Case 4

Many employers in the United States at this time require, as a condition of being hired, that prospective employees sign contracts in which they agree to arbitrate any disputes with the employer that may arise in the course of employment. By signing such a contract a person agrees not to bring an action against the employer in a court of law if during the course of employment she comes to believe the employer violated her legal rights, for example, under federal civil rights or age discrimination in employment laws. Instead, the contract requires that she pursue any such dispute exclusively through arbitration, a private dispute resolution process whose features -- e.g. who serves as judge, what procedures are followed, etc -- are specified in the contract.

The U.S. Supreme Court has upheld the legal validity of such employment arbitration contracts over the past decade in the cases of *Gilmer v. Interstate Lane Corporation* 500 U.S. 20 (1991) and *Circuit City Stores Inc. v. Adams* 532 U.S. 105 (2001). Central to its decisions in these cases, the Supreme Court viewed private arbitration as an efficient, cost-effective, and readily accessible method of resolving disputes between employers and employees. Critics, however, view the Supreme Court's decisions as having provided employers an opportunity to replace a public system of justice with, in the worst instances, grossly unfair procedures, heavily biased in the employer's favor. Such concerns led to the creation of a task force composed of representatives from six leading national organizations of attorneys, arbitrators, and other dispute resolution professionals. The task force developed an extensive set of recommended procedures for the private arbitration of disputes involving claims of an employee that the employer violated his or her legal rights under federal or State statutes.

You are an employment lawyer retained by a company that wants you to draft a contract requiring prospective employees, as a condition of being hired, to agree to arbitrate any disputes with the employer arising out of the employment relationship. In the course of discussing this matter with the company's CEO you bring to his attention the above mentioned set of recommended procedures developed by the task force composed of representatives of six leading national organizations of attorneys, arbitrators, and other dispute resolution professionals. The CEO rejects it emphatically, stating that, in his opinion, most federal and State statutes concerning the employment relationship, enacted in the last fifty years, only serve to give argumentative employees weapons to extract unwarranted concessions from management. You inform him that in a few instances courts have declined to uphold private arbitration contracts because they found the dispute resolution procedures contained in them "fundamentally unfair." You point out also, however, that in the vast majority of cases, courts have ruled in favor of employers.

The CEO makes it clear that he would like to see you draft the "toughest" (i.e. most favorable to the company) contract that, in your legal judgment, will stand up in court.

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