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Summary of Law Under the Federal Arbitration Act as Applied to Arbitration Clauses in Employment Agreements

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I. Overview of the Federal Arbitration Act

A. **Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("FAA")**.[1] "Congress enacted the FAA in 1925 in response to the traditional judicial hostility to the enforcement of arbitration agreements. The FAA provides that such agreements are enforceable to the same extent as other contracts. The enactment establishes a strong federal policy in favor of the resolution of disputes through arbitration. Accordingly, federal law presumptively favors the enforcement of arbitration agreements." *Alexander v. Anthony Intern., L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (internal citations omitted).

1. *Coverage*

a. Agreement to arbitrate is enforceable in court if it is contained in a maritime transaction or "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2.

b. To be enforceable, the agreement must be in writing. *Id.*

c. Term "involving commerce" has been interpreted broadly as reaching any transaction "affecting" commerce. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 276 (1995). Additionally, contracting parties need not have contemplated that transaction underlying contract would affect interstate commerce; rather, transaction need only in fact have affected commerce. *Id.* at 280.

d. *Exclusion*. FAA does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This exclusion has been read narrowly to exclude from the FAA's coverage only contracts of

[1] In addition to the FAA, other statutes, most notably § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, provide alternative, and sometimes differing, mechanisms for enforcing and regulating agreements to arbitrate. This article addresses employment arbitrations other than those arising under collective bargaining agreements. In addition, this article is limited to arbitration agreements covered by federal law or, to a lesser extent, Pennsylvania or New Jersey law.

"transportation workers" and not employment contracts in general. *Circuit City v. Adams*, 532 U.S. 105, 119 (2001).

2. *Jurisdiction* FAA is not an independent source of federal jurisdiction. Federal court can compel arbitration or enforce or vacate award only if it would have jurisdiction over a suit based on the underlying dispute. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 274 (3d Cir. 2004).

3. *Standard of Review* The standard of review in a case addressing the applicability and scope of an arbitration agreement is plenary. *Varallo v. Elkins Park Hosp.*, 63 Fed. Appx. 601, 603 (3d Cir. 2003).

4. *Motion to Compel* "Pursuant to 9 U.S.C. §§ 3-4, a federal court is authorized to compel arbitration if a party to an arbitration agreement institutes an action that involves an arbitrable issue and one party to the agreement has failed to enter arbitration." *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 178-179 (3d Cir. 1999). A motion to compel arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." *Medtronic Ave., Inc. v. Advanced Cardiovascular Systems, Inc.*, 247 F.3d 44, 55 (3d Cir. 2001) (internal quotations omitted). "When determining whether a given claim falls within the scope of an arbitration agreement, a court must focus on the factual allegations in the complaint rather than the legal causes of action asserted. If these factual allegations touch matters covered by the parties' contract, then those claims must be arbitrated, whatever the legal labels attached to them." *Varallo v. Elkins Park Hosp.*, 63 Fed. Appx. 601, 603 (3d Cir. 2003) (internal citations omitted). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

5. *Appeal of Orders Granting/Denying Motion to Compel Arbitration* Unlike most interlocutory orders, an order denying a motion to compel arbitration is immediately appealable as of right. 9 U.S.C. § 16. An order granting a motion for a stay pending arbitration is not an appealable order. *Id.* However, an order granting a motion to compel and dismissing the action with prejudice is an immediately appealable order. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).

6. *Stay of Proceedings* Where an issue in a case is referable to arbitration, court should stay proceedings until arbitration is completed. 9 U.S.C. § 3. Circuit courts are split on the issue of whether district court has discretion to dismiss case, rather than order a stay, where all claims in the action are arbitrable. Third

Circuit has held that where court compels arbitration, and one party requests stay pending arbitration, court has no discretion to dismiss rather than issue stay. *Lloyd v. Hovensa, LLC*, 369 F.3d 263 (3d Cir. 2004). *But see Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992) (court may dismiss, rather than stay, case when all of the claims must be submitted to arbitration).

7. *Arbitrability Determination* The question of whether the parties have submitted a particular dispute to arbitration is an issue for the court, unless the parties clearly and unmistakably provide otherwise. "A gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide. Similarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002). However, "procedural" questions growing out of the dispute and bearing on its final disposition are presumptively for an arbitrator to decide. In particular, the presumption is that the arbitrator should decide issues of waiver, delay, or similar defenses to arbitrability. *Id.; see also Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997) (holding that it is for the arbitrator to address "any argument that the provisions of the Arbitration Agreement involve a waiver of substantive rights afforded by the state statute").

8. *Judicial Enforcement of Award*

   a. A party has one year within which to move to have an arbitration award confirmed by a court. 9 U.S.C. § 9.

   b. The motion may be filed in the district in which the award was made or in any district specified by the parties in their agreement. *Id.*

   c. A court may vacate an arbitration award only if: (1) the award was procured by corruption, fraud, or undue means; (2) there was "evident partiality or corruption" on the part of the arbitrators, (3) the arbitrators were guilty of misconduct; or (4) the arbitrators exceeded their powers. 9 U.S.C. § 10.

   d. Arbitration award may also be vacated where the arbitrator "manifestly disregards" applicable law. *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 379 (3d Cir.1995); *see also Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377 (5th Cir. 2004); *GMS Group, LLC v. Benderson*, 326 F.3d 75 (2d Cir. 2003).

   e. Arbitration award may be vacated where it violates public policy. *See Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993) (award reinstating seaman who was discharged for on-duty intoxication vacated as against public policy).

f. There is a split among federal Courts of Appeals on the issue of whether parties may agree to expanded judicial review of arbitration awards.

B. Federal Arbitration: Historically

1. *The Supreme Court's Historical Skepticism Toward Arbitration*

a. *Wilko v. Swan*, 346 U.S. 429 (1953) (declining to compel arbitration of claims under the Securities Act in an action brought by an investor who had signed a margin agreement requiring arbitration of any controversies; questioning the competence of arbitrators to resolve a Securities Act claim; concluding that "the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness")

b. *Alexander v. Gardner-Denver Co*., 415 U.S. 36 (1974) (refusing to give preclusive effect to an arbitration decision under a collective bargaining agreement in an employment discrimination claim brought under Title VII; concluding that grievance arbitration was a "comparatively inappropriate forum for the final resolution of rights created by Title VII")

2. *The Supreme Court's Increased Receptiveness Toward Arbitration*

a. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (compelling arbitration of claims under the Securities Exchange Act of 1934 pursuant to an international arbitration agreement)

b. *Moses H. Cone v. Mercury Constr. Corp*., 460 U.S. 1 (1983) (affirming that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary .... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability")

c. *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the FAA "app[lies] in state as well as federal courts" and that it "withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration")

d. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614 (1985) (approving arbitration of federal antitrust claims; noting that the FAA "was designed to overcome an anachronistic judicial hostility to

agreements to arbitrate, which American courts had borrowed from English common law"; rejecting the argument that the FAA does not require arbitration of statutory claims; stating that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution")

e. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (affirming that "[t]he burden is on the party opposing arbitration ... to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue")

f. *Rodriguez de Quijas v. Shearson Am. Express, Inc.*, 490 U.S. 477 (1989) (holding that claims under the Securities Act of 1933 are subject to compulsory arbitration under the FAA; concluding that "*Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions")

g. *Volt Information Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) (upholding a California procedural rule allowing courts to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it; declining to hold that the FAA preempted the state procedural rule, stating that "[w]here, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward")

h. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (rejecting claim that an arbitration agreement was not sufficiently involved with commerce to bring it under the FAA; stating that "a broad interpretation of this [interstate commerce] language is consistent with the Act's basic purpose, to put arbitration provisions on the same footing as a contract's other terms")

i. *Mastrobuono v. Shearson Lehman*, 514 U.S. 52 (1995) (ruling that the FAA preempts state law restrictions on arbitrators' authority to award punitive damages; holding that an arbitration held pursuant to an agreement that incorporated New York law—but that said nothing explicitly about punitive damages—could result in the award of punitive damages, despite New York state case law barring arbitrators from granting such relief)

II. Arbitration of Statutory Employment Law Claims

A. **Civil Rights Act of 1991:** "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolutions including, ... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." § 118 of Pub.L. 102-166, set forth in the notes following 42 U.S.C. § 1981 (Supp.1994).

B. **Age Discrimination in Employment Act ("ADEA"):** *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991) (holding that an employee could be compelled to arbitrate his age discrimination claims under ADEA; concluding that "[h]aving made the bargain to arbitrate, the parties should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue"; rejecting plaintiff's arguments that 1) the arbitration panel would be biased; 2) that the limited discovery allowed in arbitration would make it more difficult to prove discrimination; and 3) that arbitration agreements should not be enforced because of the inequality of bargaining power between employers and employees).

C. **Title VII:** *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 182 (3d Cir. 1998) ("[W]e find Title VII entirely compatible with applying the FAA to agreements to arbitrate Title VII claims."); *Crawford v. W. Jersey Health Sys.*, 847 F. Supp. 1232, 1242-1243 (D.N.J. 1994) (enforcing arbitration of Title VII and NJLAD claims); *Spinetti v. Serv. Corp. Intl.*, 324 F.3d 212, 218 (3d Cir. 2003).

D. **RICO:** *Trumbetta v. Metropolitan Life Ins. Co.*, 1994 WL 481152, at *2 (E.D. Pa. Sept. 1, 1994) (holding that civil RICO claims are appropriate for arbitration).

E. **ERISA:** *Pritzker v. Merrill Lynch*, 7 F.3d 1110 (3d Cir. 1993) (holding that "statutory ERISA claims are subject to arbitration under the FAA when the parties have executed a valid arbitration agreement encompassing the claims at issue").

F. **Fair Labor Standards Act:** *Tripp v. Renaissance Advantage Charter Sch.*, 2003 WL 22519433, at * 5 (E.D. Pa. Oct. 8, 2003) (ordering that parties submit Fair Labor Standards Act claim to arbitration).

G. **Americans with Disabilities Act:** *Stanton v. Prudential Ins. Co.***,** 1999 WL 236603, at *5 (E.D. Pa. Apr. 20, 1999) (requiring arbitration of plaintiff's ADA claim).

H. **New Jersey Conscientious Employee Protection Act (CEPA):** *Littman v. Morgan Stanley Dean Witter*, 337 N.J. Super. 134, 146-148 (App. Div. 2001) (requiring arbitration of whistleblowing claims brought under CEPA).

III. Enforceability of Arbitration Clauses

A. **Formation of Arbitration Agreements** "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), "courts generally …. should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

B. **Specification of Types of Claims to be Arbitrated**

1. Issue is generally one of standard contract interpretation. "Absent some ambiguity in the agreement, however, it is the language of the contract that defines the scope of disputes subject to arbitration." *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002).

2. *Statutory claims*

a. Party may be compelled to arbitrate statutory claims where agreement so provides and there is no "inherent conflict" between arbitration and underlying purpose of statute. *Gilmer*, *supra*, 500 U.S. at 26-30 (ADEA claim). "By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 472 U.S. 614, 628 (1985).

b. Specific statutory claims covered by arbitration clause generally need not be listed. Indeed, clause need not specifically state that statutory claims are arbitrable. *Gilmer*, 500 U.S. at 23 (party required to arbitrate ADEA claim based on clause requiring arbitration of "any dispute, claim or controversy arising between him and [the other party]"); *But see Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (no agreement to arbitrate Title VII claim where application form did not specify that employment disputes would be arbitrated). It is advisable, however, that an arbitration provision include at least a general statement that statutory claims will be arbitrated.

c. Standard for determining whether statutory claims falling within arbitration provision are arbitrable is whether "fraud, duress, mistake or some other ground recognized by the law applicable to contracts generally would have excused the district court from enforcing . . . agreement." *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 184 (3d Cir. 1998); *cf. Prudential Ins. Co.*, *supra*, 42 F.3d at 1305 ("[W]e conclude that a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration.").

d. *No waiver of right to file with EEOC* An exception to the above principles is that an arbitration agreement may not require an employee to waive his or her right to file a charge of discrimination with the Equal Employment Opportunity Commission. *See Wastak v. Lehigh Valley Health Network*, 342 F.3d 281, 291-92 (3rd Cir. 2003); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987); *see also* 29 U.S.C. § 626(f)(4) (under ADEA, employee may not waive right to file charge of age discrimination). Additionally, the fact that an employee is required to arbitrate his or her claims against an employer does not preclude the EEOC from filing a lawsuit against the employer based upon the same conduct complained-of in the arbitration and from seeking employee-specific damages. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 27 (2002). However, an employee may waive the EEOC's right to recover individualized damages on his or her behalf. *See Cosmair*, 821 F.2d at 1091. The Court in *Waffle House* did not reach the question of the effect of a settlement by or judgment in favor of employee on the Commission's right-to-sue.

C. **Adequacy of Procedures Provided**

1. For arbitration agreement to be enforceable, arbitration procedures must permit plaintiff to "effectively vindicate" his or her statutory rights. *Gilmer*, 500 U.S. at 28.

2. "Plaintiffs are not required to take their claims to biased panels or through biased procedures." *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999); *see also Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir. 1999) ("*Gilmer* left open a door for plaintiffs to challenge mandatory arbitration of statutory claims by showing that arbitration system is structurally biased.").

3. *Selection of arbitrator: McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 (6th Cir. 2004) ("Meijer's TAP grants one party to the arbitration unilateral control over the pool of potential arbitrators. This procedure prevents Meijer's TAP from being an effective substitute for a judicial forum because its inherently lacks neutrality.").

4. *Excessive cost* "[E]xistence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000). However, burden of proving that prohibitive arbitration fees justify invalidation of arbitration agreement must be demonstrated by opponent to arbitration. *Id.* at 91. The Third Circuit has held that a provision requiring an employee to pay one-half of arbitrator's fee might be unenforceable if employee could show that provision "would deny her a forum to vindicate her statutory rights." *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir. 2002); *see also Faber v.*

Menard, Inc., 367 F.3d 1048, 1052-1055 (8th Cir. 2004) (although provision in arbitration agreement that each party bear its own attorney's fees might render agreement unconscionable, issue was for arbitrator initially to decide); *Cole v. Burns Intern. Sec. Services*, 105 F.3d 1465 (D.C. Cir. 1997) (requirement that, as condition of employment, employee agree to bear all or part of costs of arbitrator unenforceable).

5. *Time limits* Provision requiring employee to present claim to employer within 30 days of event underlying claim was unconscionable. *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003). In contrast, one-year limitations period in arbitration agreement has been held enforceable. *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003).

6. *Discovery* Generally, fact of less extensive, more informal discovery available in arbitral forum does not render arbitral forum inadequate to vindicate statutory rights. *Gilmer*, 500 U.S. at 31; *see also Great Western Mortg. Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997) (availability of informal discovery rendered arbitration provision valid). Only where discovery limitations deprive employee of a "fair opportunity to present claims" will arbitration agreement be unenforceable. *Gilmer*, at 31.

D. Unconscionability, Generally

An agreement to arbitrate may be unenforceable based on a generally applicable contractual defense, such as unconscionability. *Alexander v. Anthony International, L.P.*, 341 F.3d 256, 264 (E.D. Pa. 2003). Courts must "remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Id.*, citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624 (1985). "Although possibly relevant, considerations of public policy and the loss of state statutory rights are not dispositive in the unconscionability inquiry. The generally applicable standards of this contractual doctrine continue to dictate the result of any analysis." *Alexander*, 341 F.3d at 264.

1. Section 208 of the Restatement (Second) of Contracts provides: "If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." Restatement (Second) of Contracts § 208 (1981).

2. Courts have generally recognized that the doctrine of unconscionability involves both "procedural" and "substantive" elements. *See, e.g. Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 181-182 (3d Cir.1999). "Procedural unconscionability pertains to the process by which an agreement is reached and

the form of an agreement, including the use therein of fine print and convoluted or unclear language." *Id.* at 181. "Substantive unconscionability" refers to terms that unreasonably favor one party to which the disfavored party does not truly assent. *Id*. In the end, unconscionability "requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions." *Id*. at 181.

E. **Mutuality/Equivalence of Obligations**

1. The Third Circuit has ruled that, as long as the agreement is adequately supported by consideration, there need not be strict mutuality of obligations. Specifically, in *Harris v. Green Tree Financial Corp.,* 183 F.3d 173 (3d Cir.1999), *and Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir.2002), the Third Circuit held that provisions that required employee to arbitrate all claims, but allowed employer to choose between arbitration and court action, were enforceable because "[a]s long as the requirement of consideration is met, mutuality of obligation is present, even if one party is more obligated than the other." *Harris* at 181, *Blair* at 604.

    a. Arbitration agreements entered into by the employee in the employment application are considered to be supported by adequate consideration. "In all jurisdictions that have considered the question, courts have held that the creation of an employment relationship, which is achieved when the employer agrees to consider and/or agrees to hire the applicant for employment, is sufficient consideration to uphold an arbitration agreement contained in an employment application." *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 88 (N.J. 2002). *See also Johnson v. Circuit City Stores*, 148 F.3d 373, 378 (4th Cir. 1998) (finding that although employer agreed to be mutually bound to terms of agreement to arbitrate, court would not foreclose that employer's willingness to consider employee's application could qualify as consideration); *Koveleskie v. SBC Capital Mkts, Inc.*, 167 F.3d 361, 368 (7th Cir. 1999), *cert. denied*, 528 U.S. 811 (1999) (holding that employee's contract with employer was supported by adequate consideration because employee's signing of Form U-4 was supported by employer's promise of employment.)

    b. Arbitration agreements entered into with continuing employees do not need require separate consideration, at least in the Third Circuit; continued employment fulfills the consideration requirement. *See Blair v. Scott Specialty Gases*, 283 F.3d 595, 603 (3d Cir.2002) (holding that a mandatory arbitration agreement inserted into the employee handbook subsequent to the start of plaintiff's employment was enforceable; plaintiff signed an "Acknowledgement of Receipt and Reading" of the revised handbook stating that she had read the arbitration provision and agreed to submit any disputes arising out of her employment to final and binding arbitration). *See also Hamilton v. Traveler's Property &*

Casualty, 2001 WL 503387, at * 2 (E.D. Pa. May 11, 2001) (finding continued employment of two years following receipt of the employee handbook which included an arbitration agreement sufficient to constitute offer and acceptance; *Wilson v. Darden restaurants, Inc*., 2000 WL 150872, at *3-4 (E.D. Pa. Feb. 11, 2000) (finding acceptance of the arbitration agreement when plaintiff was given a copy of the arbitration policy, watched a video tape describing the arbitration policy, and continued to work for two months thereafter.) However, not every jurisdiction has accepted the Third Circuit's view with regard to the introduction of an arbitration agreement to continuing employees. *See, e.g*. *Cheek v. United Healthcare of Mid-Atlantic, Inc*.**,** 378 Md. 139, 159 (Md. 2003) (disagreeing with *Blair*; holding that consideration from the underlying agreement was not sufficient to support the arbitration agreement).

2. In *Zimmer v. Cooperneff Advisors, Inc.*, 2004 WL 2933979 (E.D.Pa. Dec 20, 2004), the district court held that, due to intervening decisions by the Pennsylvania Superior Court, [*Harris* and *Blair* were no longer good law] and that "[u]nder Pennsylvania law, the reservation by [one party] of access to the courts for itself to the exclusion of the consumer creates a presumption of unconscionability, which in the absence of 'business realities' that compel inclusion of such a provision in an arbitration provision, renders the arbitration provision unconscionable…." *Id.* at *7 (quoting *Lytle v. Citifinancial Services, Inc.*, 810 A.2d 643 (Pa.Super.Ct.2002)).

F. **Adequacy of Available Remedies**

1. "When an agreement to arbitrate encompasses statutory claims, the arbitrator has the authority to enforce substantive statutory rights, even if those rights are in conflict with contractual limitations in the agreement that would otherwise apply." *Bailey v. Ameriquest Mortg. Co.*, 346 F.3d 821, 824 (8th Cir. 2003).

2. *Punitive damages* Provision of arbitration agreement prohibiting award of punitive damages unenforceable where underlying statute permits such award. *Booker v. Robert Half Intern., Inc.*, 413 F.3d 77 (D.C. Cir. 2005); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003).

3. *Recovery of fees and costs*. Requirement that each party bear its own fees and costs in pursuing Title VII and state anti-discrimination law claims unconscionable because statutes provide for recovery of fees and costs by prevailing party. *Parilla v. IAP Worldwide Servs. VI, Inc.*, 369 F.3d 269 (3d Cir. 2004); *Alexander*, 341 F.3d at 267; *see also McCaskill v. SCI Mgt. Corp.*, 285 F.3d 623 (7th Cir.2002); *Perez v. Globe Airport Security Services, Inc.*, 253 F.3d 1280, 1285-86 (11th Cir.2001); *Shankle v. B-G Maint. Mgt. of Colorado, Inc.*, 163 F.3d 1230 (10th Cir.1999).

IV. Arbitration of Claims Under State Law

A. **Choice of Law Issues**

1. Questions concerning the interpretation and construction of arbitration agreements are determined by reference to federal substantive law. In interpreting such agreements, federal courts may apply state law, pursuant to section two of the FAA. Thus, generally applicable contract defenses may be applied to invalidate arbitration agreements without contravening the FAA. *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 178-79 (3d Cir. 1999); *see also General Elec. Co. v. Deutz AG*, 270 F.3d 144, 154 (3d Cir. 2001). Accordingly, whether a particular question is one for the court or an arbitrator and whether an arbitration award should be confirmed or vacated are questions of federal law. *General Elec. Co.*, at 154.

2. Choice of law provisions in an arbitration agreement are generally enforceable. "If the parties have stipulated that certain disputes will be submitted to arbitration and that the law of a particular jurisdiction will govern the controversy, federal courts will enforce that agreement." *Id.*; *see also Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001).

B. **Pennsylvania** Pennsylvania law "favors settlement of disputes by arbitration as a means of promoting swift and orderly disposition of claims." *Proscape Technologies, Inc. v. InfoLogix, Inc.*, 2005 WL 2001112, at *2 (Pa. Com. Pl. Aug. 15, 2005); s*ee also* Pennsylvania Uniform Arbitration Act, 42 Pa. C.S.A. 7301 *et seq*.

C. **New Jersey** The New Jersey Legislature codified its endorsement of arbitration agreements in *N.J.S.A.* 2A:24-1 to -11. Moreover, New Jersey courts favor arbitration as a means of resolving disputes. *See Garfinkel v. Morristown Obstetrics & Gynecology*, 168 N.J. 124, 131 (N.J. 2001) (noting favored status accorded to arbitration, but stating that favored status is not without limits); *Yale Materials Handling Corp. v. White Storage & Retrieval, Inc.*, 240 N.J. Super. 370, 375 (App. Div. 1990) (reiterating that "New Jersey law [is] consonant with federal law which liberally enforces arbitration agreements").

V. Class Action Arbitrations

A. Nothing in Federal Arbitration Act is inconsistent with class action arbitration. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). Issue is primarily one of contract interpretation that should be decided in first instance by arbitrator. *Id.* at 445-46.

B. Generally, arbitration clause that precludes class actions is enforceable. *See Johnson v. West Suburban Bank*, 225 F.3d 366, 371 (3d Cir. 2000) (Truth in Lending Act); *see* also Jenkins v. First American Cash Advance of Georgia, LLC, 400 F.3d 868 (11th Cir. 2005) ("We have held, however, that arbitration agreements precluding class action relief are

valid and enforceable."); *Gras v. Associates First Capital Corp.*, 786 A.2d 886 (N.J. Super. App. Div. 2001) (arbitration clause that precluded class action was enforceable under New Jersey Consumer Fraud Act). "Inherent conflict" standard articulated in *Gilmer* applies. *See Johnson*, 225 F.3d at 371.

C. Although the Third Circuit has suggested that use of class action procedure in arbitration "appears impossible … unless the arbitration agreement contemplates such a procedure," *Johnson*, at 377 n.4, the issue appears to be one for the arbitrator in the first instance. *See Brennan v. ACE INA Holdings, Inc.*, 2002 WL 1804918 (E.D. Pa.. Aug 01, 2002) ("[T]he parties' agreement in the instant case is silent on the issue of class arbitration and this Court will not read into the agreement a term that the parties did not bargain for. Instead, the Court will … leave all issues of interpretation for the arbitrator.").