More specifically, *Southland Corp.* addressed a provision of the California Franchise Investment Law,<sup>217</sup> which required judicial consideration of claims arising under that statute.<sup>218</sup> The Court, in assessing the validity of the provision, stated, “In enacting [section] 2 of the [F]ederal [Arbitration] Act, Congress declared a

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205. 460 U.S. 1 (1983).

206. *Mercury Constr. Corp.*, 460 U.S. at 4.

207. *Id.* at 5.

208. *Id.* at 7.

209. *Id.*

210. *Id.* at 1–2.

211. *Id.* at 19.

212. *Id.* at 24–25.

213. *Id.* at 24.

214. *Id.* at 24–25.

215. 465 U.S. 1 (1984).

216. *Southland Corp.*, 465 U.S. at 14.

217. The California Franchise Investment Law provided: “Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.” *Id.* at 10 (quoting CAL. CORP. CODE ANN. § 31512 (West 1977)).

218. *Id.*

*national policy favoring arbitration* and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties [had] agreed to resolve by arbitration.”<sup>219</sup> The Court contended that the enactment of the FAA evinced a specific legislative intention “to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”<sup>220</sup> Though arguably contradicting the savings clause of the FAA,<sup>221</sup> after *Mercury Construction Corp.* and *Southland Corp.*, parties could no longer evade the binding effects of arbitration agreements by claiming that the matters at issue did not fall under the scope of the statute. Nor could they avoid arbitration by asserting that existing state legislation precluded arbitration as a permissible forum to settle their disputes.

Yet, neither *Mercury Construction Corp.* nor *Southland Corp.* addressed arbitration rights in the context of federal statutory actions. In 1985, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>222</sup> the Court confronted this issue in the context of a claim arising under the Sherman Act.<sup>223</sup> The philosophy espoused by the Court in *Mercury Construction Corp.* and *Southland Corp.* supplied the requisite foundation for the Court’s extension of the “federal policy favoring arbitration”<sup>224</sup> to the case at bar. The Court ruled that parties who had agreed to arbitration should be held to their contractual obligations “unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue”—which the Court did not find.<sup>225</sup>

The Court justified its interpretation, stating, “By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>226</sup> Somewhat ironically, the Court’s analysis of substantive rights shaped the creation of the “effective vindication doctrine.”<sup>227</sup> The maxim stems from the *Mitsubishi* Court’s rationalization that “so long as the prospective litigant *effectively may vindicate* its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”<sup>228</sup> Thus,

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219. *Id.* (emphasis added).

220. *Id.* at 16.

221. See *supra* notes 172–74 and accompanying text for a discussion of the FAA’s savings clause.

222. 473 U.S. 614 (1985).

223. *Mitsubishi*, 473 U.S. at 616.

224. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

225. *Mitsubishi*, 473 U.S. at 628.

226. *Id.*

227. *Id.* at 637; see *Sightler v. Remington Coll.*, No. 6:15-CV-273-ORL, 2015 WL 4459545, at \*4 (M.D. Fla. July 21, 2015) (“The effective vindication doctrine permits courts to invalidate arbitration provisions that ‘prevent the “effective vindication” of a federal statutory right.’” (quoting *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013))).

228. *Mitsubishi*, 473 U.S. at 637 (emphasis added).

plaintiffs asserting the doctrine have done so in circumstances where arbitration arguably fails to provide a proper forum to vindicate their claims.<sup>229</sup>

The Court's departure from its prior opinions continued in the years succeeding *Mitsubishi*. In *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>230</sup> the Court extended the scope of the FAA within the employment realm—confirming its applicability to not only union-negotiated collective bargaining agreements, but also individual contracts.<sup>231</sup> In *Gilmer*, the plaintiff alleged violations of the Age Discrimination in Employment Act (ADEA).<sup>232</sup> Upon commencing his action in federal court, the plaintiff asserted the effective vindication doctrine to invalidate the arbitration clause he assented to as a condition of his employment.<sup>233</sup> More specifically, the defendant had required the plaintiff to register as a securities representative with the New York Stock Exchange.<sup>234</sup> His registration application contained an agreement to arbitrate “any controversy . . . arising out of the employment or termination of employment.”<sup>235</sup>

In his attempt to nullify the agreement, the plaintiff argued that compulsory arbitration frustrated the aims of the ADEA and failed to provide a sufficient forum to prove his claim.<sup>236</sup> The Court rejected the plaintiff's contention, finding his “generalized attacks” inadequate to demonstrate that proceeding in an arbitral forum would harm his case.<sup>237</sup> Moreover, the Court, citing its *Mitsubishi* dicta, demanded an express congressional policy precluding arbitration,<sup>238</sup> which the Court found the text and legislative history of the ADEA did not provide.<sup>239</sup> The plaintiff also advanced an additional challenge: that employment contracts should not be subject to compulsory arbitration because of inherent inequities in the parties' bargaining power.<sup>240</sup> The Court unhesitatingly opposed this contention, stating, “Mere inequality in bargaining power . . . is not a sufficient

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229. See, e.g., *Sightler*, 2015 WL 4459545, at \*4 (plaintiff attempted to invalidate an arbitration agreement by invoking the effective vindication doctrine, arguing that “the potential costs and fees associated with arbitration are so much higher than those associated with litigation in federal court that compelling arbitration would ‘defeat the remedial purpose’ of the ADA and the Rehabilitation Act”).

230. 500 U.S. 20 (1991).

231. *Gilmer*, 500 U.S. at 35.

232. *Id.* at 20.

233. *Id.* at 40. (Stevens, J., dissenting).

234. *Id.* at 23 (majority opinion).

235. Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of the Respondent, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (U.S. 1991) (No. 90-18), 1990 WL 10009002, at \*3.

236. For example, the plaintiff in *Gilmer* had argued that the arbitration panels were likely to be biased and that the discovery limitations would make it more difficult to prove his claim. *Gilmer*, 500 U.S. at 30–32.

237. *Id.* at 30–31.

238. *Id.* at 29.

239. *Id.* (noting that “Congress . . . did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA”).

240. *Id.* at 32–33.

reason to hold that arbitration agreements are never enforceable in the employment context.”<sup>241</sup>

In *Gilmer*, because the arbitration clause at issue was not contained within an employment contract, but rather within a securities registration application, the Court’s resolution of the issue did not necessitate adjudication of the exemption provision.<sup>242</sup> However, in *Circuit City Stores, Inc. v. Adams*,<sup>243</sup> the Court directly addressed whether the language of the exemption provision affected the legality of arbitration agreements within employment contracts. In *Adams*, the disputed contract stated: “I will settle any and all previously unasserted claims . . . relating to my . . . employment and/or cessation of employment . . . exclusively by final and binding arbitration . . . .”<sup>244</sup>

To contest the applicability of the FAA to his agreement, the plaintiff in *Adams* furthered two textual arguments. He first asserted that an employment contract did not qualify as a “contract evidencing a transaction involving interstate commerce” because “transaction,” as defined in section 2 of the FAA, “extend[ed] only to commercial contracts.”<sup>245</sup> His second argument rested with section 1’s exemption provision, which he contended excluded all employment agreements from coverage.<sup>246</sup> The Court’s interpretation of the statutory language refuted both arguments. It responded to the plaintiff’s first challenge by noting that if employment contracts could not qualify as “commerce,” the exemption provision, which explicitly excludes certain contracts of employment, would be superfluous.<sup>247</sup> Regarding the plaintiff’s second argument, the Court found that, through section 1, Congress intended to exempt “only contracts of employment of transportation workers.”<sup>248</sup> The Court justified its reading of the exemption provision by concluding that the FAA’s purpose of “overcom[ing] judicial hostility to arbitration agreements” supported a narrow construction of section 1.<sup>249</sup>

Through its discussions in *Gilmer* and *Adams*, the Court dismissed most—if not all—hesitations regarding the enforcement of binding arbitration agreements in labor contracts. Nonetheless, dissenting in both cases, Justice Stevens advanced textual, historical, and public policy arguments to contest the Court’s holdings. In his *Gilmer* dissent, Justice Stevens recited the assurances of the FAA’s drafters, who stated, “[T]he bill ‘is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages

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241. *Id.* at 33.

242. *Id.* at 25 n.2. See *supra* Part II.D.2 for a discussion of the FAA’s exemption provision.

243. 532 U.S. 105 (2001).

244. *Adams*, 532 U.S. at 109–10.

245. *Id.* at 113 (internal quotation marks omitted) (citing *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1085 (9th Cir. 1998), *abrogated by* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)).

246. *Id.* at 114.

247. *Id.* at 113–14.

248. *Id.* at 119 (emphasis added).

249. *Id.* at 118 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995)).

are.”<sup>250</sup> He not only disagreed with the FAA’s extension to employment-related disputes, per the FAA’s exemption provision, but also stated “that compulsory arbitration conflict[ed] with the congressional purpose animating the ADEA.”<sup>251</sup> More specifically, he deemed the authority of “the courts to issue broad injunctive relief [as] the cornerstone to eliminating discrimination in society.”<sup>252</sup> Joined by Chief Justice Marshall, Justice Stevens argued that by narrowing the scope of the exemption provision in the *Gilmer* case, the Court overstepped the intentions of the FAA framers and did so at the expense of the ADEA’s important policy goals.<sup>253</sup> He reiterated his concerns in his *Adams* dissent:

Today . . . the Court fulfills the original—and originally unfounded—fears of organized labor by essentially rewriting the text of § 1 to exclude the employment contracts *solely* of “seamen, railroad employees, or any other class of [transportation] workers engaged in foreign or interstate commerce.” In contrast, whether one views the legislation before or after the amendment to § 1, it is clear that it was not intended to apply to employment contracts at all.<sup>254</sup>

Critics of employment arbitration frequently echo Justice Stevens’s disapproval of the majority’s conclusions.<sup>255</sup> These critics argue that the Supreme Court unjustifiably expanded the scope of the FAA beyond the intentions of the Congress that enacted it.<sup>256</sup> In addition, since the Court’s *Gilmer* decision, employers have increasingly used arbitration agreements to avoid litigation.<sup>257</sup>

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250. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 39 (1991) (Stevens, J., dissenting) (alteration in original) (quoting *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923) (statement of Sen. Thomas J. Walsh, S. Comm. on the Judiciary)).

251. *Id.* at 41.

252. *Id.* (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975)).

253. *Id.* at 42 (contending that the “Court’s holding . . . clearly eviscerate[d] the important role played by an independent judiciary in eradicating employment discrimination”).

254. *Adams*, 532 U.S. at 129 (Stevens, J., dissenting) (alteration in original) (citation omitted).

255. See, e.g., Natalie Hrubos, Comment, *Agreements to Arbitrate Employment Discrimination Claims: Pyett Illustrates Need to Re-Forest the Legal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 281, 296 (2008) (citing Stevens’s dissent in *Adams*).

256. See *supra* Part II.D.1 for a discussion of the policy goals of the FAA’s drafters. See Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2(2) (2009) (“A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.”).

257. AM. ARB. ASS’N, RESOLVING EMPLOYMENT DISPUTES: A PRACTICAL GUIDE 2 (2006), [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_004411](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004411) (“An increasing number of employers and employees are using ADR as a more effective option to traditional litigation to resolve disputes in the non-union workplace.”); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 2 (2011) (stating that recent estimates suggest that for a third or more of nonunion employees, arbitration, as opposed to litigation, is the primary mechanism of access to justice in the employment law realm); Colvin, *supra*, at 2 (“The combination of rising levels of litigation in the employment area and the Supreme Court’s 1980’s

Legal blogs and other forms of legal commentary have not only advertised the permissibility of arbitration clauses in employment agreements but have also provided employers with advice and examples to draft such clauses.<sup>258</sup>

*F. Supreme Court Interpretations of Class and Collective Action Waivers*

The public policy implications of compulsory arbitration are exacerbated when an arbitration clause is accompanied by a provision prohibiting a party from pursuing suit in a class-wide arbitral or judicial proceeding.<sup>259</sup> Prospective defendants use these contractual clauses, referred to as either class or collective action waivers, to preclude the possibility of claim aggregation, pursuant to either Rule 23 or other statutory procedures—such as section 216 of the FLSA.<sup>260</sup> Channeling claimants to arbitration, and simultaneously denying them the right to proceed as a class, not only decreases the financial and public exposure businesses and employers face during the course of large-scale litigation, but also increases the burden each plaintiff bears as he (if he) pursues his claim individually.<sup>261</sup> Moreover, doing so drastically reduces the financial incentives of plaintiffs' attorneys.<sup>262</sup>

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reversal of its earlier rejection of the use of arbitration to resolve statutory claims produced a perfect storm of incentives for employer[s] to adopt arbitration agreements as mandatory terms and conditions of employment.”); Peter Danysh, Comment, *Employing the Right Test: The Importance of Restricting AT&T v. Conception to Consumer Adhesion Contracts*, 50 HOUS. L. REV. 1433, 1439 (2013) (stating that “pre-dispute mandatory arbitration agreements (PMAAs) became standard boilerplate provisions in employment contracts within a wide variety of industries”); Michele L. Giovagnoli, Comment, *To Be or Not to Be? Recent Resistance to Mandatory Arbitration Agreements in the Employment Arena*, 64 UMKC L. REV. 547, 555 (1996) (“[T]he number of employment related lawsuits has exploded.”); *Voluntary Arbitration in Worker Disputes Endorsed by 2 Groups*, WALL ST. J., June 20, 1997, at B13 (stating that “more than 3.5 million employees are covered by [arbitration] agreements” with the American Arbitration Association alone); Brad Reid, *Unconscionable Employment Arbitration Agreement Held Unenforceable*, HUFFINGTON POST (Nov. 8, 2013, 1:38 PM), [http://www.huffingtonpost.com/brad-reid/unconscionable-employment\\_b\\_4234686.html](http://www.huffingtonpost.com/brad-reid/unconscionable-employment_b_4234686.html) (“Provisions in employment applications that require mandatory and binding arbitration of all disputes are commonplace and are generally enforced as written by courts.”).

258. See, e.g., Andrea M. Kirshenbaum & Kate A. Kelba, *The Case for Mandatory Class and Collective Action Waivers*, LEGAL INTELLIGENCER (June 2, 2014), [http://www.postschell.com/site/files/post\\_schell\\_the\\_legal\\_intelligencer\\_class\\_action\\_waivers\\_kirshenbaum\\_kleba.pdf](http://www.postschell.com/site/files/post_schell_the_legal_intelligencer_class_action_waivers_kirshenbaum_kleba.pdf); James R. Grosso, *Labor & Employment: Decision Strengthens Use of Class, Collective Action Waivers*, DAILY RECORD (Apr. 28, 2014), <http://nydailyrecord.com/blog/2014/04/28/labor-employment-decision-strengthens-use-of-class-collective-action-waivers/#ixzz3Hw2WzZWE>; Scott T. Silverman & Andrew M. Loewenstein, *Employers Now Have a Powerful Option to Defeat FLSA Attorney's Fees Claims*, AKERMAN PRAC. UPDATE (Aug. 2011), <http://documents.jdsupra.com/3cc7e3c3-dcd5-4ca1-947a-c97444687b07.pdf>.

259. J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1745–49 (2006).

260. Katherine V. W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. REV. DISCOURSE 164, 169 (2013) (citing that “81 percent of the largest retail banks and credit card companies that require mandatory arbitration also ban class actions”).

261. Andrew L. Sandler & Victoria Holstein-Childress, *Supreme Court and Congress Focus on Mandatory Pre-Dispute Arbitration Agreements: The Debate Continues*, 22 WESTLAW J. PROD. LIAB. 12, \*3 (2011) (“Class-action waivers discourage consumers from pursuing small claims because the cost

The rise in class and collective action waivers is often attributed to the Supreme Court's *AT&T Mobility LLC v. Concepcion*<sup>263</sup> decision, which addressed a class action waiver in the context of a consumer contract.<sup>264</sup> While the procedural remedies provided by Rule 23 and section 216 vary,<sup>265</sup> lower courts have found the Supreme Court's view regarding plaintiffs' accessibility to the class action mechanism applicable in the context of FLSA collective actions.<sup>266</sup> In *Concepcion*, the complaint, which was consolidated as a class action, alleged that AT&T engaged in false advertising and fraud.<sup>267</sup> The contract at issue included an arbitration agreement, which "required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'"<sup>268</sup> In denying AT&T's motion to dismiss the claim and compel arbitration, the district court relied on the California Supreme Court's decision in *Discover Bank v. Superior Court*,<sup>269</sup> which classified most class waivers in consumer contracts as per se unconscionable.<sup>270</sup>

The *Concepcion* Court, noting the aims of the FAA, emphasized the benefits of arbitration, particularly with regard to efficiency and expediency.<sup>271</sup> The Court maintained that Congress's goal in enacting the FAA was to place

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of arbitrating them on an individual basis can exceed their value[,] [s]uch waivers are one-sided because corporations are unlikely to pursue claims against a class of consumers, [and] [c]lass waivers effectively immunize companies from liability for large-scale, small-dollar fraud.").

262. *Id.*

263. 131 S. Ct. 1740 (2011).

264. Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 725 (2012) (arguing that the Court's endorsement of class action waivers has allowed companies to insulate themselves from class actions, and with that, permitted companies "to escape many legal regulations and thereby eliminat[ed] a great deterrent to company misconduct").

265. See *supra* Parts II.B.2–II.B.4 for a discussion of class actions, collective actions, and the discrepancies between them.

266. See *infra* Part II.G for a discussion of circuit court interpretations of collective action waivers in the context of FLSA suits.

267. *Concepcion*, 131 S. Ct. at 1744.

268. *Id.*

269. 113 P.3d 1100 (2005), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

270. In *Discover Bank*, the California Supreme Court found, [W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

*Discover Bank*, P.3d at 1110 (second alteration in original) (quoting CAL. CIV. CODE § 1668 (West 2004)).

271. *Concepcion*, 131 S. Ct. at 1749 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.").

arbitration agreements on the “*same footing as other contracts*,”<sup>272</sup> which required specific enforcement of the terms to which the parties had agreed.<sup>273</sup> Upon finding the arbitration agreement enforceable, the Court also upheld its class waiver provision.<sup>274</sup> The Court further reasoned that class arbitration would nullify the advantages of arbitration by sacrificing informality and making “the process slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>275</sup>

The Court also asserted that the arbitral forum was ill equipped to handle the nuances of class proceedings—most particularly, issues related to adequate representation of absent class members, notice, and a right to opt out of the class.<sup>276</sup> Lastly, the Court highlighted the inherent risk that accompanies arbitration’s lack of multilayer review, which it contended was particularly risky for defendants in circumstances “when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once.”<sup>277</sup> By recognizing both the rationale of the class waiver, as well as the established federal policy favoring arbitration, the Court found California’s *Discover Bank* rule incompatible, and thus, preempted by the FAA.<sup>278</sup>

More recently, in *American Express Co. v. Italian Colors Restaurant*,<sup>279</sup> the Court upheld a class waiver, despite the fact that individualized arbitration rendered the expense of pursuing the claim higher than the award sought through the statutory remedy.<sup>280</sup> The Court concluded that the antitrust laws, which gave rise to the suit, did “not guarantee an affordable procedural path to the vindication of every claim.”<sup>281</sup> Its ruling therefore rejected the plaintiffs’ appeal to the policy goals of Rule 23,<sup>282</sup> while also substantially weakening—if not wholly diminishing—the influence of the effective vindication doctrine.<sup>283</sup> The Court explained, “[C]ongressional approval of Rule 23 [did not] establish an entitlement to class proceedings for the vindication of statutory rights.”<sup>284</sup>

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272. *Id.* at 1757 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

273. *Id.*

274. *Id.* at 1753.

275. *Id.* at 1751.

276. *Id.*

277. *Id.* at 1752.

278. *Id.*

279. 133 S. Ct. 2304 (2013).

280. *Italian Colors Rest.*, 133 S. Ct. at 2308.

281. *Id.* at 2309.

282. See *supra* Part II.B.3 for a discussion of the policy aims behind enacting Rule 23.

283. *Italian Colors Rest.*, 133 S. Ct. at 2306. See *supra* notes 227–29 and accompanying text for a discussion of the effective vindication doctrine.

284. *Italian Colors Rest.*, 133 S. Ct. at 2309. The Court’s ruling established that the mechanism provided to plaintiffs pursuant to Rule 23 was merely a procedural right that did not create any additional statutory or substantive rights. *Id.* at 2309–11. Throughout the country’s judicial history, courts have permitted predispute waiver of procedural rights through contract. David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 612 (2010). Even a party’s right to a jury trial can be contractually waived. *Id.* at 641. The Supreme Court and lower courts have historically recognized a substantive right to proceed in an arbitral forum. See

Moreover, the Court held that vindication of the plaintiff's procedural rights would impermissibly abridge the defendant's substantive right to arbitration.<sup>285</sup>

Through Rule 23, Congress sought to afford claimants, who individually would lack sufficient strength to bring their opponents to court, with a more convenient and less expensive vehicle to vindicate their rights.<sup>286</sup> Thus, critics of *Concepcion* and *Italian Colors* contend that those decisions explicitly controvert what the legislature had originally hoped to achieve.<sup>287</sup> Similarly, because large, public litigation deters noncompliance with statutory standards,<sup>288</sup> opponents of class action waivers fear that a broad interpretation of *Concepcion* among lower courts will "effectively eliminate most consumer and employment class actions, . . . provid[ing] companies with licenses to cheat and harm almost at will."<sup>289</sup>

### G. Circuit Interpretations of the FAA in FLSA Lawsuits

Despite its pro-FAA pronouncements, the Supreme Court has not yet addressed the validity of arbitration agreements and collective action waivers in the context of an FLSA dispute. The Second,<sup>290</sup> Third,<sup>291</sup> Fourth,<sup>292</sup> Fifth,<sup>293</sup> Sixth,<sup>294</sup> Eighth,<sup>295</sup> Ninth,<sup>296</sup> and Eleventh<sup>297</sup> Circuits have held that an employee can waive his or her right to proceed in a judicial forum and as a class, notwithstanding the remedial language in section 216.<sup>298</sup> However, courts have

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Southland Corp. v. Keating, 465 U.S. 1, 11–13 (1984); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201–02 (1956); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 254 n.9 (S.D.N.Y. 2005) ("It is well settled that a contractual agreement to arbitrate creates a substantive right to an arbitral forum."). Moreover, courts have interpreted the enactment of the FAA as Congress's conferment of a federal right to arbitration. *See Olde Disc. Corp. v. Tupman*, 1 F.3d 202, 208 (3d Cir. 1993).

285. *Italian Colors Rest.*, 133 S. Ct. at 2309–10.

286. *See supra* Part II.B.3 for a discussion of the legislative history of Rule 23.

287. *See, e.g., Sternlight, supra* note 264.

288. *See id.* at 725 (arguing that by condoning class action waivers, the Supreme Court has allowed companies to insulate themselves from class actions, and with that, has permitted them "to escape many legal regulations and thereby eliminat[ed] a great deterrent to company misconduct").

289. *Id.* at 726.

290. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296–97 (2d Cir. 2013).

291. *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 265 (3d Cir. 2012); *Vilches v. Travelers Cos.*, 413 F. App'x 487, 489 (3d Cir. 2011).

292. *Muriithi v. Shuttle Exp., Inc.*, 712 F.3d 173, 180–81 (4th Cir. 2013); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002).

293. *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 296–97 (5th Cir. 2004).

294. *Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 591–92 (6th Cir. 2014) (finding a collective action waiver unenforceable because it was not accompanied by an arbitration agreement, which would have provided the alternative forum necessary for the effective vindication of the employee's claim).

295. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052–53 (8th Cir. 2013).

296. *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319–20 (9th Cir. 1996).

297. *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014).

298. *See supra* Part II.B.2 for a discussion of the options for redress provided in section 216 of the FLSA.

not enforced collective action waivers that are unaccompanied by arbitration clauses, finding compulsory individualized proceedings valid only in the context of arbitration.<sup>299</sup> Nonetheless, as evidenced by the increasing number of claims filed, signees of such agreements continue to pursue their FLSA claims in judicial forums, hoping to withstand a defendant's motion to either dismiss or compel arbitration.<sup>300</sup>

The Fifth Circuit case, *Carter v. Countrywide Credit Industries, Inc.*,<sup>301</sup> demonstrates the arguments plaintiffs frequently pursue—albeit, here, unsuccessfully—to invalidate arbitration agreements and collective action waivers. In *Carter*, current and former employees brought a collective action suit to recover overtime compensation.<sup>302</sup> Following the filing of the claim, the defendant moved to compel the plaintiffs to arbitration on an individual basis, pursuant to the agreements each plaintiff had signed as a condition of his or her employment.<sup>303</sup> To invalidate the arbitration clause, the plaintiffs argued (1) that FLSA claims were not subject to arbitration, and (2) that the collective action waiver infringed upon substantive rights granted by section 216 of the FLSA.<sup>304</sup> The court, supported by rulings in the Fourth and Ninth Circuits, as well as by the Supreme Court's *Gilmer* analysis,<sup>305</sup> determined that nothing in the FLSA's text or legislative history evidenced preclusion of arbitration.<sup>306</sup> In addition, the Fifth Circuit rejected the plaintiffs' contention that the collective action waiver infringed upon their substantive statutory rights.<sup>307</sup> The court, noting that the collective action provision of the FLSA mirrors the language of the ADEA, held that "*Gilmer's* conclusion . . . applies with equal force to FLSA claims."<sup>308</sup>

Similarly, in *Owen v. Bristol Care, Inc.*,<sup>309</sup> the Eighth Circuit reversed the district court's denial of the defendant-employer's motion to compel arbitration

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299. *Killion*, 761 F.3d at 592 (citing the overwhelming precedent in the circuit courts of appeals upholding collective action waivers, but noting that none of those decisions spoke "to the validity of a collective-action waiver outside of the arbitration context").

300. Many academics argue that because wage and hour claims are frequently not large enough to warrant individualized litigation, eliminating the collective action procedure will severely limit plaintiffs' incentives to file suit. This will prove particularly relevant in circumstances of "negative-value claims," in which the recovery sought does not justify the cost of the individual claim. *E.g.*, Danysh, *supra* note 257, at 1439–40 (quoting Glover, *supra* note 259, at 1737).

301. 362 F.3d 294 (5th Cir. 2004).

302. *Carter*, 362 F.3d at 296.

303. *Id.*

304. *Id.*

305. See *supra* notes 230–42 and accompanying text for a discussion of the Supreme Court's *Gilmer* analysis.

306. *Carter*, 362 F.3d at 297–98; see *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002) (holding that FLSA claims are arbitrable); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319–20 (9th Cir. 1996) (finding no evidence in the text or legislative history of the statute that Congress intended to preclude arbitration of FLSA claims).

307. *Carter*, 362 F.3d at 298.

308. *Id.*

309. 702 F.3d 1050 (8th Cir. 2013).

in an FLSA action.<sup>310</sup> In *Owen*, the plaintiffs alleged that the text of the FLSA provided the substantive “right . . . to bring an action by or on behalf of any employee, and the right . . . to become a party plaintiff to such any [sic] action.”<sup>311</sup> Through its analysis of the FLSA’s collective action procedure, and particularly its opt-in requirement, the court concluded that even if Congress provided a right to pursue claims collectively, that right was merely procedural.<sup>312</sup> The court therefore found that, through private contract, a party could waive his ability to proceed with others collectively.<sup>313</sup> The Eighth Circuit also noted that the Supreme Court’s *Gilmer* conclusion confirmed that the inclusion of a collective action remedy failed to satisfy the contrary congressional command necessitated by the Supreme Court’s interpretation of the FAA.<sup>314</sup>

Plaintiffs have also attempted to invalidate arbitration agreements and collective action waivers through the FAA’s savings clause<sup>315</sup>—frequently through the invocation of the unconscionability doctrine.<sup>316</sup> Though each state provides its own definition of the maxim, courts in many states<sup>317</sup> assess the contract law defense in terms of substantive unconscionability (contractual terms that are unreasonably favorable to the drafter)<sup>318</sup> and procedural unconscionability (a lack of meaningful choice on the part of the nondrafting party regarding acceptance of the provision).<sup>319</sup> Due to *Concepcion*, plaintiffs can no longer argue that state statutes explicitly preclude arbitration as a proper forum for their claims.<sup>320</sup> Yet, many claimants still contend that the nuances of their circumstances render their agreements to arbitrate unfair.<sup>321</sup> Thus, while *Concepcion* weakened the unconscionability defense in the context of

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310. *Owen*, 702 F.3d at 1051.

311. *Id.* at 1052 (first omission in original) (quoting 29 U.S.C. § 216(b) (2012)).

312. *Id.* at 1052–53 (concluding that, because the FLSA states that “[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing,” and because the employee must affirmatively opt into the action, the employee should have the power to waive participation in a class action (quoting 29 U.S.C. § 216(b))).

313. *Id.* at 1053 (stating that the collective action “provision falls short of the ‘contrary congressional command’ required to override the FAA” (quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 667 (2012))).

314. *Id.* at 1054–55. See *supra* note 284 for a discussion of the waiver of procedural rights.

315. 9 U.S.C. § 2 (2012) (stating that arbitration agreements are subject to invalidation “upon such grounds as exist at law or in equity for the revocation of any contract”).

316. Yvette Ostolaza, *Overview of Arbitration Clauses in Consumer Financial Services Contracts*, 40 TEX. TECH L. REV. 37, 40 (2007) (“Arbitration agreements are often voided on the basis of unconscionability . . .”).

317. Yan, *supra* note 173, at 553–55.

318. *Vilches v. Travelers Cos.*, 413 F. App’x 487, 493 (3d Cir. 2011).

319. *Id.* at 494.

320. See *supra* notes 263–78 and accompanying text for an in-depth discussion of the Supreme Court’s *Concepcion* decision.

321. See *Omstead v. Dell, Inc.*, 533 F. Supp. 2d 1012, 1028 (N.D. Cal. 2008) (stating that “the inquiry [of] whether a class action waiver provision will be considered unconscionable in California ‘is a fact-specific, case-by-case inquiry’” (quoting *Brazil v. Dell Inc.*, No. C-07-01700 RMW, 2007 WL 2255296, at \*4 (N.D. Cal. Aug. 3, 2007))).

arbitration, courts still must evaluate allegations of unconscionability on a case-by-case, fact-specific basis.<sup>322</sup>

For example, in *Vilches v. Travelers Cos.*,<sup>323</sup> after the plaintiffs began working for the defendant, the defendant issued a revised arbitration policy, which stated, “There will be no right or authority for any dispute to be brought, heard or arbitrated under this Policy as a class or collective action . . . or in a representative capacity on behalf of any person.”<sup>324</sup> Each plaintiff submitted to the arbitration agreement and collective action waiver as a condition of his or her employment.<sup>325</sup> Despite the policy, employees collectively brought suit in federal court, alleging that their employer violated the FLSA overtime mandates.<sup>326</sup> The plaintiffs countered the defendant’s motion to compel individual arbitration by asserting that the arbitration clause and collective action waiver were unconscionable and therefore unenforceable.<sup>327</sup> The *Vilches* court, in its evaluation of New Jersey contract theory,<sup>328</sup> examined whether the facts of the dispute demonstrated the requisite elements of substantive and procedural unconscionability.<sup>329</sup> Assessing the plaintiffs’ allegations of substantive unconscionability, the court first addressed and rejected concerns related to the nature of the employee-employer contractual relationship.<sup>330</sup> The court emphasized that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”<sup>331</sup> Thus, the court held that the inherent disparity between employers and employees did not, by itself, evidence substantive unconscionability.<sup>332</sup>

In its analysis of the plaintiffs’ procedural unconscionability contention, the court focused on how the defendant communicated the changed policy.<sup>333</sup>

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322. See *Westlake Vinyls, Inc. v. Goodrich Corp.*, 523 F. Supp. 2d 577, 583 (W.D. Ky. 2007) (noting that “[u]nconscionability determinations are fact specific and are addressed on a case-by-case basis”).

323. 413 F. App’x 487 (3d Cir. 2011).

324. *Vilches*, 413 F. App’x at 489–90 (emphasis omitted).

325. *Id.* at 490 n.2 (highlighting that the email which contained the arbitration policy stated that the policy was an “essential element and condition of continued employment”).

326. *Id.* at 489.

327. *Id.* at 490.

328. The *Vilches* court, in its examination of New Jersey contract theory, representatively reflects the unconscionability doctrine in most states, which require a showing of both procedural and substantive unconscionability to invalidate a contract or contract provision. See Yan, *supra* note 173, at 553.

329. *Vilches*, 413 F. App’x at 494.

330. *Id.* at 493.

331. *Id.* (first alteration in original) (omission in original) (quoting *Martindale v. Sandvik, Inc.*, 800 A.2d 872, 880 (N.J. 2002)).

332. *Id.* at 493–94.

333. *Id.* at 494. In its discussion, the Third Circuit highlighted other factors that may indicate procedural unconscionability, namely, “age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process.” *Id.* (quoting *Estate of Ruzsala ex rel. Mizerak v. Brookdale Living Cmty., Inc.*, 1 A.3d 806,

Because the defendant provided several announcements of the amendment and “requested acknowledgment and agreement to the revision on an annual basis,”<sup>334</sup> the court found the defendant’s notice sufficient.<sup>335</sup> It therefore rejected the plaintiffs’ procedural unconscionability assertion.<sup>336</sup> Finding no evidence of either procedural or substantive unconscionability, the Third Circuit affirmed the district court’s dismissal of the action.<sup>337</sup>

In sum, considering the Supreme Court’s interpretation in comparable contexts, coupled with the overwhelming authority on the circuit level, employee-signees of arbitration agreements and collective action waivers should expect to pursue their FLSA claims individually in arbitration. Nonetheless, if the rise in suits demonstrates increasing employer noncompliance, funneling aggrieved employees to a forum more favorable to their employers warrants legitimate concern. The following Section proposes amendments to both the FLSA and FAA to alleviate inequities in arbitration, while also addressing the procedural issues associated with FLSA collective action litigation.

### III. DISCUSSION

The courts of appeals have dismantled most, if not all, cognizable arguments contesting the legitimacy of arbitration agreements and collective action waivers in the context of FLSA disputes.<sup>338</sup> Simultaneously, the filing of both individual FLSA suits and collective actions continues to rise rapidly.<sup>339</sup> By advocating for statutory emendation and regulatory adjustments, President Barack Obama and various members of Congress have sought to ameliorate the surge in FLSA litigation, promote employer compliance, and adjust section 213’s exemptions to broaden FLSA coverage.<sup>340</sup> In addition, legislation has been proposed to stifle the increasing dominance of the FAA over labor-related claims.

This Section argues that by correcting the inadequacies and ambiguities of both the FLSA and FAA, fairer results can be achieved in both judicial and arbitral adjudications of FLSA claims. In this Section, Part III.A discusses failed legislation, as well as the likelihood that the DOL will amend the C.F.R. in an effort to narrow the scope of the EAP exemption.<sup>341</sup> Part III.B addresses the

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819 (N.J. Super. App. Div. 2010)). The court, viewing the plaintiffs as sophisticated employees with significant corporate experience, and coupling that assessment with the notice provided by the defendant regarding the changes in the arbitration policy, found a complete absence of evidence indicating unconscionability. *Id.* at 493–94.

334. *Id.* at 494 (noting that “Travelers provided several notices of the class arbitration amendment and requested acknowledgment and agreement to the revision on an annual basis”).

335. *Id.*

336. *Id.*

337. *Id.*

338. See *supra* Part II.G for a discussion of recent circuit court rulings of FLSA claims.

339. See *supra* Part II.C for a discussion of the rise in FLSA claims and the possible reasons for this increase.

340. See *supra* Part II.B.1 for a discussion of the exemptions provided in section 213 of the FLSA.

341. See *supra* notes 61–66 and accompanying text for a discussion of the EAP exemption.

deficiencies of the currently accepted two-step certification process by suggesting legislative guidelines to standardize judicial oversight of the collective action procedure. Finally, Part III.C recommends legislation that seeks to harmonize the policy aims of both the FAA and FLSA with the realities of existent labor litigation and arbitration.

A. *Proposed Legislation*

On May 12, 2011, Senator Al Franken of Minnesota reintroduced the Arbitration Fairness Act.<sup>342</sup> The bill proposed to invalidate and make unenforceable pre-dispute arbitration clauses in civil rights, consumer, and employment disputes.<sup>343</sup> Notably, the bill prohibited any arbitration provision in a collective bargaining agreement between an employer and a labor organization, or between labor organizations, when doing so waives “the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.”<sup>344</sup> The bill narrowed the scope of its 2007 predecessor that died in committee shortly after its introduction.<sup>345</sup> The 2007 version sought to invalidate *all* pre-dispute agreements that required the arbitration of claims arising under any statute intended to regulate contracts or transactions between parties of unequal bargaining power.<sup>346</sup>

The findings of the 2011 bill cited the dominant concerns associated with the FAA: (1) the FAA was originally “intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power,” (2) the Supreme Court changed and extended the meaning of the FAA beyond its original scope, (3) “[m]ost consumers and employees have little or no meaningful choice whether to submit their claims to arbitration,” and (4) “[m]andatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators’ decisions.”<sup>347</sup> However, the bill failed to garner the requisite support and, like its predecessor, died in committee.<sup>348</sup>

In an effort to ameliorate some of the FLSA’s issues,<sup>349</sup> in June 2014, Senator Tom Harkin, Chairman of the Senate Health, Education, Labor, and Pensions Committee, along with eight Senate Democrats, introduced legislation

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342. S. 987, 112th Cong. (2011).

343. *Id.* § 402(a).

344. *Id.* § 402(a)–(b).

345. S. 1782, 110th Cong. §2(4)(b)(2) (2007).

346. *Id.*

347. S. 987, 112th Cong. § 2(1)–(4). The bill also included an additional contention: that “[a]rbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.” *Id.*

348. Amalia D. Kessler, *Stuck in Arbitration*, N.Y. TIMES, Mar. 7, 2012, at A27 (noting that the proposed Arbitration Fairness Act of 2011 died in committee).

349. See *supra* Parts II.B.1, II.B.2, II.B.4, and II.C regarding problems associated with the FLSA.

to restore overtime protections for low- and mid-wage salaried workers.<sup>350</sup> The bill, titled Restoring Overtime Pay for Working Americans Act, sought to “modernize and streamline the existing overtime regulations.”<sup>351</sup> A primary goal of the bill was to limit the reach of section 213’s exemptions by increasing the amount of salaried workers eligible for overtime awards from twelve to forty-seven percent.<sup>352</sup>

To achieve this goal, the bill proposed four significant alterations to the current FLSA. The first sought to gradually raise the overtime salary threshold for EAP workers from \$455 a week to \$1,090 to match the inflation-adjusted level from 1975—the last time the threshold was set.<sup>353</sup> In addition, the bill intended to incrementally raise the threshold for “highly-compensated employees” from \$100,000 to \$125,000.<sup>354</sup> Third, the legislation created a commonsense definition of the “primary duty” criteria that determine exemption.<sup>355</sup> In 2004, the DOL removed the fifty percent minimum that had previously limited the scope of eligibility for the EAP exemption.<sup>356</sup> The revised regulation created a loophole that exempted the employee if, *at any time*, he engaged in the prescribed duties.<sup>357</sup> The Restoring Overtime Pay for Working Americans Act would have reinstated the former threshold and required that the worker perform the delineated duties fifty percent of the time or more to qualify for the exemption.<sup>358</sup> Lastly, the bill would have established the same penalties for violations of the FLSA’s recordkeeping provisions as those of the minimum wage or overtime provisions—up to \$1,100 if the violation were willful or repeated.<sup>359</sup> This final element aimed to incentivize thorough recordkeeping of hours, wages, bonuses, and commissions, which would provide courts and arbitrators with helpful and readily available evidence in assessing possible FLSA violations.<sup>360</sup>

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350. See Press Release, Harkin, Eight Senate Democrats Introduce Bill to Restore Overtime Protections for American Workers, *supra* note 142.

351. Memorandum from President Barack Obama on Updating and Modernizing Overtime Regulations to Thomas C. Perez, Sec’y of Labor (Mar. 13, 2014), <https://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations>.

352. Press Release, Harkin, Eight Senate Democrats Introduce Bill to Restore Overtime Protections for American Workers, *supra* note 142.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. See *supra* note 66 for citations to the sections of the C.F.R., which delineate the primary duties of those who qualify for the EAP exemption. See also Press Release, Harkin, Eight Senate Democrats Introduce Bill to Restore Overtime Protections for American Workers, *supra* note 142 (“Regulations issued in 2004 removed [the] 50 percent threshold, creating a loophole that allowed a worker to be exempt even if he or she only spends a few hours a week supervising or doing other exempt duties.”).

358. See Press Release, Harkin, Eight Senate Democrats Introduce Bill to Restore Overtime Protections for American Workers, *supra* note 142.

359. *Id.*

360. *Id.*

The bill was contested by House Republicans, who categorized the proposed reforms as “too onerous on businesses.”<sup>361</sup> Considering Republican resistance, as well as typical congressional stagnation, the Restoring Overtime Pay for Working Americans Act died in committee.<sup>362</sup> However, the statutory language of the EAP exemption empowers the DOL to define who is covered through the C.F.R.<sup>363</sup> On March 13, 2014, President Obama issued a memorandum to the DOL, directing the Secretary of Labor to update the regulations and limit the reach of the EAP exemption.<sup>364</sup> The President instructed the Secretary of Labor to revise the existing guidelines in light of the legislative intentions of the FLSA, as well as the changing nature of the American workplace.<sup>365</sup> More specifically, the President sought to simplify the overtime rules to facilitate employer compliance.<sup>366</sup> If implemented, changes to the EAP exemption, which clarify and minimize its scope, would likely eliminate a significant percentage of FLSA-related litigation.<sup>367</sup>

*B. Suggestions for the FLSA Collective Action Certification Process*

Because the Arbitration Fairness Act failed to garner requisite legislative approval, judicial analysis of these issues persists on an ad hoc basis.<sup>368</sup> Without congressional guidance, district courts continue to struggle to systematically oversee the conditional certification and notification processes.<sup>369</sup> Not only do parties expend significant resources by participating in two, unpredictable phases of certification, but also, courts receive and respond to countless motions, as well as facilitate the preliminary opt-in process for multiple prospective plaintiffs.<sup>370</sup>

As mentioned, the two-step certification process places an often unattainable burden on plaintiffs.<sup>371</sup> This stringent standard frequently induces

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361. Dave Jamieson, *Senate Democrats Think You Deserve Overtime Pay*, HUFFINGTON POST (June 18, 2014, 4:46 PM), [http://www.huffingtonpost.com/2014/06/18/overtime-pay-rules\\_n\\_5508758.html](http://www.huffingtonpost.com/2014/06/18/overtime-pay-rules_n_5508758.html).

362. Restoring Overtime Pay for Working Americans Act, GOVTRACK, <https://www.govtrack.us/congress/bills/113/s2486> (last visited Nov. 1, 2015) (commenting on the status of the bill).

363. See *supra* notes 65–66 and accompanying text discussing the role of the DOL in outlining the scope of the EAP exemption’s primary duty test.

364. See Press Release, White House Office of the Press Sec’y, Fact Sheet: Opportunity for All: Rewarding Hard Work by Strengthening Overtime Protections, *supra* note 64.

365. *Id.*

366. *Id.*

367. See *supra* notes 140–43 and accompanying text for a discussion of how ambiguities in the statute often lead to accidental employer noncompliance.

368. See *supra* Part II.D for a discussion of Supreme Court decisions that have shaped FLSA analyses among lower courts.

369. See *supra* Part II.B.4 for a discussion of the issues that arise throughout the course of collective action certification.

370. See *supra* Part II.B.4 for a discussion of the second stage of the certification process, particularly with respect to enhanced discovery and the increased role of the court.

371. See *supra* Part II.B.4 for a discussion of the difficulty plaintiffs have in surmounting the burden of proof imposed during the second stage of certification.

the disaggregation of collective actions. Disaggregation then leads to either numerous individual FLSA suits, or a group of aggrieved employees without the means to independently pursue their claims.<sup>372</sup> Considering the spike in FLSA suits, the risks posed to employers through large actions,<sup>373</sup> as well as the procedural and financial challenges employees confront during litigation, Congress should standardize the collective action certification process.<sup>374</sup> To address some of these identified issues, Congress should codify an alternative procedure that proportionally allocates costs and resources between the two stages.

During the first step of certification, district court judges should require a stronger preliminary showing from plaintiffs, rather than mere “substantial allegations”<sup>375</sup> that the employees were “victims of a common policy or plan that violated the law.”<sup>376</sup> During this phase courts should permit limited discovery, which would sufficiently allow both parties to compile evidence that would reveal, or rebut, the existence of an illegal policy.<sup>377</sup> Though discovery decisions would remain discretionary, rather than facilitating notice subsequent to only “substantial allegations,” district courts should allow each party to conduct cost-effective, controlled discovery that would promote either earlier settlement or expedited dissolution of frivolous claims. For example, if plaintiffs allege FLSA violations by a national employer who possibly infringed the rights of employees in various offices across the United States, upon evaluating the complaint, the court should permit the defendant to depose a small percentage of the purportedly affected employees. The plaintiffs could then respond by deposing a limited number of the personnel responsible for implementing the plan or policy that gave rise to the allegation.

Courts should also allow parties to compel discovery of relevant documentation—more specifically, information related to hours, wages, bonuses, and commissions. To facilitate this initial inquiry, Congress should adopt the provision of the Restoring Overtime Pay for Working Americans Act that

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372. GAO REPORT, *supra* note 125, at 8 n.18 (noting that decertification of large collective actions likely contributes to spikes in individual FLSA claims).

373. See *supra* notes 259–62 and accompanying text for discussion of why large entities have class action waivers.

374. See *supra* Part II.D.3 for a discussion of the advantages and disadvantages of arbitration in the employment context.

375. *Davis v. NovaStar Mortg., Inc.*, 408 F. Supp. 2d 811, 815 (W.D. Mo. 2005) (quoting *Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 678 (D. Colo. 1997)); see also *Schwed v. Gen. Elec. Co.*, 159 F.R.D. 373, 375 (N.D.N.Y. 1995) (explaining that plaintiffs need to provide merely some factual basis from which the court can determine if similarly situated plaintiffs exist); *Heagney v. European Am. Bank*, 122 F.R.D. 125, 127 (E.D.N.Y. 1988) (stating that plaintiffs need to provide the court only with the potential class within reasonable limits, along with some identifiable factual basis from which the court can determine if similarly situated plaintiffs exist).

376. *Dilonez v. Fox Linen Serv. Inc.*, 35 F. Supp. 3d 247, 252 (E.D.N.Y. 2014) (quoting *Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010)).

377. See *supra* Part II.D.3 for a discussion of the ways in which decreasing discovery assists defendants.

necessitates meticulous documentation on the part of employers.<sup>378</sup> Doing so would incentivize employers to maintain, in a readily accessible format, the records necessary for courts to make preliminary determinations regarding the strength of an employee's claim. Courts, per statutory mandate, should shift the burden of proof from the employee to the employer when employers fail to provide sufficient documentation at this stage. Defendants would then need to counter the plaintiffs' allegations to warrant dismissal at the court's initial phase of inquiry. Following the described discovery, courts would then decide the plausibility of the claim by drawing inferences in favor of plaintiffs, not from the allegations, but rather from the evidence the parties heretofore compiled. If the evidence satisfies this threshold inquiry, courts would proceed to the next step of the process.

At the second stage of certification, courts should adopt a balanced approach between representative and individualized discovery, depending on the facts of the case. Congress should codify the four-pronged analysis developed by the United States District Court for the Western District of Missouri in *Fast v. Applebee's International, Inc.*<sup>379</sup> As mentioned, the court's opinion provided four factors to determine the proper amount of discovery in FLSA collective actions. The *Applebee's* court required that the discovery (1) "not be[] sought for the purpose of depriving the opt-in plaintiff of his class status," (2) be "simple enough that it does not require the assistance of counsel to answer," (3) "meet[] the standards of Federal Rule of Civil Procedure 26, and (4) "not otherwise [be] available to the defendant."<sup>380</sup> Following the *Applebee's* ruling, other courts have resolved discovery disputes through its test. These subsequent decisions demonstrate that the four factors promulgated by the *Applebee's* court adeptly assess the facts of each case, in a way that can advantage both employers and employees. For example, in *White v. 14051 Manchester, Inc.*,<sup>381</sup> the district court found that defendants' proposed discovery was not unduly burdensome to plaintiffs because of the relatively small plaintiff opt-in class.<sup>382</sup> Adversely, in *Perrin v. Papa John's International, Inc.*,<sup>383</sup> the court concluded that despite the simplicity of the questionnaire that the defendant wished to compound on every opt-in plaintiff, a response from nearly four thousand individuals "would be unduly burdensome, unnecessary, and likely to undermine efficiency interests."<sup>384</sup> Though district courts in Missouri decided *White* and *Perrin*, at

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378. See *supra* notes 359–60 and accompanying text for a discussion of the penalties delineated by the Restoring Overtime Pay for Working Americans Act for violations of the FLSA's recordkeeping provisions.

379. See *supra* notes 120–22 and accompanying text for a discussion of the factors the district court considered to adjudicate a discovery dispute in *Fast v. Applebee's International, Inc.*

380. Hoffman, *supra* note 102, at 496 (citing *Fast v. Applebee's Int'l, Inc.*, No. 06-4146-CV-C-NKL, 2008 WL 5432288, at \*2 (W.D. Mo. Dec. 31, 2008)).

381. No. 412-CV-469JAR, 2013 WL 1867113 (E.D. Mo. May 2, 2013).

382. *White*, 2013 WL 1867113, at \*2.

383. No. 4:09-CV-01335-AGF, 2014 WL 4749547 (E.D. Mo. Sept. 24, 2014).

384. *Perrin*, 2014 WL 4749547, at \*4.

least one other district court has referenced the *Applebee's* decision to properly balance the interests of the opposing parties in the FLSA action before it.<sup>385</sup>

Codification of this four-pronged analysis would prompt plaintiffs and defendants to craft arguments to address these questions, and therefore promote judicial efficiency by organizing discovery disputes around a single, standardized analysis. In addition, by reducing the burden imposed on plaintiff classes, while still permitting the defendant to conduct meaningful discovery, courts would achieve fairer results, and would do so more quickly. Furthermore, decreased burdens might enable more plaintiff classes to withstand defendants' motions for decertification, which would lead to increased claim aggregation and promote more comprehensive resolution of FLSA claims. Finally, a less stringent certification standard may act as another deterrent of employer noncompliance.<sup>386</sup>

C. *Balancing Arbitration Rights, Employee Rights, and Forum Practicalities*

Considering the Supreme Court's declaration of a "federal policy favoring arbitration,"<sup>387</sup> along with the requirement that individuals and classes pursuing statutory claims demonstrate an express congressional policy precluding arbitration,<sup>388</sup> congressional action is necessary to combat the fairness issues associated with compulsory arbitration and collective action waivers in employment contracts. To determine the best way to do so, Congress should balance the original aims of the FAA with those of the FLSA, and adjust the language of both statutes to provide the contrary congressional policy necessitated by the Supreme Court.<sup>389</sup> In its assessment, Congress should address the justified concerns of both business and labor advocates.

The predominant problem with the Arbitration Fairness Act was its breadth.<sup>390</sup> Because the bill proposed to completely nullify all pre-dispute arbitration clauses affecting civil rights, as well consumers and employment disputes, the bill espoused clear antibusiness aims. Rather than defeating the possibility of arbitration in these contexts, Senator Franken's proposal should have delineated more specific arbitration procedures to adjust for nuances within the areas he specified.<sup>391</sup>

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385. *Morales v. Farmland Foods, Inc.*, No. 8:08-CV-504, 2010 WL 3447513, at \*2 (D. Neb. Aug. 27, 2010).

386. Sternlight, *supra* note 264, at 725 (arguing that the Court's permissibility of class action waivers has permitted companies "to escape many legal regulations and thereby eliminat[ed] a great deterrent to company misconduct").

387. See *supra* Parts II.E and II.F for a discussion of Supreme Court interpretations of the FAA.

388. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (stating that "the burden is on [the plaintiff] to show that Congress intended to preclude a waiver of a judicial forum").

389. *Id.*

390. See *supra* notes 342–48 and accompanying text for a discussion of the Arbitration Fairness Act.

391. See *supra* notes 342–48 and accompanying text for a discussion of Senator Franken's proposals.

To appease big business and arbitration advocates, the statutory revisions should explicitly permit the use of pre-dispute arbitration agreements in employment contracts. In so doing, the amendments should require that arbitrators hearing labor disputes satisfy specific criteria to ensure their neutrality. Mandatory use of nonprofit, impartial associations would ameliorate the repeat player bias, as well as other cited reservations related to arbitrator partiality.<sup>392</sup> While some arbitration companies, such as the American Arbitration Association,<sup>393</sup> already require particular qualifications and training,<sup>394</sup> arbitrators faced with FLSA claims should possess some level of statutory expertise prior to overseeing disputes. Thus, the DOL should allocate resources to educate arbitrators of approved associations in relevant judicial precedent and legislative history. Such training would assist arbitrators as they formulate their own analyses, and would also ensure that the FLSA would continue to safeguard fairness in the nation's employment realm.<sup>395</sup>

Regarding procedural discrepancies, the DOL should institute uniform regulations with respect to the limitations imposed on discovery. Uniform regulations would eliminate variances among arbitration proceedings and provide both employers and employees with predictability in the arbitral process in which they will participate. Though discovery limitations would ultimately be at the discretion of the arbitrator, the use of nonprofit organizations, trained by the DOL, would more frequently lead to consistent, neutral results. As stated, discovery limitations in arbitration disadvantage employees who cannot feasibly gather the information necessary to prove statutory violations from a source other than their employer.<sup>396</sup> This consideration should lead Congress to adopt the provision of the Restoring Overtime Pay for Working Americans Act, which necessitates meticulous documentation,<sup>397</sup> in its emendation of the FAA. Employers would then know, in advance, which files arbitrators would expect them to produce. If employers refuse to, or cannot, furnish basic information regarding hours, wages, bonuses, and commissions, arbitrators should shift the burden of proof and require the production of evidence demonstrating FLSA compliance.

Additionally, the regulations should maintain the cost-shifting provision of the FLSA and mandate that if the arbitrator finds that the employer did violate

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392. See *supra* Part II.D.3 for an overview of the advantages arguably gained by employers in arbitration.

393. See *About the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR)*, AM. ARB. ASS'N, [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_003878](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003878) (last visited Nov. 1, 2015).

394. See *Qualification Criteria for Admittance to the AAA® National Roster of Arbitrators*, AM. ARB. ASS'N, <https://www.adr.org/aaa/faces/s/about> (last visited Nov. 1, 2015).

395. See *supra* notes 250–54 and accompanying text for a discussion of the role of the judiciary in furthering Congress's aims, as described in Justice Stevens's dissents in *Gilmer* and *Adams*.

396. See *supra* note 152 for a discussion of procedural limitations in arbitration.

397. See *supra* notes 359–60 and accompanying text for a discussion of the penalties delineated by the Restoring Overtime Pay for Working Americans Act for violations of the FLSA's recordkeeping provisions.

the FLSA, the award should account for all costs the employee assumed as a result of arbitration. This would incentivize the victims of FLSA violations to pursue their claims, despite the fees they may confront during the course of the arbitration process. Significantly, these adjustments would be consistent with the already established Due Process Protocols for Arbitration,<sup>398</sup> developed by representatives of the National Academy of Arbitrators, the American Arbitration Association, the American Bar Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Employment Lawyers Association, and the Society of Professionals in Dispute Resolution. Thus, Congress merely needs to codify these preestablished norms.

Congress should formally prohibit collective action waivers in the context of employment agreements when such waivers are not accompanied by an arbitration agreement.<sup>399</sup> Similarly, collective action waivers should adhere to the effective vindication doctrine,<sup>400</sup> and should be per se unenforceable if the procedural costs of arbitration eclipse the amount in the dispute.<sup>401</sup> Most importantly, the FAA should explicitly allow collective arbitration, and in so doing, delineate processes that address the forum-related issues posed in the Supreme Court's *AT&T Mobility LLC v. Concepcion* opinion.<sup>402</sup>

Inherent discrepancies between section 216 and Rule 23 would immediately dispel one of the concerns underscored by the *Concepcion* Court: that as a forum, arbitration is ill equipped to handle issues related to adequate representation of absent class members—more specifically, the provision of notice and the right to opt out of the class.<sup>403</sup> This argument in the context of FLSA collective actions is substantially weakened for two predominant reasons. First, as opposed to class actions, each employee would need to affirmatively opt into the collective arbitration proceeding. Additionally, a putative collective action class is limited to the employees of a single employer, contrary to the

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398. The Due Process Protocols set forth these elements for a fair arbitration procedure: (1) employee choice of representatives; (2) arbitrator authority to award attorneys' fees as a remedy; (3) "adequate but limited pre[hearing] discovery," including depositions; (4) access to names and contact information for the parties in the arbitrator's recent cases; (5) joint selection of the arbitrator from a "roster" of impartial arbitrators with diverse backgrounds and relevant legal expertise; (6) a written decision consistent with the law, "not less than would be the case before a court"; (7) arbitrator authority to award relief allowed by the statute on which the claim is based; (8) final and binding awards with limited judicial review; and (9) fee sharing unless one party cannot afford to do so, in which case other arrangements should be made with efforts to preserve arbitrator neutrality. *Policy Statement on Employment Arbitration*, NAT'L ACAD. ARB. (May 20, 2009), [http://www.naarb.org/due\\_process/due\\_process.html](http://www.naarb.org/due_process/due_process.html).

399. See *Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 592 (6th Cir. 2014) (noting that although other circuit courts have overwhelmingly upheld collective action waivers, none of their decisions spoke to "the validity of a collective-action waiver outside of the arbitration context").

400. See *supra* notes 227–29 and accompanying text for a discussion of the effective vindication doctrine.

401. See *supra* note 300 discussing the issues associated with negative-value claims.

402. See *supra* notes 263–78 and accompanying text for a discussion of the *Concepcion* Court's criticisms of class arbitration.

403. See *supra* note 277–78 and accompanying text for a discussion of the *Concepcion* Court's concerns surrounding class arbitration.

often indeterminate composition of a plaintiff class in a consumer or products liability class action suit.

The Court's concern regarding arbitration's lack of multilayer review, which is particularly risky for defendants in circumstances "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once,"<sup>404</sup> would necessitate a revision of the current standards of review for arbitration awards.<sup>405</sup> As mentioned, courts review arbitration awards pursuant to either the judicially crafted "manifest disregard" standard or sections 10 and 11 of the FAA,<sup>406</sup> both of which provide judges with minute, if any, power to overturn or adjust awards. These standards have proven to provide employees with little to no opportunity to contest the conclusions of potentially biased arbitrators, while additionally posing a substantial risk to employers liable for large monetary sums.

Thus, the amended FAA should provide a separate standard of review for employment arbitration. The standard should maintain an appropriate level of deference and should not negate arbitration's predictability.<sup>407</sup> Because the DOL would play an integral role in the training of those arbitrators assessing FLSA claims, the arbitrators' conclusions should be reviewed under the highly deferential "substantial evidence" standard, which also applies to judicial review of decisions made by administrative agencies.<sup>408</sup> Under this standard, a district court, which would have jurisdiction if not for the arbitration clause, would overturn the decision only if an arbitrator's conclusion had no reasonable basis.<sup>409</sup> This revised standard would retain elevated deference, yet provide arbitrators with procedural incentives to clearly articulate how their decisions reflect the FLSA's text and policy goals.<sup>410</sup> Though these changes would not wholly diminish the Supreme Court's concern that class arbitration would nullify some advantages of arbitration, by sacrificing informality and making the process slower and more costly, the revisions would still shield employers from arduous appellate proceedings and reduce the risk of sizeable, unwarranted arbitration awards.

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404. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).

405. See *supra* notes 184–89 and accompanying text for a discussion of the reviewability of arbitrator awards and conclusions.

406. 9 U.S.C. §§ 10–11 (2012).

407. See *supra* notes 184–89 and accompanying text for a discussion of judicial review of arbitrator awards.

408. The standard is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 430 (4th Cir. 1998) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

409. See *Brault v. Soc. Sec. Admin., Comm'r*, 683 F.3d 443, 447–48 (2d Cir. 2012) (stating that substantial evidence "means such *relevant* evidence as a *reasonable* mind might accept as adequate to support a conclusion" (quoting *Moran v. Astrue*, 569 F.3d 108, 112 (2d Cir. 2009))).

410. This would eliminate many of the issues associated with lack of political accountability attributed to the arbitration process. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1476 (D.C. Cir. 1997) (stating that "unlike a judge, an arbitrator is neither publicly chosen nor publicly accountable").

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Arbitrators should follow a certification process similar to that suggested for district courts. With arbitrator oversight, each party should be permitted to conduct limited discovery to either prove or disprove that the class is or is not similarly situated.<sup>411</sup> If the employees surpass this preliminary threshold, arbitrators, with guidance and assistance from the DOL, would provide notice in the same fashion as a district court.<sup>412</sup> An employee class and an employer would then follow the same procedural guidelines instituted for bilateral arbitration. Though sacrificing some of the expediency of arbitration, permitting and standardizing class arbitration proceedings would decrease individual claims, ameliorate fairness issues, and retain the agreed-upon contract. Finally, by maintaining the FLSA's fee-shifting provision, as well as providing a vehicle for collective arbitration, plaintiffs' attorneys would still possess a strong financial incentive to raise employee awareness of FLSA rights and promote the filing of FLSA claims.

#### IV. CONCLUSION

The recent rise in FLSA claims poses substantial financial burdens on employers, while also flooding the dockets of U.S. district courts. Moreover, Congress's failure to provide statutory guidance regarding the adjudication of such disputes, particularly in the collective action context, has produced pervasive unpredictability for parties involved in FLSA litigation. This lack of predictability diminishes the probability of early settlement, while also increasing the overall costs litigants bear as they guess their way through discovery. Arbitration is not an unfair forum to settle disputes between employers and employees, especially considering the procedural benefits both parties stand to gain. Nonetheless, in practice, arbitral proceedings can produce advantages for employers at the expense of employees.

Remedying these problems necessitates affirmative legislative action. By supplementing the FLSA with provisions that guide judicial conduct, Congress can eliminate the issues associated with the unpredictability of FLSA-related litigation. Similarly, through emendation of the FAA, Congress can further the interests of employers seeking to avoid the costs and resources expended in litigation, while also ensuring that the original aims of the FLSA are realized in arbitration. Because the modifications espouse both pro-business and pro-labor interests, Congress maintains a legitimate chance of garnering the bipartisan support required for such action. Such measures would echo the promulgations of New Deal advocates, who adeptly recognized that the prosperity of America's

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411. See *supra* note 110 and accompanying text for a discussion of the factors courts use to determine whether or not employees are similarly situated.

412. There are various avenues through which the federal government could assist arbitrators in facilitating notice. These include providing approved arbitration associations and companies with the funding and resources necessary to conduct the notification process themselves; or, the DOL could directly assume the responsibility of notification, once the arbitrator certifies the class.

laborers and its businesses were not mutually exclusive, but rather went “hand in hand”<sup>413</sup>—each relying upon the other to create a robust national economy.

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413. S. REP. NO. 75-884, at 2 (1937).