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**Article**

***Trilogy Redux: Using Arbitration to Rebuild the Labor Movement***

**Ann C. Hodges<sup>†</sup>**

INTRODUCTION

In 1960, the Supreme Court revolutionized arbitration, at least in the labor arena, by deciding the *Steelworkers Trilogy*, which encouraged arbitration to resolve labor disputes and directed the courts to abstain from involvement in the merits of these disputes.<sup>1</sup> The decisions validated a system of self-government that had evolved in industrial workplaces and affirmed the peaceful resolution of labor disputes internally through the use of arbitration.<sup>2</sup> Labor arbitration is one of the premier achievements of American labor law.

But now workplace arbitration has taken a different turn. In the 1980s, the Supreme Court applied a similar deference to agreements to arbitrate statutory claims.<sup>3</sup> The cases involved arbitration agreements between businesses of roughly equal bargaining power. Businesses, however, seized on the judicial

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1. See *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598–99 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584–85 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568–69 (1960).

2. See *Am. Mfg.*, 363 U.S. at 570 (Brennan, J., concurring).

3. See *infra* note 7 and accompanying text.

approval of arbitration of statutory claims and began to include arbitration agreements in contracts of adhesion with employees and consumers. These agreements can have several effects. In many cases, they deprive the parties of jury trials. They may limit discovery and available damages, and shorten limitations periods for filing claims. And perhaps most importantly, they may limit the ability to bring a class action suit, rendering many smaller claims uneconomical. This new revolution in arbitration has the potential to limit employees' ability to vindicate their statutory rights.

With their long history of representing employees in arbitration, unions may have an opportunity to step in and provide representation for employees in these cases.<sup>4</sup> Private attorneys who represent employees are rarely attracted to individual arbitration cases because of the often-limited potential for damages.<sup>5</sup> In contrast, union representation in such cases, by either attorneys or trained union representatives, offers a benefit to employees that may help unions recruit new members. Additionally, representation in arbitration can be a part of a workers' rights campaign against employer-imposed arbitration systems that limit the legal rights of employees. Representation can provide a membership benefit to accompany new forms of union membership recently announced by the AFL-CIO for employees who are not in collective bargaining units.<sup>6</sup> Accordingly, unions should explore cost-effective methods of providing such benefits to enhance workplace justice for all employees.

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4. Other scholars have previously recognized the opportunities for unions to become service providers in the nonunion workplace and build such representation into majority representation. See Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 833-34 (1996); Matthew W. Finkin, *Employee Representation Outside the Labor Act: Thoughts on Arbitral Representation, Group Arbitration, and Workplace Committees*, 5 U. PA. J. LAB. & EMP. L. 75, 86-89 (2002); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 81-83 (1993); Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 205-13 (1991). The program proposed here builds on that suggested by Professor Finkin. The need for such a program is even greater today as a result of the limitations on class actions that have developed since his initial proposal, which threaten further the ability of employees to vindicate their statutory rights.

5. See Rabin, *supra* note 4, at 206.

6. Michelle Amber, *After Trumka Keynote, Convention Votes to Impel All Workers to Join Labor Movement*, 174 DAILY LAB. REP. (BNA) at C-1 (Sept. 9, 2013) (reporting on a resolution to authorize development of new forms of workplace representation and advocacy outside of collective bargaining units in collaboration with affiliate unions).

This Article analyzes the possibility of creating a program to provide representation to workers bound to arbitrate their legal disputes with their employers, while at the same time building a movement to challenge the practice of compulsory arbitration and its impact on workers' rights. First, I briefly review the Supreme Court's recent arbitration jurisprudence and its impact on workers, with a particular focus on the limitations on class actions. Then I move to a discussion of the advantages and challenges to the creation of such a program. Finally, I examine some alternative visions of what such a program might look like, highlighting the risks and benefits of different structures. While there is no doubt that there are challenges in implementing the proposal, there are also opportunities to build a movement of workers fighting for workplace justice across workplace boundaries. It is those opportunities that offer new hope to the labor movement.

#### I. THE COURT'S ARBITRATION JURISPRUDENCE AND ITS IMPACT ON EMPLOYEES

Once the Supreme Court began to enforce agreements to arbitrate statutory claims,<sup>7</sup> the move to enforce workplace arbitration agreements was almost inevitable. Employment cases comprise a substantial part of the federal docket, and judges often view such cases with distaste.<sup>8</sup> Arbitration removes the cases from court and places them in a private system of dispute resolution, similar to that in the unionized workplace. The difference, of course, is that most employees with such "agreements" have no union representation.<sup>9</sup>

##### A. THE GROWTH OF ARBITRATION

In 1991, the Court enforced an agreement to arbitrate an age discrimination claim made in a securities registration application, finding that the Age Discrimination in Employment Act did not preclude agreements to resolve such claims in a dif-

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7. This occurred in the *Mitsubishi Trilogy* in the 1980s. See *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 481-86 (1989); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 241-42 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-40 (1985).

8. See Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 448-49, 449 n.176 (2000).

9. Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 191 (2003).

ferent forum than the courts.<sup>10</sup> Ten years later, the Court's tortured reading of the exclusion for employment contracts in the Federal Arbitration Act (FAA) opened the floodgates for enforcement of arbitration agreements imposed on employees as a condition of employment.<sup>11</sup> These cases signaled to employers that they could shift employees' statutory claims to the arbitral forum.

Employee plaintiffs and their lawyers have resisted arbitration, resulting in a multitude of cases at all levels of the state and federal court systems challenging arbitration agreements. Over the objections of employees, some courts have ordered arbitration of legal claims where rights that would be available in litigation are limited. Arbitration agreements may be enforced even where discovery is limited, where damages are limited, where the statute of limitations is shortened, or where the employee pays part of the cost of arbitration (unless that cost is prohibitive).<sup>12</sup> Where the unilaterally adopted arbitration procedure is too favorable to the employer, however, a court will not order arbitration.<sup>13</sup> Several theories have been used to challenge these arbitration agreements. Where the underlying statute prohibits arbitration agreements for the statutory claims, courts will not order arbitration.<sup>14</sup> This is also the

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10. See *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20, 35 (1991).

11. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118–19 (2001).

12. See, e.g., *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91–92 (2000) (holding that the plaintiff must arbitrate despite the agreement's silence on fees since she had the burden of showing prohibitive costs); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298–99 (5th Cir. 2004) (ordering arbitration despite discovery limitations); *Musnick v. King Motor Co.*, 325 F.3d 1255, 1261–62 (11th Cir. 2003) (ordering arbitration despite a provision that the loser pays the fees of the other party and holding such a provision insufficient to show that arbitration is cost-prohibitive); *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 231–32 (3d Cir. 1997) (ordering arbitration despite a shortened statute of limitations and a waiver of punitive damages and holding that whether the employee waived the longer statute and punitive damages were questions for the arbitrator).

13. See, e.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (“We hold that the promulgation of so many biased rules—especially the scheme whereby one party to the proceeding so controls the arbitral panel—breaches the contract entered into by the parties.”).

14. *Gilmer*, 500 U.S. at 26. Most employment statutes were enacted well before the Supreme Court authorized arbitration of statutory claims, however, and do not bar arbitration. Cf., e.g., *Laws Enforced by EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/statutes/index.cfm> (last visited Apr. 4, 2014) (listing several important federal employment statutes enacted prior to the 1980s).

case when there is no real agreement to arbitrate.<sup>15</sup> Further, where a statutory claim cannot be effectively vindicated in arbitration, the employee can go to court despite the arbitration agreement.<sup>16</sup> Finally, arbitration agreements are subject to the same defenses as enforcement of any contract, such as duress and unconscionability.<sup>17</sup>

While some state and federal courts have been vigilant about these defenses,<sup>18</sup> the Supreme Court has whittled away at them in recent years, casting doubt on their continuing viability.<sup>19</sup> The Supreme Court has played an important role, even in the state court cases, frequently finding that the FAA preempts state laws that prevent enforcement of agreements to arbitrate legal claims.<sup>20</sup> The result is growing enforcement of unilaterally imposed arbitration agreements to prevent employees from litigating statutory claims. The Supreme Court

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15. See *Floss v. Ryan's Family Steakhouses, Inc.*, 211 F.3d 306, 315–16 (6th Cir. 2000) (finding the agreement to arbitrate was illusory because the arbitration provider reserved the right to modify all the rules and procedures without the consent of the employee).

16. *Green Tree*, 531 U.S. at 90. The Court's decision in *American Express v. Italian Colors Restaurant* casts some doubt on the scope of this defense to arbitration by finding that the high cost of individual arbitration relative to the claim did not create an inability to vindicate statutory rights, and by upholding a class action ban in an arbitration agreement. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013).

17. See 9 U.S.C. § 2 (2012); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996).

18. See, e.g., *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1084 (9th Cir. 2007) (invalidating as unconscionable an arbitration agreement imposed in a contract of adhesion with reduced statutes of limitations, confidentiality provisions, exemptions for employer claims against employees, and a ban on administrative complaints); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 694, 698–99 (Cal. 2000) (refusing to enforce an adhesive contract as unconscionable because it bound the employee but not the employer to arbitrate claims and it restricted damages).

19. See, e.g., *Italian Colors*, 133 S. Ct. at 2309–10 (finding that inability to vindicate statutory rights because of the high cost of an individual claim relative to a class action does not render a class waiver unenforceable); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750–53 (2011) (invalidating a California law finding class waivers in adhesion contracts unconscionable).

20. See, e.g., *Nitro-Lift Techs. v. Howard*, 133 S. Ct. 500, 503–04 (2012) (reversing the decision of the Oklahoma Supreme Court finding noncompetition agreements unenforceable under state law, and finding that the FAA required arbitration of the issue of the validity of the noncompetition covenants); *Preston v. Ferrer*, 552 U.S. 346, 349–50 (2008) (“We hold today that, when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum . . . are superseded by the FAA.”).

has been particularly active in addressing the impact of arbitration agreements on class actions.

#### B. FOCUS ON CLASS ACTIONS

Class actions are the legal bane of businesses. They enable large groups of consumers or employees to band together to sue the employer in one action. They are particularly useful for cases where each plaintiff has a small claim that would cost more to litigate than the claim is worth. Litigating as a group makes it cost-effective to bring the case.<sup>21</sup> Thus, the ability to bring a class action may increase the business's vulnerability to legal claims. Additionally, class actions are costly and time-consuming to litigate.<sup>22</sup> They often attract media attention and accordingly may affect a company's reputation.<sup>23</sup> As a result, there is considerable pressure on companies to settle such claims when they are filed.<sup>24</sup>

Aided by the Supreme Court, businesses have discovered a new way to eliminate class actions. As the result of a series of Supreme Court decisions, arbitration now serves that function. In another trilogy of arbitration cases since 2010, the Court has held that: (1) class arbitration cannot be ordered where an arbitration agreement does not explicitly provide for it;<sup>25</sup> (2) a California rule that invalidated most class action waivers in arbitration agreements as unconscionable was preempted by the FAA;<sup>26</sup> and (3) a class action waiver is enforceable even if an individual claim would cost more to litigate than is available in damages, rejecting the argument that the arbitration agreement denied effective vindication of the statutory claim.<sup>27</sup>

The Court first addressed this issue in 2010 in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, which involved review of a decision by a panel of arbitrators to order

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21. *Cf., e.g.*, *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 298 (2d Cir. 2013) (noting the plaintiff's claim that "pursuing individual arbitration would be 'prohibitively expensive' because the recovery she seeks is dwarfed by the costs of individual arbitration").

22. Deborah A. Sudbury et al., *Keeping the Monster in the Closet: Avoiding Employment Class Actions*, 26 EMP. REL. L.J., Autumn 2000, at 5, 20–21.

23. *Id.* at 21.

24. *Id.* at 6, 22–23.

25. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010).

26. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

27. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013).

class arbitration where the parties stipulated that the arbitration agreement was silent on the issue.<sup>28</sup> Finding that the arbitrators' decision was based only on their own notions of good public policy, the Court found that arbitrators could not order class arbitration where the parties had not agreed to it, noting the vast differences between individual and class arbitration.<sup>29</sup>

The following year, in *AT&T Mobility v. Concepcion*, the Court found that the FAA preempted a California law designed to protect consumers from class action waivers found unconscionable.<sup>30</sup> The *Discover Bank* rule held class waivers unconscionable where they are:

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 . . . .<sup>31</sup>

Although the FAA allows for the application of generally applicable contract defenses, the Court found that the law stood at odds with the accomplishment of the FAA's purpose of enforcing arbitration agreements and therefore was preempted.<sup>32</sup> "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."<sup>33</sup>

*American Express v. Italian Colors Restaurant* completed the formula for eliminating class actions through arbitration agreements.<sup>34</sup> The Second Circuit had ruled that the class action waiver was unenforceable because without a class action, the plaintiffs could not vindicate their statutory rights given the high cost of expert testimony in this antitrust case.<sup>35</sup> Although the Court had found in previous cases that arbitration would not be ordered when a plaintiff could not effectively vindicate a statutory right in arbitration, the majority ruled that this exception did not apply when it was too costly to enforce a

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28. 559 U.S. at 668–69.

29. *Id.* at 670–76.

30. 131 S. Ct. at 1746, 1753.

31. *Id.* at 1746 (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2000)).

32. *Id.* at 1748.

33. *Id.*

34. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013).

35. *Id.* at 2308.



right in an individual action because the expense of litigation would exceed the potential recovery.<sup>36</sup>

None of these cases was an employment case, but each was an interpretation of the FAA, which has been interpreted to cover arbitration agreements in the employment setting.<sup>37</sup> Taken together these cases hold that a class action waiver in an arbitration agreement is enforceable unless the particular statute states otherwise and that unless the arbitration agreement expressly provides for class arbitration, no class claim is available in the arbitral forum.<sup>38</sup>

Given employers' fear of class actions, these cases seem likely to spur even more employers to impose arbitration agreements on employees unilaterally. One development does offer faint hope for employees. In *D.R. Horton, Inc.*, the NLRB found that employers who bar class claims in both arbitral and judicial forums violate the National Labor Relations Act because class actions are concerted activity protected by the statute.<sup>39</sup> The Fifth Circuit denied enforcement in *Horton* on appeal,<sup>40</sup> however, and most other courts that have considered the issue have rejected the application of *Horton* in actions to enforce arbitration agreements.<sup>41</sup> And *Horton* allows employers to force arbitration so long as a class action is available in arbitration.<sup>42</sup> It seems likely that arbitration agreements in employment will continue to grow, which could have profound negative

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36. *Id.* at 2310–11.

37. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113–19 (2001).

38. In *Oxford Health Plans LLC v. Sutter* the Court did enforce an award where the arbitrator found that the agreement allowed class actions, although there was no express provision so stating. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2066 (2013). That case, however, is based on the broad deference to the arbitrator's decision. *Id.* at 2068. If the parties do not agree to allow the arbitrator to decide the issue of availability of class actions, the case would not apply.

39. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, at 6, 13 (Jan. 3, 2012).

40. *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 364–65 (5th Cir. 2013) (denying enforcement in relevant part).

41. Three circuits have already rejected the *Horton* decision. See *Richards v. Ernst & Young, LLP*, No. 11-17530, at 5 (9th Cir. Dec. 9, 2013) (per curiam); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–55 (8th Cir. 2013). The author believes that *Horton* was correctly decided and, in fact, that unilaterally imposed arbitration agreements in general violate the NLRA as applied to both class and individual claims. See *Hodges*, *supra* note 9, at 237. This is not the trend in the courts, however.

42. See *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, at 12–13.

effects on employees limited to the arbitral forum and deprived of the right to litigate as a class.

### C. IMPACT OF ARBITRATION'S GROWTH

For the employer, the arbitral forum offers certain advantages over litigation. It is not public, it is faster and often cheaper than litigation, and the case is not heard by a jury that may be more sympathetic to an employee than a business.<sup>43</sup> Because the employer often has better access to the evidence needed to prove an employment case, discovery limitations will make the employee's case more difficult in the arbitral forum.<sup>44</sup> If the agreement shortens statutes of limitations or limits damages that would be available in court, those provisions also benefit the employer.<sup>45</sup> There is some evidence that employers, as repeat players in arbitration, benefit from that status, as compared to employees who are not repeat players.<sup>46</sup> Employers may be able to secure both better arbitrators and more favorable decisions because of their repeat-player status.<sup>47</sup> And, of course, the class action limitations are extremely valuable, particularly where the employee's claims are of low value individually but large value collectively.<sup>48</sup> Because of the difficulties created by the arbitral forum and the unavailability of class actions, many plaintiffs' attorneys decline to represent employees who are limited to arbitration.<sup>49</sup> As a result, legal rights go unenforced and employee protections become mythical.

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43. *Cf. Green, supra* note 8, at 454–62 (explaining employers' questionable, yet nonetheless extant fears of jury trials and excessive litigation fees).

44. *Cf. Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298–99 (5th Cir. 2004) (noting that discovery in arbitration was less extensive than in litigation, though not finding the limitations sufficiently prohibitive).

45. *See Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 231–32 (3d Cir. 1997). Empirical research suggests that employees who win their cases in court receive greater damages than in arbitration but the studies do not include those cases that settle prior to litigation, which may affect the findings. Douglas M. Mahony & Hoyt N. Wheeler, *Adjudication of Workplace Disputes*, in *LABOR AND EMPLOYMENT LAW AND ECONOMICS* 361, 383–85 (Kenneth G. Dau-Schmidt et al. eds., 2009).

46. *See infra* note 84 and accompanying text.

47. Mahony & Wheeler, *supra* note 45, at 379–80.

48. A prime example would be claims under the Fair Labor Standards Act or state wage law for overtime pay or work off the clock. *See Hodges, supra* note 9, at 215–16.

49. *Cf. Rabin, supra* note 4, at 220–21 (“Lawyers are trained to be combative, and they often structure their fees on the basis of time spent. What would make them turn instead to quick, inexpensive and less dramatic forums?”).

Arbitration is not a panacea for employers, however. Many employment cases are decided in favor of the employer on summary judgment motions, before a trial is held.<sup>50</sup> Summary judgment may not be available in arbitration,<sup>51</sup> although evidence indicates its use is increasing.<sup>52</sup> Further, the arbitrator must be paid directly while judges are paid by the taxpayers. And the ability to appeal arbitration decisions is extremely limited, which is beneficial for the winner, but not the loser.<sup>53</sup> Also, because employee lawyers are likely to challenge arbitral agreements, they may result in costly enforcement litigation.<sup>54</sup> Accordingly, there are some counterincentives for employers considering implementation of an arbitration agreement.

There is no central repository for data on how many employers use arbitration agreements. Estimates vary.<sup>55</sup> The class action decisions from the last several years, however, are likely to increase consideration of such agreements, particularly by employers who may see themselves as vulnerable to class claims.<sup>56</sup> As arbitration increases, employees will find it more difficult to enforce their rights because of inability to find legal representation and enforcement costs.<sup>57</sup> As will be developed in the next section, unions, using either attorneys or trained union representatives, may help fill the gap.

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50. See, e.g., Green, *supra* note 8, at 451–52.

51. See *id.* at 470.

52. Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed?*, 29 OHIO ST. J. ON DISP. RESOL. 59, 72–73 (2014) (finding that motions for summary judgment were made in 23.9% of 217 arbitration cases studied from the American Arbitration Association in 2008). Defendants received a full or partial grant of summary judgment in 37 of the 52 cases in which a motion was made. *Id.* at 19.

53. Green, *supra* note 8, at 426.

54. *Id.* at 422.

55. See Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 408–12 (2007) (reviewing existing studies and stating that “a current estimate in the range of 15 to 25 percent of employers having adopted employment arbitration seems reasonable”). These studies preceded the recent cases upholding arbitral bans on class actions, which almost certainly increased the attractiveness of arbitration. See Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 427 (2005) (suggesting that upholding class action waivers in consumer and employee arbitration clauses will spur business to increase the use of these clauses and advance the end of class action litigation, absent action to prevent businesses from imposing waivers).

56. *Id.*

57. *Id.* at 411.

## II. OPPORTUNITIES FOR UNIONS

While the developments in the courts that allow employers to divert legal claims to arbitral forums create significant difficulties for employees in enforcing their rights, they may offer an opportunity for unions to offer representation in arbitration to build membership. Declines in membership have weakened union power and reduced the number of employees who see the value in union membership.<sup>58</sup> Many employees have an inflated view of their rights in the nonunion workplace.<sup>59</sup> Educating employees about their real rights and the difficulties of enforcement of those rights in the absence of union representation could pay dividends for unions in increasing membership and power.

Unions, using either attorneys or trained lay union representatives, could provide representation to workers with compulsory arbitration agreements for legal claims in workplaces without collective bargaining agreements. The representation could include not only the arbitration proceeding itself, but also any steps preceding arbitration, such as a grievance procedure or mediation.<sup>60</sup> Such services could be provided as a benefit of at-large<sup>61</sup> membership in the union. This attractive benefit may help recruit members outside the traditional method of organizing a collective bargaining unit. As some members take advantage of the arbitration representation, others in the same workplace will see the value of union membership. As membership builds, the union will eventually attain enough members to seek majority representation rights.

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58. See Josh Levis, *Analysis: Why America's Unions Are Losing Power*, CNN (Dec. 12, 2012, 04:06 PM), <http://www.cnn.com/2012/12/11/us/union-power-analysis>.

59. See generally Ian H. Eliasoph, *Know Your (Lack of) Rights: Reexamining the Causes and Effects of Phantom Employment Rights*, 12 EMP. RTS. & EMP. POL'Y J. 197 (2009); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447; Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997).

60. See Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 388, 421 (2004) (suggesting representing employees in nonunion workplaces in mediation); see also Ann C. Hodges, *Strategies for Combating Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & L. 183, 226 (2006) (suggesting unions join with other organizations to challenge harassment in the nonunion workplace).

61. At large members would be those who are not a part of an existing collective bargaining unit. The AFL-CIO has indicated an interest in recruiting at large members. See Amber, *supra* note 6, at C-1.

The next section will discuss some of the advantages and risks to unions of developing a program to provide arbitral assistance to individual employees as a means of developing membership.

#### A. ADVANTAGES OF THE MODEL

##### 1. The Need for Representation and Its Potential as a Recruitment Device

Most employer-created arbitration processes allow employees a representative of their choice, if only to ensure legal enforcement and ability to obtain arbitrators.<sup>62</sup> Because of the difficulty of obtaining counsel for arbitration, many employees with claims will have a need for representation. In general, private attorneys representing employees must take cases that provide promise for substantial recovery of attorneys' fees and costs in order to maintain their practices.<sup>63</sup> To do this, they consider several interrelated factors in selecting among potential clients. These factors include the strength of the claim, the potential for damages, the availability of attorneys' fees and the right to a jury trial.<sup>64</sup> While very highly paid employees may be able to afford to pay a lawyer to handle their case, most em-

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62. The Due Process Protocol, 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 set forth the elements for a fair arbitration procedure, which included employee choice of representatives. See *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, NAT'L ACAD. ARB. (May 9, 1995), <http://www.naarb.org/proceedings/pdfs/1995-298.pdf>. The National Academy of Arbitrators, an organization of professional arbitrators whose members are chosen using rigorous standards of excellence, advises its members to be cautious in accepting arbitral appointments where one party is unrepresented. See *Policy Statement on Employment Arbitration*, NAT'L ACAD. ARB. (May 20, 2009), [https://www.naarb.org/due\\_process.asp](https://www.naarb.org/due_process.asp). The American Arbitration Association will decline to administer arbitration if the process "substantially and materially deviates" from the Due Process Protocol. *Employment Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N (Nov. 1, 2005), [https://www.adr.org/aaa/showproperty?nodeId=/UCM/ADRSTG\\_004362&revision=latestreleased](https://www.adr.org/aaa/showproperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased); see also *CPR Employment Dispute Resolution Procedure*, INT'L INST. FOR CONFLICT PREVENTION & RESOL., <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/630/CPR-Employment-Dispute-Arbitration-Procedure.aspx> (last visited Apr. 4, 2013) (indicating that CPR reserves the right to refuse to administer any procedure if the employer and employee do not have the right to choose their own representatives).

63. See Colvin & Pike, *supra* note 52, at 33.

64. *Id.*

ployees, particularly those who have been terminated, need representation on a contingency basis so that the fees will come out of the recovery.<sup>65</sup> Additionally, many employment statutes provide attorneys' fees and costs to successful plaintiffs as part of the recovery.<sup>66</sup> A strong claim is more likely to result in either a litigation victory or a favorable settlement, which will lead to compensation for the attorney, either from the defendant or a percentage of the client's recovery. But if the plaintiff does not win the case, the attorney gets no compensation.

The size of the potential damage recovery is also a factor as the attorney risks being insufficiently compensated for the time invested unless there is a substantial likelihood of a significant recovery of damages. Unless the facts are egregious, making an award of significant punitive damages likely and/or a victory with accompanying attorneys' fees more certain, lower-wage employees will have more difficulty finding counsel than higher-paid employees because their damages will be smaller.<sup>67</sup> For the same reason, class actions are preferable to individual claims because aggregating damages makes the potential for recovering adequate fees to cover the attorneys' investment of time more likely.<sup>68</sup> Further, the employer may be more likely to settle a class action because of the size of the damages, the cost of the litigation,<sup>69</sup> and the potential for bad press. Finally, the availability of a jury trial is important because conventional wisdom, supported by some data,<sup>70</sup> is that juries are more likely to rule in favor of plaintiffs and to award significant damages.<sup>71</sup>

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65. *Id.* at 14.

66. For a list of some statutes that provide for recovery of fees, see *infra* note 188.

67. See Colvin & Pike, *supra* note 52, at 31–33 (describing results of a study of arbitration cases showing that “the economic calculus will make it difficult for plaintiff attorneys to accept cases unless they offer relatively high damages and strong prospects of winning”).

68. See Lisa B. Bingham, *Employment Arbitration: The Repeat Players Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 198–201 (1997).

69. While in theory class claims are less costly for defendants because they combine multiple claims in one proceeding, the reality is that most class members would not litigate individual cases so the cost savings are often more theoretical than real. See Sudbury & Towns, *supra* note 22, at 20.

70. Mahony & Wheeler, *supra* note 45, at 385; see also Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEG. STUD. 1, 8–11 (2011) (finding median damage awards five to ten times greater in employment litigation than in employment arbitration).

71. Bingham, *supra* note 68, at 199.

Claims under the Fair Labor Standards Act and state wage payment statutes create particular difficulty for plaintiffs. Often the damages for any one individual are relatively small: a failure to pay overtime, for example, or a requirement that an employee work off the clock for a few hours a week. Where the employer makes a practice of these violations, such as by misclassifying employees as exempt when they are not or as independent contractors when they are employees, damages for a class may be significant.<sup>72</sup> A collective action<sup>73</sup> provides significant potential for recovery of attorneys' fees, but an individual claim in arbitration will be unattractive to most attorneys.

A recent study of employment arbitration found that almost a third of employees in employer-promulgated arbitration procedures represented themselves.<sup>74</sup> Further, even those employees who had a lawyer were far less likely than their employer to have a lawyer with experience in employment law.<sup>75</sup> Representation was an important predictor of employee win rates as well as the amount of damages, which increased substantially.<sup>76</sup>

Accordingly there is a need for representation in these cases which the union can fill. Public sector unions have recruited members for many years with the promise of legal representation in disputes relating to employment.<sup>77</sup> Both teachers' unions and police officers' unions have been successful in maintaining membership, even in states that do not allow collective bargaining, by offering legal representation as a benefit of member-

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72. The FLSA allows employees to collect back pay for two years, three if the violation is willful. 29 U.S.C. § 225(a) (2012).

73. The FLSA provides for opt-in collective actions rather than class actions under Rule 23 of the Federal Rules of Civil Procedure. 29 U.S.C. § 216(b) (2012).

74. Colvin & Pike, *supra* note 52, at 15.

75. *Id.* at 16.

76. *Id.* at 27–28; see also LAURA J. COOPER, DENNIS R. NOLAN, RICHARD A. BALES, & STEPHEN F. BEFORT, *ADR IN THE WORKPLACE* 825 (3d. ed. 2014) (citing a study showing that the outcome of disputes is similar if both parties or neither party is represented but where one party has legal representation and the other does not, the represented party is more likely to win). *But see* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 800 n.93, 818 (2003) (finding similar win rates for low income employees in arbitration with and without counsel).

77. See Joseph E. Slater, *The Assault on Public Sector Collective Bargaining: Real Harms and Imaginary Benefits*, AM. CONST. SOC. FOR L. & POL'Y 1–2 (2011), [http://acslaw.org/sites/default/files/Slater\\_Collective\\_Bargaining.pdf](http://acslaw.org/sites/default/files/Slater_Collective_Bargaining.pdf).

ship.<sup>78</sup> Teachers sued by students or fired in violation of tenure statutes can obtain legal representation paid by the union.<sup>79</sup> Similarly, police officers who are disciplined, discharged, or sued by citizens can obtain legal representation as union members.<sup>80</sup> Both of these professions have a significant risk of suits being filed against them by the members of the public they serve, which provides a particular inducement for the benefit of union-paid legal representation.<sup>81</sup> However, unions can also educate employees without similar risk, but who may have legal claims against their employer that they cannot afford to litigate, to recognize the value of the benefit. As discussed in the following sections, unions that provide such representation can use it to build membership and thus union strength and to improve the enforcement of workers' rights, benefiting union and nonunion workers alike.

## 2. Using Existing Arbitral Expertise and Balancing Employer Power

Unions that offer this benefit can use their existing expertise to assist workers in arbitration of legal claims. Most collective bargaining agreements contain arbitration provisions for contractual violations, and unions regularly arbitrate these claims.<sup>82</sup> Thus union lawyers and union representatives have

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78. See, e.g., *We've Got You Covered*, VA. EDUC. ASS'N, <http://www.veanea.org/home/300.htm> (last visited Apr. 4, 2014). But see Craig Gilbert, *The Politics of Wisconsin's Declining Union Membership*, MILWAUKEE J. SENTINEL, Feb. 9, 2013, <http://www.jsonline/blogs/news/190545131.html>.

79. See, e.g., *Higher Education Faculty & Staff: About Us*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/34718.htm> (last visited Apr. 4, 2014); *Your Benefits: Legal and Financial Services*, AM. FED'N TEACHERS, <http://www.aft.org/benefits/legal.cfm> (last visited Apr. 4, 2014).

80. See, e.g., FRATERNAL ORDER POLICE DEFENSE PLAN, <http://www.foplegal.com> (last visited Apr. 4, 2014); L.A. POLICE PROTECTIVE LEAGUE, <http://lapd.com/about/services> (last visited Apr. 4, 2014).

81. See, e.g., Kevin Oates, *Professor Defend Thyself: The Failure of Universities to Defend and Indemnify Their Faculty*, 39 WILLAMETTE L. REV. 1063, 1063–64 (2003) (discussing the increasing number of lawsuits against university professors); W. VA. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, COPING WITH POLICE MISCONDUCT IN WEST VIRGINIA 8 (2004), available at <http://www.law.umaryland.edu/marshall/usccr/documents/cr122004024296.pdf> (indicating that police officers in West Virginia must pay any damages exceeding the state cap); *We've Got You Covered*, VA. EDUC. ASS'N, <http://www.veanea.org/home/300.htm> (last visited Apr. 4 2014) (describing the legal benefits of association membership).

82. See COOPER, NOLAN, BALES, & BEFORT note *supra* 76 at 20 (indicating that 99% of collective bargaining agreements contain provisions to arbitrate at least some grievances).



extensive experience in the arbitral forum. While the employer-created arbitration forum will not be identical to the labor arbitration forum, the experience will still be valuable.

In addition, unions can balance the repeat player effect that benefits employers in legal arbitration.<sup>83</sup> Employers who have arbitrated previously are more successful in arbitration and when they have arbitrated before the same arbitrator, they are even more likely to win.<sup>84</sup> Additionally, employees recover more when the employer is not a repeat player than when it is.<sup>85</sup>

One possible explanation for the repeat player effect is the experience gained in prior arbitrations while another is that repeat player employers may screen out meritorious cases, settling them prior to arbitration.<sup>86</sup> Another possibility is that arbitrators maximize their chances of being reemployed by favoring the repeat player in close cases.<sup>87</sup> Finally, employees may lack knowledge about arbitrator backgrounds or the importance of arbitrator backgrounds that may influence the decision because of their lack of experience with arbitration.<sup>88</sup>

Currently, even those employees with representation in employer-promulgated arbitration have attorneys with employment law experience far less often than their employers.<sup>89</sup> Further, employer attorneys are far more likely to be repeat players in arbitration than employee attorneys.<sup>90</sup>

Data on labor arbitration where unions are involved in the process show that employee win rates tend to be higher.<sup>91</sup> While some of the disparities relate to differences in the forum and the norms that have developed in each,<sup>92</sup> others may be at-

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83. See generally Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998).

84. *Id.* at 234, 238; Mahony & Wheeler, *supra* note 45, at 379–80.

85. Bingham, *supra* note 83, at 234. This research does not reveal the reason for the repeat player effect but only its existence. Mahony & Wheeler, *supra* note 45, at 380.

86. Bingham, *supra* note 83, at 234; Mahony & Wheeler, *supra* note 45, at 380.

87. Bingham, *supra* note 83, at 242.

88. Mahony & Wheeler, *supra* note 45, at 389–90.

89. Colvin & Pike, *supra* note 52, at 16.

90. *Id.* at 13 (finding in a study of 217 arbitration cases from 2008 that only 11% of cases involved a repeat player attorney for the employee while 54% of cases involved an employer with a repeat player attorney).

91. *Id.* at 382–83.

92. *Id.* at 382, 385–86.

tributable to the comparative lack of experience of employers and employees and the fact that only the employer will be in a position to use the arbitrator in the future. These two factors that harm employee chances in arbitration can be remedied through experienced union representation. The union can assist in selecting an appropriate arbitrator, effectively represent the employee in the hearing and any pre- and post-hearing proceedings, and appear to the arbitrator as a repeat player who can affect future business. Thus, while arbitration is viewed by plaintiffs' attorneys with skepticism, the union may provide employees a better chance for success in the forum.

### 3. Demonstration of Value to Build Membership

Representing employees in arbitration provides an opportunity to demonstrate the value of union membership to individuals. As noted above, finding an attorney to enforce rights in arbitration is difficult.<sup>93</sup> Employees with claims will quickly realize that their rights are relatively ephemeral without a viable means to enforce them. While an employee might be able to arbitrate without representation, represented employees fare better in arbitration when the employer also has representation.<sup>94</sup> While there is always the potential that an employee who loses in arbitration will blame the union, an effective advocate will educate the employee about the risks of loss and demonstrate the value of representation, win or lose.

Representation offers an immediate and tangible value to the employee that is also visible to other employees.<sup>95</sup> The union can use the opportunity provided by representation to inform the employee(s) of other benefits of union membership and representation such as a union-sponsored training, collective bargaining agreements, just cause protection against discharge, and union representation on the job site.<sup>96</sup> Arbitration prepara-

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93. See *supra* notes 62–73 and accompanying text.

94. See Carrie Menkel-Meadow, *The NLRA's Legacy: Collective or Individual Dispute Resolution or Not?*, 26 A.B.A. J. LAB. & EMP. L. 249, 261 n.67 (2011).

95. One difficulty with this strategy is that many of the cases may involve employees who have been terminated, limiting their continued contact with their coworkers. See Colvin & Pike, *supra* note 52, at 13 (showing only 5% of 217 American Arbitration Association cases in 2008 involved employees who were still employed). It is possible, however, that the availability of union representation in arbitration may encourage more employees to bring claims while still employed. See *infra* notes 98–100 and accompanying text.

96. See, e.g., *The Union Advantages: Facts & Figures*, SERVICE EMPLOYERS' INTERNATIONAL UNION, <http://www.seiu.org/a/ourunion/research/union-advantage-facts>

tion done at a union facility presents a chance for the client to make connections with other union members and union staff and learn more about the union. Motivated employees who demonstrate leadership potential could be trained to organize and educate other workers at the workplace or in the particular industry about the union and the benefits of representation, including the opportunity to obtain representation for legal claims. Indeed, if particularly skilled individuals are identified, they might even be trained to represent employees from their workplace in arbitration of similar claims.<sup>97</sup>

Wage and hour claims, where many employees are treated similarly in pay denials, might be particularly susceptible to this sort of treatment. Once one or two claims are litigated in arbitration, a litigation formula is established that should work for similar claims without the need for a trained lawyer to handle the case. In fact, after some number of successful arbitrations, it is likely that the cases will settle quickly and the benefits of the union will be tangibly demonstrated to all employees.

#### 4. Ensuring Enforcement of the Law

Helping workers enforce rights violated by their nonunion employers raises the floor for all workers, including union workers. Research has demonstrated that employees in unionized workplaces are more likely to enforce their rights.<sup>98</sup> Com-

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-and-figures.php (last visited Apr. 4, 2014) (describing the spectrum of benefits for union members).

97. *But see infra* notes 130–40, 184–88 and accompanying text regarding representation by non-lawyers.

98. *See* John W. Budd & Brian P. McCall, *The Effect of Union on the Receipt of Unemployment Insurance Benefits*, 50 INDUS. & LAB. REL. REV. 478, 488 (1997) (finding that unionized employees are more likely than nonunion employees to collect unemployment compensation benefits, even after controlling for differences in demographics, unemployment compensation systems, and jobs); Barry T. Hirsch, David A. MacPherson & J. Michael Dumond, *Workers' Compensation Reciprocity in Union and Nonunion Workplaces*, 50 INDUS. & LAB. REL. REV. 213, 218, 233 (1997) (finding that unionized workers were more likely to file workers' compensation claims and more likely to receive workers' compensation benefits); Michele Hoyman & Lamont Stallworth, *Suit Filing by Women: An Empirical Analysis*, 62 NOTRE DAME L. REV. 61, 77 (1986) (finding correlation between union activism and filing of lawsuits); Michele M. Hoyman & Lamont E. Stallworth, *Who Files Suits and Why: An Empirical Portrait of the Litigious Worker*, 1981 U. ILL. L. REV. 115, 134–36 (finding that both union activism and grievance filing were positively associated with filing of lawsuits and discrimination charges); Alison D. Morantz, *Does Unionization Strengthen Regulatory Enforcement? An Empirical Study of the Mine Safety and Health Administration*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 697, 712–13 (2011) (finding MSHA inspections in unionized mines are more fre-

pliance with legal requirements raises costs for employers. Nonunion employers who ignore the law can make it difficult for unionized and compliant employers to compete. Accordingly, just as it is in the interest of unions to raise wages of nonunion employers to avoid the race to the bottom, it is in their interest to force all employers to comply with the law.

To the extent that greater enforcement of law by union members is due to the lack of fear of retaliation because of the protection of a union contract,<sup>99</sup> offering representation to workers who have no contract will not increase enforcement. Another part of the explanation, however, is the union's education of workers about their rights and representational support in enforcing them.<sup>100</sup> Thus, education and representation of workers in unorganized workplaces will result in greater enforcement of the laws and benefit those in unionized workplaces as well. Unionized workers will benefit because their employers will not be threatened by nonunion competitors who can offer lower prices based on avoidance of legal compliance. Reducing the difference in cost structure between union and nonunion employers will make it easier for the union to negotiate better employment terms for unionized workers.

Having reviewed some of the benefits of the proposed representational model, I now turn to the concerns and risks that unions must consider before implementing this proposal.

#### B. MINIMIZING RISKS FOR THE UNION

Implementing a program to provide representation in arbitration to employees in unorganized workplaces is not without risk. The program must be carefully developed and implemented as part of an effort to increase union membership and legal enforcement to benefit all members of the union. The sections

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quent, last longer, and result in higher proposed fines); David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 INDUS. REL. 20, 26-34 (1991) (finding that unions increase enforcement of OSHA in the manufacturing sector, resulting in more frequent inspections, more employee representation on inspections, more intense inspections, greater numbers of violations found and greater penalties); David Weil, *Employee Rights, Unions, and the Implementation of Labor Policies*, PROCEEDINGS OF THE FORTY-FIFTH ANNUAL INDUS. REL. RES. ASS'N MEETING 474, 476 (1993) (analyzing various studies and concluding that unions improve enforcement of various laws, including the Fair Labor Standards Act, OSHA, MSHA, certain provisions of ERISA, workers' compensation laws and unemployment compensation laws).

99. See Budd & McCall, *supra* note 98, at 490-91.

100. *Id.*

below analyze several significant issues that must be considered in program design and implementation.

### 1. Remaining a Movement and Not Just a Service Provider

Using legal action as a primary strategy for developing and maintaining a social movement risks losing the very individuals that the union is trying to recruit.<sup>101</sup> Because legal action requires a level of expertise that the average worker does not possess, an organization trying to use litigation (or arbitration) to build worker membership may instead cause workers to feel disempowered and disconnected.<sup>102</sup> Thus, the process must be carefully constructed to involve the employees and to engage them in the broader organization, not just their own arbitration. Otherwise, once the arbitration is over, the employee will have no lasting connection to the organization.<sup>103</sup> It is important that the union remain a movement, not a service organization for its members.<sup>104</sup>

Worker centers,<sup>105</sup> which often provide legal representation for low wage workers, have struggled with this question of balancing the use of organizing and legal action to effectuate social change, while increasing and retaining membership.<sup>106</sup> Lessons

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101. See Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 *FORDHAM URB. L.J.* 604, 604 (2009); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 *UCLA L. REV.* 443, 455–56 (2001) (summarizing critiques); Victor Narro, *Finding the Synergy Between Law and Organizing: Experiences from the Streets of Los Angeles*, 35 *FORDHAM URB. L.J.* 339, 353–54 (2008).

102. See JULIUS G. GETMAN, *RESTORING THE POWER OF UNIONS* 323–24 (2010) (arguing that unions have placed too much value on professionalism which results in a gulf between the leadership and the rank and file); COREY S. SHDAIMAH, *NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE* 23 (2009) (identifying problems with the necessary use of legal expertise to initiate change which may result in lawyers dominating the process).

103. JENNIFER GORDON, *SUBURBAN SWEATSHOPS* 300–02 (2005) (describing challenge of using individual representation to generate collective action and suggesting ways to facilitate the process).

104. Nicole A. Archer et al., *The Garment Worker Center and the “Forever 21” Campaign*, in *WORKING FOR JUSTICE: THE LA MODEL OF ORGANIZING AND ADVOCACY* 154, 162 (Ruth Milkman et al. eds., 2009).

105. “Worker centers are community-based mediating institutions that provide support to low wage workers.” JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 2 (2006). They focus on three prongs of action: service, advocacy and organizing. *Id.*

106. Archer et al., *supra* note 104 at 160–64 (describing the Garment Worker Center’s struggle to maintain involved membership in a campaign

learned from these groups include the importance of clear communication between workers and legal advocates, involvement of employees in decisions of the organization, and development of leadership among the employees.<sup>107</sup> Jennifer Gordon, who founded a worker center, describes the use of law not only to vindicate specific legal rights but also to challenge the system and foster collective activity through legislative action, protest, alliance building, and publicity.<sup>108</sup> For example, a group of workers represented by the union might use multiple individual claims in arbitration to impose a cost on the employer who has deprived the employees of the class action option.<sup>109</sup> Regardless of victory in individual actions, the workers may build solidarity around the goal of regaining their right to collective litigation of claims. Workers may also be motivated to support changes in the law relating to arbitration to allow not only workplace, but also consumer class actions. Using arbitration as part of a movement to increase workers' rights broadens the goal beyond just winning a particular arbitration. Having broader goals reduces the risk that workers will abandon the union once the arbitration is over.

Another advantage of making arbitration representation part of a broader campaign for workers' rights is that it reduces the adverse consequences of losing a case. Employee win rates in employment arbitration are not high, especially when the individual arbitration agreements of high-powered executives are excluded from the data.<sup>110</sup> While union representation may increase the win rate, there will still be lost cases, perhaps many. If the goal is not just winning a case, but imposing a cost on the employer and educating workers and the public about the loss of rights through unilaterally-imposed arbitration, employees are less likely to blame their representatives if a case is lost. The employees can then be motivated to educate their coworkers about the problems with the arbitration procedure

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that focused on legal action); GORDON, *supra* note 103, at 300; Narro, *supra* note 101, at 342–43.

107. GORDON, *supra* note 103, at 291–94 (describing the importance of a culture of democracy); Archer, *supra* note 104, at 162–63; Narro, *supra* note 101, at 358.

108. GORDON, *supra* note 103, at 295–98.

109. *Id.* at 296 (suggesting the use of large numbers of individual claims to clog a legal system and show the need for change).

110. See Colvin & Pike, *supra* note 52, at 22.

that may have affected their ability to win the case.<sup>111</sup> Employees can also help the union compile data to support legislative efforts to restrict unilaterally-imposed, unbalanced arbitration procedures. Whether the goal be eliminating compulsory arbitration or requiring fair and balanced arbitration procedures, their stories can become a part of efforts to advocate for change. In this way, the union's representation is used to build and sustain a movement.

Finally, both educating and listening to workers are essential if representation in arbitration is to translate to active union membership. If the union is nothing more than a legal service provider to the member, then the program will be nothing more than a lost opportunity for the union.

## 2. NLRA Limitations on Moving to Majority Representation

Because a major goal of the arbitration program is building membership, where possible, unions will want to increase membership in each workplace to become the majority representative for the employees. At-large members will have whatever benefits the particular union chooses to provide but cannot, at least under current law, compel the employer to negotiate with the union. Only when a majority of employees in an appropriate bargaining unit choose representation will the bargaining requirement attach, enabling the union to negotiate a collective bargaining agreement to protect the workers. Unions interested in moving from one or more at-large members to majority representation must be aware that providing free representation during the critical period between a petition for representation and an election may be grounds for setting aside an election won by the union.<sup>112</sup> While the National Labor Relations Board had previously held that providing employees free legal services relating to employment concerns was not objectionable,<sup>113</sup> after a contrary opinion by the D.C. Circuit,<sup>114</sup> the Board in 2011 in *Stericycle* decided that "a union ordinarily engages in objectionable conduct warranting a second election by financing a lawsuit filed during the critical period, which states claims under Federal or State wage and hours laws or other similar employment law claims on behalf of employees in the

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111. To the extent that the employees are no longer in the workplace, this task may be complicated. See *supra* note 95 and accompanying text.

112. See *Stericycle, Inc.*, 357 N.L.R.B. No. 61 (Aug. 23, 2011).

113. See *Novotel New York*, 321 N.L.R.B. 624, 637 (1996).

114. See *Freund Baking Co. v. NLRB*, 165 F.3d 928, 935 (D.C. Cir. 1999).

unit.”<sup>115</sup> The rule was qualified, however, in a footnote, stating that where legal assistance was an existing benefit of union membership, not conditioned on joining the union before the election, providing such assistance only to members was not objectionable.<sup>116</sup>

The *Stericycle* rule does not provide a serious obstacle to the legal assistance benefit so long as it is provided to all union members regardless of the election. While none of the cases involved the precise program advocated here, a benefit tied to membership that is available to employees who choose to join the union even without a majority organizing campaign would seem to pass muster under the existing rules, as it would be available to all members regardless of when they joined the union. To add extra insurance that the benefit would not invalidate a pending election, the union could avoid filing any claim during the critical period, since the Board drew a bright line rule that permits legal representation in claims filed before the petition but finds objectionable claims filed during the critical period.<sup>117</sup> Because the median time between filing the petition and the election is thirty-eight days,<sup>118</sup> avoiding filing during this time period would not pose a significant problem in most situations. Thus this program should not interfere with union efforts to convert at-large members to majority representation where support exists.

### 3. Duty of Fair Representation or Other Potential Liability

An important question in determining whether to institute such a program is whether the risks for liability for the union outweigh any benefits from increased representation. In providing representation in arbitration outside collective bargaining, the union's intent will be to offer the best possible representation. Anything less will not serve the interests of either the union or the workers. Nevertheless, some cases will be lost, some workers will be unhappy, and some may bring legal action

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115. 357 N.L.R.B. No. 61, at 4.

116. *Id.* at 4 n.15 (citing *Dart Container*, 277 N.L.R.B. 1369 (1985) (holding that leaflet telling employees that the membership benefit of free legal services from the union would be available to employees in the event the union won the election was not objectionable because it merely advised employees of an existing union benefit)).

117. 357 N.L.R.B. No. 61, at 3-4.

118. OFFICE OF THE GEN. COUNSEL, NLRB, SUMMARY OF OPERATIONS (FISCAL YEAR 2012), MEMORANDUM GC 13-01 at 5 (2013), available at <http://www.nlr.gov/reports-guidance/general-counsel-memos>.



against the union. While setting realistic expectations regarding the outcome of arbitration will help deal with this problem, it is important to consider what legal claims might be available to dissatisfied workers.

When representing workers in arbitration under collective bargaining agreements, unions are governed by the duty of fair representation. The union's representation cannot be arbitrary, discriminatory or in bad faith or the union will be liable to the employee for any losses attributable to the union's conduct.<sup>119</sup> The duty of fair representation, however, arises from the right of exclusive representation.<sup>120</sup> It is necessary to ensure the constitutionality of the law, which deprives the employee of the right to negotiate directly with the employer and substitutes representation by the union.<sup>121</sup> Thus, the purpose of the duty does not require its application when the union is offering representation to employees who may choose instead to represent themselves because they are not a part of a majority bargaining unit. Representation is a benefit of union membership, but acceptance is not an obligation. The employee remains free, in the case of legal claims, to choose alternative representation. Indeed, the same is true of legal claims even where the union is the majority representative unless the union has negotiated an exclusive forum for legal claims that bars the employee from choosing alternative representation.<sup>122</sup>

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119. See *Bowen v. U.S. Postal Serv.*, 459 U.S. 212, 223 (1983); *Vaca v. Sipes*, 386 U.S. 171, 190, 195–96 (1967).

120. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 204 (1944).

121. *Id.*

122. See, e.g., *Freeman v. Local Union No. 135, Chauffeurs, Teamsters & Helpers*, 746 F.2d 1316, 1321 (7th Cir. 1984) (finding no duty of fair representation requiring appeal of unfavorable grievance arbitration award because the “union does not serve as the exclusive agent for the members of the bargaining unit with respect to [that] particular matter”); *Dycus v. NLRB*, 615 F.2d 820, 826 n.2 (9th Cir. 1980) (affirming NLRB's finding that the duty does not apply to union's withdrawal as representative since duty terminates with representation); *Merk v. Jewel Food Stores Div.*, 641 F. Supp. 1024, 1028–31 (N.D. Ill. 1986), *aff'd*, 848 F.2d 761 (7th Cir. 1988) (finding union owed no duty to former employees in settling wage claims with employer where they were no longer members of the bargaining unit and their interests conflicted with those of current employees); *Lacy v. Local 287, UAW*, 102 L.R.R.M. 2847, 2850 (S.D. Ind. 1979) (finding union owed plaintiffs no duty with respect to filing claim for Trade Readjustment Assistance benefits), *aff'd mem.*, 624 F.2d 1106 (7th Cir. 1980); *cf.* *Roberts v. W. Airlines*, 425 F. Supp. 416, 430–31 (N.D. Cal. 1976) (finding union had no legal duty to file lawsuit challenging state laws limiting employment of women); *Rosenfeld v. S. Pac. Co.*, 293 F. Supp. 1219, 1229 (C.D. Cal. 1968) (same), *aff'd*, 444 F.2d 1219 (9th Cir. 1971).

Based on existing precedent and the rationale for the application of the duty, it seems unlikely that the duty of fair representation would apply to unions representing employees in arbitration where the employee remained free to choose other representation. Because none of the existing case law arose in an identical context, however, the answer is not certain. Most of the decided cases arose when the union failed to file legal claims, and many involve efforts by employees to evade the statute of limitations based on the union's failure to file.<sup>123</sup> Courts declined to find any duty on the part of the union to file a claim, absent any explicit promise to do so, when the employee was free to file his or her own claim. But in the program proposed here, where the union has voluntarily taken on representation of the member in a legal case, some duty to the member may apply.

If attorneys are used, ethical standards regarding representation will apply, and malpractice claims will lie against the lawyers who fail in their duty. If union representatives are used,<sup>124</sup> the duty of fair representation might be the most favorable standard for the union as it applies a relatively high bar for claims and provides the union a wide range of reasonableness in its decisions.<sup>125</sup> The wide range of reasonableness, however, is designed to provide the union the flexibility needed to represent all workers in the exclusive representation context. Representing an individual in a legal claim, particularly where there is no majority representation, does not implicate those concerns, with one possible exception. The union which represents the entire bargaining unit must make decisions about wise use of resources and may choose not to arbitrate certain contractual claims because of resource limitations.<sup>126</sup> The same concerns may apply to at-large union members.

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123. See, e.g., *Steffens v. Bhd. of Ry. & Airline Clerks*, 797 F.2d 442, 447 (7th Cir. 1986); *Freeman*, 746 F.2d at 1316; *Lacy*, 102 L.R.R.M. at 2847.

124. The use of union representatives in these cases raises other issues discussed *infra* notes 184–88 and accompanying text.

125. See *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 69, 76–78 (1991). Generally employees have failed in their efforts to hold lay union representatives to the standard of attorneys in handling cases in the contractual grievance and arbitration procedure. See Ellyn Moscovitz & Victor J. Van Bourg, *Carve-Outs and the Privatization of Workers' Compensation in Collective Bargaining Agreements*, 46 SYRACUSE L. REV. 1, 52 (1995) (discussing cases).

126. There is some debate about whether this is a legitimate reason for declining to arbitrate under a collective bargaining agreement. See generally Clyde W. Summers, *The Individual Employee's Rights Under the Collective*

Once the union commits to representation as a benefit of membership, however, it would seem committed to providing such representation on the terms offered. Failure to do so might well give rise to a legal claim against the union, perhaps in the form of breach of contract. In addition, negligent representation by a union representative might also give rise to a common law claim of breach of a duty.<sup>127</sup> While the union might argue that such a claim is preempted by the duty of fair representation,<sup>128</sup> it is unclear whether the duty would have such force in the absence of exclusive representation. In either case, there is some risk of liability for unions instituting such a program. While attorneys can protect against suits for malpractice with insurance, unions should consider the potential for liability in using union representatives as a cost of the model. There is no reason that the risk of claims against the union would be any greater than the risk of duty of fair representation claims in the exclusive representation context, however. And finding a lawyer to sue the union would be even more challenging than finding a lawyer for arbitration in the first place. Thus, the risk should be factored into the cost, but should not dissuade unions from developing the program. Financing considerations will be contemplated further in Part IV.

#### 4. Unauthorized Practice of Law

While unions commonly use union representatives in contractual arbitration without consideration of the unauthorized practice of law, even where such claims might implicate or overlap with legal claims,<sup>129</sup> the growth of arbitration of legal

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*Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251 (1977).

127. Some courts have addressed the issue of what standard of care applies to provision of what might be characterized as legal services by non-lawyers. See Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 97. The issue of the standard is intertwined with the question of what is the practice of law. *Id.* In some cases the courts find non-lawyers should be held to the standard of a lawyer. *Id.* Another approach is to apply a general negligence standard without explicitly defining the standard of care. *Id.* at 97–98. Other cases have declined to apply an attorney standard where a lay person is authorized to engage in representation in a legal forum. *Id.* at 99–100.

128. See *supra* note 119 and accompanying text.

129. In 2012, the Rhode Island Supreme Court declined to prevent non-lawyer union representatives from representing the union in contractual labor arbitration based on the prohibition on unauthorized practice of law. See *In re Town of Little Compton*, 37 A.3d 85, 86 (R.I. 2012). The court noted that some other states had explicitly allowed the practice, most had not addressed the

claims has given rise to concerns about unauthorized practice of law in the arbitral forum.<sup>130</sup> While an employer's program of arbitration may not limit representation to lawyers, this does not prevent the bar from intervening to protect consumers from unauthorized legal practice. The bar may be more concerned if the arbitration is being undertaken for compensation in the form of dues, as the program contemplates, as contrasted with representation by a friend, family member or coworker. Further, an employer who fears that union representation in arbitration may lead to unionization of the workforce may be motivated to report such representation to the bar. If the duty of fair representation does not apply to protect the union member from union misconduct,<sup>131</sup> the bar may be even more concerned about protecting members from unauthorized practice of law.

There is no easy answer to the question of when unauthorized practice of law occurs in arbitration. The issue could arise whether union representatives or out-of-state lawyers are involved. The cases that would be covered by the proposed program will largely involve legal claims. That they take place in the arbitral forum does not automatically place them outside the practice of law. Such determinations depend on the law of the state. One question will be whether the state has authorized representation by either nonlawyers or out-of-state lawyers in arbitration.<sup>132</sup> That in turn may depend on which state's law applies.<sup>133</sup> Some arbitrations may take place in a location other than where the dispute arose, and much of the preparation may take place in yet other jurisdictions.<sup>134</sup> In some states, out-of-state attorneys may be able to do a few arbitrations per year without engaging in unauthorized practice or may be able to obtain admission *pro hac vice* for purposes of a particular case.<sup>135</sup>

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issue, and none that the court or the parties could find had prohibited union representatives from arbitrating contractual claims. *Id.* at 90–91.

130. Kristen M. Blankley et al., *Multijurisdictional ADR Practice: Lessons for Litigators*, 11 CARDOZO J. CONFLICT RESOL. 29, 29–31 (2009); Buhai, *supra* note 127, at 125–26.

131. *See supra* notes 119–26 and accompanying text.

132. Blankley, *supra* note 130, at 32–33; Buhai, *supra* note 127, at 125–26.

133. *Id.* at 38–43.

134. *Id.* Workplace arbitrations are probably less likely to be scheduled in locations other than the employment site than others, as choosing an inconvenient location may jeopardize the enforceability of the arbitration agreement.

135. Blankley, *supra* note 130, at 43–54 (discussing a variety of state rules and their applicability).

Another question will be whether the arbitration actually involves the practice of law at all.<sup>136</sup> If not, unauthorized practice is not an issue. The answer will depend in part upon the design of the arbitration system and the state law that applies.<sup>137</sup> Many of the arbitration systems for nonunion employees have been structured to contain at least some of the elements of a judicial proceeding in order to avoid being set aside by a court on grounds that the agreement is unconscionable or the employee is unable to vindicate the statutory rights in the proceeding.<sup>138</sup> These elements may make it more likely that an arbitration is construed as the practice of law.

In the many jurisdictions that have adopted ABA Model Rule 5.5(c)(3), the questions are easier to answer for attorneys; the rule authorizes licensed attorneys to practice law temporarily in an ADR proceeding if their representation in the case is “reasonably related” to their practice in the jurisdiction where they are licensed.<sup>139</sup> For non-attorneys, however, or attorneys in other jurisdictions, the questions are more complex and require a careful evaluation of state law.

These issues relating to unauthorized practice of law complicate the creation of an arbitration program for legal claims, but provide ammunition for an advocacy campaign against the use of arbitration to deprive employees of their legal rights. Employees can be compelled by their employer to arbitrate le-

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136. *Id.* at 31–37; Buhai, *supra* note 127, at 94.

137. Blankley, *supra* note 130, at 33–36 (discussing varying views on whether and when arbitration is the practice of law). While some states have not construed arbitration as the practice of law under the unauthorized practice of law limitations, these cases have involved attorneys not authorized to practice in the jurisdiction and not non-attorneys. *See, e.g.*, Colmar, Ltd. v. Fremantlemedia N. Am., Inc., 801 N.E.2d 1017, 1028 (2003) (recognizing that arbitration is more informal than a judicial proceeding, is chosen for the informality which leads to quicker and cheaper resolution of disputes, is not required to follow the rules of evidence, and does not rely on legal precedent; refusing to set aside an award because of the participation of an attorney not licensed in Illinois); Prudential Equity Grp. LLC v. Ajamie, 538 F. Supp. 2d 605, 608 (S.D.N.Y. 2008) (same).

138. *See, e.g.*, Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997) (finding on due process grounds that a predispute arbitration agreement is enforceable only when it provides for neutral arbitrators, more than minimal discovery, a written award, all types of relief available in court, and does not force the employee to pay unreasonable costs or arbitrators’ fees); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 682 (Cal. 2000) (reaching the same result on unconscionability grounds).

139. *See* MODEL RULES OF PROF’L CONDUCT R. 5.5(c)(3) (2013). Twenty-nine states have adopted this provision although six have modified the rule in ways that may alter its application. Blankley, *supra* note 130, at 47.

gal claims in a less hospitable forum, deprived of the ability to bring such claims as a class, and then deprived of representation because attorneys are uninterested or unaffordable and non-attorneys are ineligible due to bar rules. The reason that non-lawyers have been permitted to practice law in some areas is a tacit recognition that poor and middle-class Americans have been deprived of access to legal services due to cost.<sup>140</sup> Efforts to restrict union representation of workers in arbitration can become part of the campaign to combat unilaterally-imposed arbitration and provide a fair and neutral forum for workplace disputes.

These issues relating to the unauthorized practice of law must be taken into account in determining the financing of the system and the model to be chosen, and it is to those two subjects that the Article turns next.

### III. STRUCTURING AN EFFECTIVE AND SUSTAINABLE PROGRAM

#### A. FINANCING THE PROGRAM

Perhaps the most difficult issue is how to finance such a program. Representation can be costly and the demand is somewhat unpredictable. The program would backfire as a tool for increasing union membership if the need for representation outstripped the ability to provide it effectively. Thus the program must be structured in a way that makes financing feasible. While the program might vary based on the particular union, this section will set forth some programmatic options relating to finances.<sup>141</sup> The following section, which discusses how to provide the representation, will also affect the financial viability of the program.

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140. Buhai, *supra* note 127, at 93–94. Although some representation is permitted but not expressly authorized, the Social Security Act explicitly allows non-attorney representation in claims before the agency and provides for compensation. 42 U.S.C. § 406 (2006).

141. Some scholars have suggested that new ways of aggregating claims in arbitration might arise and that there might even be a market for lawyers or non-lawyers to purchase small claims. See Myriam E. Gilles & Anthony J. Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, DEPAUL L. REV. (forthcoming 2014) (Cardozo Legal Studies Research Paper No. 392, 2013), available at <http://ssrn.com/abstract=2263443>. Unions might play a role in creating new ways of financing and litigating arbitration claims of employees.

### 1. Eligibility for Assistance

Since a major purpose of the program is to increase union membership, the benefit should be offered to union members only. Unions should consider whether to require a waiting period after joining for eligibility for representation. A waiting period would prevent individuals from joining only when they need representation and thus increasing costs. If most members need representation, there will be an insufficient number of members who do not use the benefit to subsidize the cost of representation. On the other hand, the recruiting appeal for representation may be less attractive to those who cannot foresee using the benefit. And long delays in seeing benefits from the program may cause employees to cease membership. It will be important to publicize victorious cases to members and potential members so that they see the value of obtaining and retaining membership.

### 2. Scope of Assistance

The program will also need to define the scope of legal assistance available. The union needs to create a program with the correct balance to ensure that costs to the union are not excessive while still providing a valuable service to members. To some extent, the scope of representation will depend on anticipated utilization and the model of representation chosen. The proposed model is to offer representation in arbitration, including any procedures preceding arbitration. An alternative would be to offer representation in any legal dispute relating to employment regardless of forum.

Limiting the program to arbitration reduces the population of employees who can be effectively recruited using this benefit. The arbitration-only option would apply primarily to newly recruited at-large members, as most existing members will not have an arbitration program for claims other than those under the collective bargaining agreement, unless the union has chosen to negotiate such a program. This would reduce the cost of the program. A program offering representation for all workplace legal claims regardless of forum will be substantially more expensive as existing members would likely take advantage of the option as well.<sup>142</sup> Additionally, the union must

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142. Of course, some unions already provide representation for members in cases involving claims under laws such as the Fair Labor Standards Act and the various discrimination laws. Another option is to offer a broader legal services plan that also covers common claims not directly related to employment

have attorneys available for cases litigated in the judicial forum.<sup>143</sup> Alternatively, the program could cover all arbitration, including consumer arbitration, which would expand the benefit in ways that would aid existing members, but would also challenge existing union expertise.

An arbitration-only program has the advantage of being part of a larger political and social justice campaign to fight back against employers who are limiting employee and consumer rights using binding arbitration agreements. Such a campaign would align unions with plaintiffs' employment attorneys and other groups, such as Public Citizen, who are fighting the arbitration battle.<sup>144</sup> As noted above, it also broadens the goals of the program beyond winning a particular case, which increases the utility of the program as an effective recruitment and retention device.

Limiting representation to arbitration will likely be cheaper for the union because it is likely to involve only one hearing with very limited availability of any appeal. Moreover, the speed of the process will avoid tying up the representatives for long periods of time. If the employer's ADR program includes

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such as real estate closings, divorces, and immigration issues. Some unions have a history of offering such plans. *See, e.g., Affordable Access to Justice*, UAW LEGAL SERVS. PLAN, <http://www.uawls.com/default.asp> (last visited Apr. 4, 2014). Unions have more general plans as well. *See Legal Help for Union Families*, UNION PLUS, <http://www.unionplus.org/legal-aid-services> (last visited Apr. 4, 2014) (offering legal assistance to members and retirees of participating unions). As noted above, the more claims that are covered, the more costly the benefit as more people are likely to use it. In addition, while there are opportunities to recover legal fees from the defendant in many successful employment cases, thus reducing the cost of representation, in other areas of law, such as real estate and immigration, no fee recovery is available. On the other hand the costs of representation will be quite low for some cases, such as simple real estate transactions. This type of plan, however, is less likely to serve the purpose of engaging employees in the broader union movement and more likely to draw and retain only those who see the union as a competitive service provider. Any type of legal services plan that requires practice in court will require use of counsel authorized to practice in the jurisdiction, potentially increasing costs.

143. Depending on the state and its interpretation of unauthorized practice of law, there may be limitations on the use of non-lawyers in arbitration as well. *See supra* notes 130–40 and accompanying text.

144. *See Advocacy: Forced Arbitration*, NELA, <https://www.nela.org/NELA/index.cfm?event=showPage&pg=mandarbitration> (last visited Apr. 4, 2014); *Fair Arbitration*, PUB. CITIZEN, <http://www.citizen.org/Page.aspx?pid=2512> (last visited Apr. 4, 2014). The Arbitration Fairness Act has been regularly introduced in Congress. Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013). It would eliminate compulsory arbitration imposed on employees and consumers by businesses.



earlier steps, the case may settle in those stages, reducing the costs. Litigation, however, might take years, involving extensive pretrial discovery and appeals, as well as pretrial motions with accompanying briefs.

To reduce the cost of the program (and also the benefit), the union could limit claims to certain legal violations. For example, claims relating to unpaid wages under state and federal law are likely to be difficult for employees to pursue in individual arbitration, where the cost might exceed the amount of the recovery.<sup>145</sup> These claims may be less complex to arbitrate than discrimination claims, for example, and easier to standardize once a few successful claims have been brought.<sup>146</sup> Without potential for class actions, these claims may be far less attractive to the plaintiffs' bar.<sup>147</sup> The union could provide a real service to employees, tying into the theme of challenging employers who try to take away employee rights using arbitration. The downside to this limitation is that it makes the benefit less attractive than one that covers a broader range of workplace disputes. Discrimination, wrongful terminations under state tort and contract law, and violations of the Family Medical Leave Act are common claims that also cry out for legal representation.

Another question is whether some judgment will be made as to the prospects for success before the union undertakes representation. Including such a requirement is essential to pre-

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145. See *Bailey v. Ameriquist Mortg. Co.*, No. Civ. 01-545(JRTFLN), 2002 WL 100391, at \*6, *rev'd*, 346 F.3d 821 (8th Cir. 2003) (noting that given the small size of each plaintiff's overtime claim, many were likely to abandon those claims without availability of a class action).

146. Recent research on a set of employment arbitrations before the American Arbitration Association demonstrated that discrimination claims were more difficult to win in employer-promulgated procedures than other cases, but led to higher damage awards in those cases won. Colvin & Pike, *supra* note 52, at 28.

147. Other Court decisions have made it easier to defeat class and collective actions also. See, e.g., *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013) (finding employer's offer of complete individual relief under Fed. R. Civ. P. 68 mooted collective action under the Fair Labor Standards Act); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (applying high standard for commonality of claims warranting class action under Fed. R. Civ. P. 23); see also Christopher McKinney, *Corporate Attorneys Planning Strategies to "Pick Off" FLSA Collective Actions*, TEX. EMP. L. BLOG (Apr. 30, 2013), <http://www.texasemploymentlawblog.com/2013/04/articles/trial-practice-litigation-issu/corporate-attorneys-planning-strategies-to-pick-off-flsa-collective-actions> (describing business strategies for defeating FLSA collective actions in light of *Genesis Healthcare* and pointing out that these cases could become so difficult that plaintiffs' lawyers will decline to accept them).

serve resources for cases in which there is a viable claim. The union must decide who will make the determination of viability and what standard will be used. Further, the standards for the determination must be clear to the members to avoid unhappiness and legal action when denials occur. Certainly the union should be able to decline representation in cases where there is no viable legal claim, and strong claims pose no real issue, but there are many arguable claims where success is uncertain. At a minimum, the decisions must involve assessment by a lawyer and include an explanation to the member of the reasons for the decision.

The more claims that are covered, the more valuable the benefit is to the employees but the more costly the benefit is to the union. Where the arbitration plan is so tilted against employees that success is unlikely, the union must decide whether to decline representation or challenge the plan in court. Such litigation will be expensive, but may offer the potential for recovery of legal fees and if successful will benefit all of the employees in the workplace. Further, as noted above, even a loss in such cases can be fuel for the fire of both membership recruitment and arbitration reform. Nevertheless, without some victories in arbitration the program is likely to be both unpopular and unsuccessful.

Another consideration is whether the union will cover all costs of representation or impose some limits either in maximum monetary terms or in terms of services covered.<sup>148</sup> For example, if the employee is responsible for part of the cost of the arbitrator it should be clear whether the union pays that, as well as other costs of litigation such as discovery. In addition, the program must be clear on whether the union provides representation for appeals of unfavorable decisions. Given the limited grounds for appeal of arbitration,<sup>149</sup> the union should certainly retain the right to decide not to fund an appeal unless prospects for success are substantial. That limitation and the reasons for it should be clear to members and used to bolster the campaign to limit or reform compulsory arbitration. Deci-

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148. Additionally, where the employer's program offers the employee funds to pay a lawyer, the program should require the employee to access those funds and pay them to the attorney, defraying part of the cost of representation. See *infra* note 158.

149. See 9 U.S.C. §§ 10, 11 (2012); *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 585–86 (2008) (finding FAA's grounds for review exclusive).<sup>150</sup> Of course, depending on the scope of the plan or pilot program, existing members may utilize the plan immediately.

sions about the scope of representation must be carefully considered, as they will impact both the costs and benefits of the plan.

### 3. Marketing and Rollout of the Plan

To some extent, the costs of the plan will depend on how and to whom it is marketed. To avoid being overwhelmed with more claims than the system can handle,<sup>150</sup> the program could initially be marketed or tested in a limited way, perhaps to employees in industries where the union already represents some employees, or to those where at least some employees have shown interest in union membership. Alternatively it could be piloted in a particular geographic area where the union has available local representatives who can handle the claims.<sup>151</sup> Limiting the geographic area facilitates compliance with bar requirements regarding unauthorized practice of law and fee sharing. Additionally, a slow roll-out will give the union the opportunity to test the program and work out any kinks before a wholesale campaign.

### 4. Union Membership Dues

Unions already have set membership dues for existing and prospective members. AFL-CIO unions have just voted to adopt new forms of representation with new dues structures and/or other financing mechanisms.<sup>152</sup> As a benefit of membership, representation could be covered by dues payments or subject to an additional charge, calculated by the union. Depending on the scope of the benefit, some dues increase or additional charge may be necessary.

Since this benefit is designed as a tool to recruit new members who are not a part of a collective bargaining unit, a union that does not currently have at-large or affiliate members will need to determine whether to charge the same dues to those members or a different amount based on the availability of benefits and the cost of representation. Even those that cur-

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150. Of course, depending on the scope of the plan or pilot program, existing members may utilize the plan immediately.

151. Recent research by Colvin & Pike demonstrated that arbitration cases in California were more likely to be successful and to achieve a higher damage award for the employee. Colvin & Pike, *supra* note 52, at 28–29. This may suggest that California is a good place to begin the program although it also indicates that Californians may not need the program as much as employees in other states.

152. Amber, *supra* note 6.

rently have such members may need to reconsider the dues structure in light of this added benefit.<sup>153</sup> Working America, the AFL-CIO's affiliate for members in units not represented for collective bargaining, is currently considering a dues structure based on services and benefits provided, which might provide an opportunity to test this idea.<sup>154</sup> A key factor in cost will be the model of representation used, and it is to that factor that the Article turns next.

#### B. PROVIDING REPRESENTATION

There are a variety of possible models for providing representation in legal disputes. Careful evaluation will be necessary to determine the best model for each union. This section is not designed to provide a comprehensive analysis of all possible issues, but to highlight some of the available models for consideration and suggest some of the benefits and concerns that might arise with each.

Unions arbitrating collective bargaining disputes use varied representation models. Some regularly use attorneys for arbitration, either in-house lawyers or attorneys from law firms, while others rarely use attorneys, preferring to utilize union representatives in arbitration cases. Cost and complexity of the case are certainly factors in making this determination. As for the legal arbitrations contemplated, depending on the scope of cases, some may require attorneys for effective representation because of the legal complexity while others might easily be arbitrated by trained union representatives. In addition, questions of unauthorized practice of law must weigh heavily in this determination.<sup>155</sup> Whatever model is chosen, it should be clear up front to the members who will represent them or, if the plan uses both attorneys and union representatives, who will decide which representatives handle which cases. The sections that follow discuss the considerations in deciding which representational model to follow.

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153. For example, the United Steelworkers currently have an associate membership, which apparently is free and designed to facilitate communication, community, and political action and organizing. See *About the Associate Members Program*, UNITED STEELWORKERS, [http://www.usw.org/join\\_us/about](http://www.usw.org/join_us/about) (last visited Apr. 4, 2014).

154. Amber, *supra* note 6.

155. See *supra* notes 130–40 and accompanying text.

## 1. Attorneys

These are legal disputes and the immediate instinct is to use lawyers to try them, regardless of forum. Lawyers are trained to handle legal disputes. Their training and experience enables them to see the nuances of cases that may be missed by lay representatives. There are clear rules that apply to all attorneys and govern their representation of clients.<sup>156</sup> The availability of malpractice insurance to guard against claims by dissatisfied clients is another benefit of using lawyers. Unions typically have attorneys on staff and frequently also use outside counsel. Either could be utilized to handle legal claims of members. Important considerations in deciding between them are cost to the union, availability of attorneys authorized to arbitrate in the relevant jurisdictions, and the application of ethical rules regarding representation and legal fees.

### a. *In House Attorneys*

Virtually every existing national union has a staff of attorneys that handles a variety of legal matters for the union. Some local unions employ staff attorneys as well. It is well-settled that the union can employ attorneys to assist members with legal claims without running afoul of state bar requirements.<sup>157</sup> The union might use its own staff attorneys or set up a separate legal plan with attorneys employed specifically to aid workers in their legal disputes with employers.

#### i. Financial Considerations

A significant benefit of using staff attorneys is cost.<sup>158</sup> Paying attorneys a salary is likely to be more cost-effective than

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156. See, e.g., MODEL RULES OF PROF'L CONDUCT (2013).

157. See, e.g., *United Mine Workers, Dist. 12 v. Ill. State Bar Assoc.*, 389 U.S. 217, 221–22 (1967); see also *NAACP v. Button*, 371 U.S. 415, 428–29 (1963) (finding constitutional right to assist members and others with litigation using NAACP staff attorneys paid by the organization).

158. Some employers provide funds to employees to assist in obtaining legal representation. See *Due Process Protocol*, *supra* note 62; see also COOPER, NOLAN, BALES, & BEFORT *supra* note 76, at 825 (quoting an employer's counsel who suggests that employers should, if necessary, pay for the employee's lawyer because it makes the process easier for both parties and provides the employee with both a realistic view of the prospects for success and advice about the fairness of any settlement). The union's program should make clear that members are expected to take advantage of any funds provided by the employer and use them to pay for representation. It is highly unlikely that such fees will cover the entire cost of representation, but they will alleviate some expense. Where such programs exist to convince employees to join the

paying outside counsel to litigate. In today's tight job market for lawyers, hiring qualified attorneys interested in workers' rights and willing to work for a union representing workers with legal claims should not be difficult. However, hiring staff does come with the added costs of the benefits the union provides and associated employment costs, such as workers' compensation and unemployment insurance. Geographic considerations may also be relevant. It may be more cost-effective to use outside counsel in locations requiring significant travel costs for union staff lawyers. Additionally, the union must consider whether the staff attorneys will be able to arbitrate in the relevant jurisdictions. Thus, the union must determine whether it is more economical to hire attorneys or contract with outside counsel, which will depend on many factors and might change over time.

Even where the union's attorney is salaried, if the legal claim results in a remedial award of attorneys' fees, those fees can be awarded at market rates so long as they go into a litigation fund and not into the union's general fund.<sup>159</sup> To avoid ethical concerns about fee splitting arrangements with nonlawyers, the fund should be controlled by attorneys and used to support only legal actions, not other union functions.<sup>160</sup>

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union for the benefit of representation, the union must be prepared to show the inadequacy of employer funds for obtaining effective representation. Additionally, using employer funds to pay union-provided attorneys raises the question of whether payment of those funds to the union or the employee would violate § 302 of the NLRA. *See* 29 U.S.C. § 186(a) (2012). Because the payment is to the employee, and not to the union directly, it would seem to implicate only § 302(3), which prohibits payment to employees to influence other employees in the exercise of their § 7 rights. *Id.* § 186(a)(3). Since that is not the purpose, § 302 should not bar the use of the fees to pay union lawyers, so long as the fees go towards legal representation, and not the general treasury. *See infra* note 159 and accompanying text.

159. *See, e.g.,* *Raney v. Fed. Bureau of Prisons*, 222 F.3d 927, 939 (Fed. Cir. 2000); *Kean v. Stone*, 966 F.2d 119, 123 (3d Cir. 1992); *Curran v. Dep't of Treasury*, 805 F.2d 1406, 1410 (9th Cir. 1986); *see also* *Blum v. Stenson*, 465 U.S. 886, 901-02 (1984) (allowing full recovery of market rate fees to nonprofit legal services organization, even though the attorney was salaried and had no billing rate). There is, however, no guarantee that an arbitrator will award fees using the same standards as a court would. And, indeed, some arbitration programs limit remedies, including fees. *See* *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 225, 230-31 (3d Cir. 1997).

160. *Raney*, 222 F.3d at 936-37; *Rodriguez v. City of New York*, 721 F. Supp. 2d 148, 155 (E.D.N.Y. 2010). While some bars have eliminated the ban on fee sharing with nonprofit organizations as have the ABA Model Rules, other states retain limitations on fee sharing with nonlawyers. For examples of rules that permit fee sharing with nonprofit organizations, *see* MODEL RULES OF PROF'L CONDUCT R. 5.4(a)(4) (2002); *see also* Va. Legal Ethics

With these limited restrictions, however, attorneys' fees awards from successful cases can assist in funding representation for other union members with legal claims.

ii. Ethical Issues Regarding Representation

The concern that animates the prohibition on fee sharing also applies in general to the employment of attorneys by the union, controlled by non-attorneys, to represent members. The fear is that the attorney will be influenced by something other than solely the needs of the client. In approving the use of union attorneys to represent members in *United Mine Workers*, the Supreme Court characterized the possibility of conflicting interests between the union and employees as "theoretically imaginable," but found it to be no justification for barring union legal assistance to members.<sup>161</sup> To insure protection of the interests of members and to avoid any issue with the bar, the program should provide for complete independence on the part of the lawyers making decisions regarding clients' cases. It should require attorney compliance with all ethical rules and in particular, dedication to the interests of the union member/client.<sup>162</sup> Ideally, designated attorneys should handle the members' cases exclusively, while others handle the union's legal business. Such separation will protect the interests of the union, the members, and the attorneys.<sup>163</sup> Using a separate le-

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Comm., Op. 1744 (2000), available at <http://www.vacle.org/opinions/1744.htm>; Am. Bar Ass'n, Ala. Formal and Informal Ethics Op. RO-95-08 (1995), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/Iris/clearinghouse/opinion2.authcheckdam.pdf>. For examples of rules prohibiting fee sharing with nonprofit organizations, see R.I. Sup. Ct. Ethics Advisory Panel, Op. 2000-05 (2000) [hereinafter R.I. Ethics Op.], available at <http://www.courts.ri.gov/AttorneyResources/ethicsadvisorypanel/Opinions/2000-5.pdf>; Mass. Bar Assoc., Ethics Op. 97-6 (1997), available at <https://www.massbar.org/publications/ethics-opinions/1990-1999/1997/opinion-no-97-6>; Tex. Ctr. for Legal Ethics, Op. 503 (1994), available at <http://www.legaethics.texas.com/Ethics-Resources/Opinions/Opinion-503.aspx>.

161. 389 U.S. at 224.

162. The union lawyer's ethical obligations are complex when representing members in the negotiated grievance and arbitration procedure. See generally Russell G. Pearce, *The Union Lawyer's Obligations to Bargaining Unit Members: A Case Study of the Interdependence of Legal Ethics and Substantive Law*, 37 S. TEX. L. REV. 1095 (1996) (discussing the complexities involved for union lawyers who represent the union as an organization and union members and potential members). Some of the challenges should be less difficult when dealing with legal claims.

163. See generally, Pearce, *supra* note 162 (discussing the complexity of a union lawyer's ethical obligations).

gal plan which employs the attorneys but is funded by the union might further emphasize the distinction.

*b. Outsourcing Representation*

An alternative method for providing the legal services to members is to outsource the representation to private attorneys. Most unions use outside counsel for some legal services and thus have relationships with private attorneys who specialize in labor and employment issues. Additionally, attorneys who specialize in representing employees may be interested in handling these cases if payment were more certain than in a contingent case involving an individual employee in arbitration.<sup>164</sup> The U.S. Supreme Court in *Brotherhood of Railroad Trainmen v. Virginia State Bar*<sup>165</sup> held that union referral of members to outside counsel for representation is permissible and protected First Amendment activity.

*i. Costs, Fees, and Ethical Limitations*

Use of outside counsel may be more expensive than hiring staff attorneys. Outside counsel are typically compensated on an hourly basis, although the union could negotiate favorable rates, particularly in today's legal market. Attorneys must make sufficient income to support their practices, which explains the general lack of interest in many of these cases. Negotiation might produce a favorable fee agreement beneficial to both the union and the attorneys, however. A creative arrangement might reduce the costs to the union to comparable to or less than the cost of in-house lawyers.

As one example, a nonprofit group representing day laborers paid an attorney a \$10,000 retainer to represent the day laborers in their workers' compensation claims.<sup>166</sup> The organization allowed the attorney to keep 10% of the recovery for each claim and to pay back the organization with the first \$10,000 collected through this process.<sup>167</sup> The remainder of the fees belonged to the attorney.<sup>168</sup> The bar approved the arrangement,

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164. See *supra* note 67 and accompanying text (noting that employees with smaller claims often have trouble finding a lawyer to take their case because the size of the potential recovery is so small).

165. 377 U.S. 1, 7-8 (1964).

166. D.C. Bar, Ethics Op. 329 (2005), available at <http://www.dcbbar.org/legal-ethics/opinions/opinion329.cfm>.

167. *Id.*

168. *Id.*



noting that because the payment to the nonprofit was not contingent on the amount of the recovery and because of the nonprofit's purpose, there was little likelihood that the nonprofit would interfere with the attorney's professional judgment.<sup>169</sup> Additionally, allowing the practice would further the purpose of making legal services more available to underserved populations.<sup>170</sup> In such an arrangement, the union can predict its costs. However, it does not then benefit from all of the fees awarded in successful cases where defendants pay fees.

Recovery of fees in excess of those paid out to the lawyer offers a way for the union to finance other litigation on behalf of employees. In the case of staff attorneys, the ability to obtain market rate fees offers that opportunity. With outside counsel, such recovery is less likely unless the union can negotiate to pay less than market rates and obtain a fee award of market rates or more.<sup>171</sup> Contentious litigation over the fee award will raise the costs of the case. And fee awards shared with the union by outside counsel may raise more questions with the bar than those by in-house attorneys.

The concern of the bar that differentiates outside counsel referrals from in-house attorney cases is that cases might be referred to counsel who promise the greatest "referral fee" to the referring organization.<sup>172</sup> Many bars have recognized that these concerns are not present when the referring organization is a nonprofit with a goal of increasing access to legal representa-

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169. *Id.*

170. *Id.*

171. The arbitrator would have to be convinced that the market rate exceeded the rate the attorney charged. *See* *Blum v. Stenson*, 465 U.S. 886, 895 (1984) ("[courts] must avoid . . . decreasing reasonable fees because the attorneys conducted the litigation more as an act of pro bono publico than as an effort at securing a large monetary return." (quoting *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 681 (N.D. Cal., 1974)); *Reiter v. MTA N.Y.C. Transit Auth.* 457 F.3d 224, 232–33 (2d Cir. 2006) (finding that the magistrate judge had erred in granting fees at negotiated discount rate instead of market rate); *St. Louis Fire Fighters Ass'n v. City of St. Louis*, 96 F.3d 323, 332 n.9 (8th Cir. 1996) (stating that the fee agreed to may indicate what is reasonable and should be considered, but it is not dispositive for determining fee award). In some cases attorneys' fees may include an adjustment either up or down based on factors such as success in the case or, in rare cases, quality of representation. *See* 2 EMPLOYMENT DISCRIMINATION LAW 42-70 to 42-79 (Barbara T. Lindemann et al. eds., 2012).

172. *See* R.I. Ethics Op., *supra* note 160 (noting that fee-splitting could cause a lay-person to hire the lawyer who offers the best referral fee, rather than the most competent lawyer).

tion.<sup>173</sup> Others, however, have applied the prohibition on fee sharing even to nonprofits,<sup>174</sup> some recognizing the inapplicability of the concern but feeling bound by the language of the rule.<sup>175</sup> The concern seems even less relevant if the union is only receiving compensation for fees paid to the lawyer. Further, building on *United Mine Workers* and *Brotherhood of Railroad Trainmen*, the union may have a First Amendment argument to challenge the bar requirements.<sup>176</sup> Nevertheless, in creating such a program unions must be aware that in some states recovery of legal fees may be impossible, at least without litigation.

To maximize the chances of fee recovery and to minimize any ethical concerns, the union's agreements with outside counsel should ensure the independence of the lawyers in representing the employees. Additionally, any fees recovered by the union should be segregated in a legal expense fund separate from the general treasury. Fee arrangements could be tailored to the requirements of the bar in the particular state. Attorneys may be reluctant to risk bar sanctions even if there are constitutional or other arguments available to challenge the bar. Alternatively, the union could seek a legal ethics opinion from the bar specific to the circumstances of the program.

*c. Legal Services Plan*

An alternative that may alleviate some bar concerns is to set up a legal services plan as a separate organization that employs or retains counsel. If the organization is operated by an attorney or attorneys who control the decisions, concerns about fee sharing or unauthorized practice of law will be minimized.<sup>177</sup> For a union with an existing legal services plan, inclu-

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173. See, e.g., *supra* note 160 and accompanying text.

174. See *id.*

175. See R.I. Ethics Op., *supra* note 160, at 2–3.

176. See N.Y. State Bar Ass'n, Ethics Op. 906 (2012), available at <http://www.nysba.org/CustomTemplates/Content.aspx?id=4222> (citing Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L.J. 1069, 1126–32 (1989)).

177. See *id.* (indicating that decisions banning fee sharing do not address the situation where the nonprofit is itself a law firm). As for unauthorized practice of law, although some bars have raised concerns about attorneys working for nonprofits run by non-lawyers, see Wayne Moore, *Are Organizations That Provide Free Legal Services Engaged in the Unauthorized Practice of Law?*, 67 FORDHAM L. REV. 2397, 2400 (1999). *United Mine Workers* seems to have put those concerns at rest for unions. *United Mine Workers, Dist. 12 v. Ill. State Bar Assoc.*, 389 U.S. 217 (1967).

sion of the arbitration services in the plan will entail minimal administrative cost. Setting up such a plan, however, will involve administrative costs which must be taken into account in determining the best structure.

The union could create a legal services plan in partnership with other organizations such as worker centers or existing legal aid programs in the area.<sup>178</sup> One advantage of creating a separate organization is that, consistent with existing legal requirements, it might be established as an organization that would entitle attorneys working for the organization to loan forgiveness after ten years of employment in qualifying organizations.<sup>179</sup> Unions do not qualify, but a separate organization funded in part by the union and created in partnership with existing service providers to low income populations, if carefully structured, could meet the requirements.<sup>180</sup> If so, the organization could attract young lawyers who would be willing to work for lower pay because of the loan forgiveness attached to employment. A cheaper alternative to using lawyers, however, would be to employ union representatives in arbitration.

## 2. Using Union Representatives

The use of union representatives in place of attorneys could reduce the arbitration costs to the union even further. In many unions, union representatives are trained to arbitrate cases and regularly do so.<sup>181</sup> In most cases, however, the claims are contractual rather than legal,<sup>182</sup> although there is occasional overlap. Accordingly, additional training may be necessary to enable union representatives without legal backgrounds to

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178. Unions are already partnering with worker centers on various initiatives, and the AFL-CIO recently adopted a resolution, backed by organizational resources, to increase partnerships with community organizations dedicated to social and economic justice, including worker centers. *Resolution 16: Building Enduring Labor-Community Partnerships*, AFL-CIO 2013 CONVENTION, <http://www.aflcio.org/About/Exec-Council/Conventions/2013/Resolutions-and-Amendments/Resolution-16-Building-Enduring-Labor-Community-Partnerships> (last visited Apr. 4, 2014).

179. See *Public Service Loan Forgiveness Program*, U.S. DEP'T EDUC., FED. STUDENT AID, <http://studentaid.ed.gov/repay-loans/forgiveness-cancellation/charts/public-service#what-kinds-of-employment> (last visited Apr. 4, 2014).

180. See *id.* (noting that employment with a public organization that provides public interest legal services may qualify for the loan forgiveness program).

181. See *In re Town of Little Compton*, 37 A.3d 85, 90–91 (R.I. 2012) (discussing the use of union representatives in arbitration cases).

182. See *id.* at 93 (noting that the labor disputes often involve “the law of the shop” (internal quotation marks omitted)).

handle these claims. And some cases may be too legally complex to be handled by a union representative. As noted above, however, in some instances, once a few cases have been arbitrated, similar cases could easily be tried following the pattern.<sup>183</sup> For example, if many employees have been required to work off the clock under similar circumstances, it would be relatively easy for a union representative to try such cases based on a litigation pattern. The legal questions as to whether payment is due are relatively straightforward, and the cases will turn mostly on the facts.<sup>184</sup>

The most significant question about using union representatives is whether they would be engaged in the unauthorized practice of law.<sup>185</sup> There appears to be a significant risk in many states that arbitrating legal claims might be deemed the unauthorized practice of law, even if the employer's arbitral system contemplates nonlegal representation.<sup>186</sup> The union must consider the risk of legal liability should it undertake such a model. While the union might be able to insure against duty of fair representation claims and perhaps other legal claims of negligent representation if such representation is in compliance with law, unauthorized law practice would most likely negate any insurance.

A less risky model would use union representatives like paralegals, engaging them in investigation and case preparation under the supervision of lawyers, in addition to involving them in earlier steps in the ADR process. Their substantial experience in arbitration would fit them well for such tasks and reduce the attorney time invested. If the union representatives acted as paralegals, recovery of fees for their time might be available if fees are awarded as a remedy.<sup>187</sup> Because most em-

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183. See *supra* Part II.A.3 (identifying the susceptibility of certain wage and hour disputes to this kind of system).

184. The employee would need to prove that she worked overtime without pay and show the amount of time worked, in addition to showing that the employer had actual or constructive knowledge that the employee was working overtime. *E.g.*, *Davis v. Food Lion*, 792 F.2d 1274, 1276 (4th Cir. 1986). Even where there is some complex aspect to the litigation, such as the use of an expert in the *Food Lion* case to show that Food Lion's system effectively required off the clock work, *id.* at 1277, a lawyer could try the first individual case but all subsequent cases should be able to be systematized.

185. See *supra* Part II.B.4.

186. See *supra* notes 130-40 and accompanying text.

187. Recovery for paralegal time is permissible if documentation is available to support the time expended and the tasks are appropriate for a paralegal and not tasks that could be completed by a staff member without such qualifi-

ployment statutes refer explicitly to remedial awards of attorneys' fees, it is unclear whether recovery of fees for a nonlegal representative acting in place of a lawyer would be available, however.<sup>188</sup>

### 3. Employee Self-Representation

Another alternative would be to train employees for self-representation. This model could be used in cases with a multitude of similar claims that would otherwise be litigated as a class.<sup>189</sup> It would work most effectively in cases with relatively simple legal issues. Self-representation avoids the problem of unauthorized practice of law.<sup>190</sup> It also empowers employees and involves them directly in their own cases, which may decrease the chance that they see the union only as a service provider and increase the chance that they stay involved with the union after the conclusion of the case.<sup>191</sup> The cost to the union should be lower, although it is possible that an attorney might litigate simple cases in less time than it takes to train members

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cations, for example, clerical work. *See, e.g.*, *Spagon v. Catholic Bishop of Chicago*, 175 F.3d 544, 553 (7th Cir. 1999) (noting that the relevant inquiry for determining hours worked by paralegals is "whether the work was sufficiently complex to justify the efforts of a paralegal, as opposed to an employee at the next rung lower on the pay-scale ladder" (internal quotation marks omitted)); *Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1249 (10th Cir. 1998) (stating that fees for paralegal services are recoverable and should be determined in the same manner as those for lawyers).

188. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 216(b) (2012) ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."); Family Medical Leave Act, 29 U.S.C. § 2617(a)(3) (2012) ("The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant."); Title VII, 42 U.S.C. § 2000e-5(k) (2006) ("In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fee) as part of the costs . . ."); Americans with Disabilities Act, 42 U.S.C. § 12205 (2006) ("In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs . . .").

189. This model may be especially useful given the limits imposed by the Supreme Court on the use of class action litigation. *See supra* Part I.B.

190. *See Unauthorized Practice of Law*, S.C. BAR, <http://www.sbar.org/PublicServices/UnauthorizedPracticeofLaw.aspx> (last visited Apr. 4, 2014) (excepting self-representation from the general definition of unauthorized practice of law).

191. *See supra* Part II.B.I.

to be self-advocates, particularly if there are a small number of members involved.

One risk is that employees will see this as an abandonment of the promise of representation, resulting in dissatisfaction and perhaps even litigation. Thus it should be done only with clear notice to members that this is possible in some cases or with the agreement of the member(s) that it is an effective approach in the particular case.

#### 4. Hybrid Model

Given all of the considerations outlined above, the best model for representation is one that is flexible. A flexible model enables the union to respond to the specific needs in the particular case by considering the members involved, the particular jurisdiction's limits on representation, the availability of representatives that meet the necessary criteria, and the costs and potential fee recoveries. A hybrid entails administrative costs, since a determination must be made as to what resources to allocate to each case. It necessitates standards for the determination that are clear to both the administrators and the members who are entitled to representation. Clear standards minimize the likelihood of member disappointment, which could undermine the value of the system, and also of legal liability for failure to represent or effectively represent as promised. Involvement of representative members in creating and administering such standards would be ideal, although might be difficult in larger organizations. Such a system would enable the most effective deployment of union resources and, one hopes, lead to the best chances of success on the claims and incorporation of members in an advocacy campaign to enhance workplace justice.

### CONCLUSION

Erosion of worker's rights is proceeding at an accelerating pace. Unions, while declining in strength and influence, remain the most powerful workers' rights organizations in the United States. Unions have an opportunity to both build their membership and advocate for greater protection for the legal rights of workers by creating an arbitration advocacy program. While elimination of unilaterally-imposed employer arbitration would be ideal, it seems unlikely in the current climate. Given that, union advocacy can challenge employer-created arbitration programs by providing employee representation to balance em-

ployer power and by mobilizing workers to combat such programs through public protest and legislative advocacy. While there are challenges in establishing a cost-effective program, creative union efforts can meet them, turning an employer tactic used to reduce enforcement of the law to their advantage. Unions must seize every possible opportunity to improve the lives of workers and rebuild a powerful and successful movement to balance corporate power.