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THANKS, OBAMA! “FAIR PAY AND SAFE WORKPLACES” COME AT THE COST OF
MANDATORY PRE-DISPUTE EMPLOYMENT ARBITRATION

By
Andrew C. Fillmore*

I. INTRODUCTION

On July 31, 2014, President Barack Obama signed into law Executive Order 13673, titled “Fair Pay and Safe Workplaces,” which imposed changes to labor laws in the United States.¹ In an attempt to “increase efficiency and cost savings” in the work performed by government contractors, the President transformed the way these federal contractors are regulated.² Specifically, the Executive Order prohibits companies with federal contracts greater than \$1 million from including mandatory pre-dispute arbitration agreements in employee contracts for claims arising under Title VII of the Civil Rights Act of 1964³ (“Title VII”) or any tort related to sexual assault or harassment.⁴ With few exceptions to the requirement, the President believes this will help improve contractors’ compliance with labor laws.⁵

The Executive Order expands a similar policy enacted by Congress in 2009, commonly known as the Franken Amendment, which restricts arbitration in certain circumstances for Department of Defense contractors.⁶ Excluding the Franken Amendment, Congress has been consistently unwilling to pass legislation that would further limit mandatory arbitration for all general consumers and employees.⁷

The issuance of the Executive Order is controversial for numerous reasons. First, although the President maintains authority to issue executive orders governing the

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¹ Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014) [hereinafter *Executive Order*].

² *Id.*

³ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-66 (1964) (“Equal Employment Opportunity”).

⁴ See Office of the Press Secretary, *FACT SHEET: Fair Pay and Safe Workplaces Executive Order*, WHITEHOUSE.GOV (July 31, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order> [hereinafter *Fact Sheet*].

⁵ See *id.*

⁶ Department of Defense Appropriations Act 2010, Pub. L. No. 111-118, § 8116, 123 Stat. 3409, 3454 (2009).

⁷ See Arbitration Fairness Act of 2002, S. 3026, 107th Cong. (2002); Arbitration Fairness Act of 2007, H.R. 310, 110th Cong. (2007); Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011).

Executive Branch,⁸ executive orders may be subject to judicial review or overriding legislative action.⁹ Second, the Executive Order appears to be the President's way of circumventing a gridlocked Congress to create new law.¹⁰ Additionally, the restriction on arbitration contradicts years of established Supreme Court precedent and several well-respected interpretations of the Federal Arbitration Act¹¹ ("FAA").¹² This Executive Order also presents the issue of permanence; a new presidential administration can easily repeal President Obama's limits on arbitration.¹³ Ultimately, the Executive Order will likely result in an increase in the financial costs of contracting with the federal government, a cost that will eventually be passed through to the U.S. taxpayers.¹⁴ Although not readily apparent, the issuance of this Executive Order creates the potential for great costs and balance of powers complications in the near future.

This article will discuss the significance of the Fair Pay and Safe Workplaces Executive Order and its impact on arbitration in the United States. Part II will examine the details and language of the Executive Order, in its entirety. Part III will investigate the historical basis of the arbitral language of the Executive Order and compare how the language has evolved. Part IV will consider the conflicts of arbitrability that arise among the Executive Order and several U.S. Supreme Court opinions. Finally, Part V concludes with an analysis of the consequences impacting multiple branches of the Government, federal contractors, and employees as a result of the Executive Order.

⁸ Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014) ("By the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 121, and in order to promote economy and efficiency in procurement by contracting with responsible sources who comply with labor laws, it is hereby ordered . . .").

⁹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see also John C. Duncan Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 362, 369-70 (2010).

¹⁰ See Philip Bump, *The 113th Congress is Historically Good at Not Passing Bills*, WASHINGTON POST (July 9, 2014), available at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/09/the-113th-congress-is-historically-good-at-not-passing-bills/>.

¹¹ The United States Arbitration Act, 43 Stat. 883, codified at 9 U.S.C. §§ 1-16 (2013).

¹² See generally *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001); *Alexander v. Gardner - Denver Co.*, 415 U.S. 36 (1974).

¹³ See generally Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 305 (2001).

¹⁴ See Geoff Burr, *Nothing's Fair About Obama's Fair Pay Order*, GOVEXEC.COM (Sept. 12, 2014), available at <http://www.govexec.com/contracting/2014/09/nothings-fair-about-obamas-fair-pay-order/93866/>.

II. DETAILS OF THE EXECUTIVE ORDER

The goal of the Executive Order is to “increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by ensuring that they understand and comply with labor laws.”¹⁵ The Administration provides support for the Executive Order’s change to labor law compliance by referencing a 2010 report issued by the Government Accountability Office, which found that many companies cited for labor law violations received government contracts.¹⁶ The Executive Order was designed to help ensure that “all hardworking Americans get the fair pay and safe workplaces they deserve.”¹⁷

In addition to the impact on arbitration, the Executive Order includes two major provisions for government contractors: (1) mandatory disclosure of prior labor law violations,¹⁸ and (2) greater paycheck transparency for employers.¹⁹

A. Disclosures of Labor Law Violations

The Executive Order provides that all companies seeking to bid on government contracts for goods and services in excess of \$500,000 must represent any administrative merits determination, arbitral award or decision, or civil judgment rendered against the bidder within the preceding three-year period for any violation of labor laws.²⁰ Additionally, the Executive Order requires the newly created “Labor Compliance Advisors” to review these disclosures and determine whether an offeror is a responsible source that has a “satisfactory record of integrity and business ethics.”²¹ The Labor Compliance Advisors will consult with the Department of Labor in establishing the appropriate standards.²² Additionally, these disclosure requirements cover any subcontractors that the potential contractor would utilize for the fulfillment of the

¹⁵ Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

¹⁶ See Office of the Press Secretary, *FACT SHEET: Fair Pay and Safe Workplaces Executive Order*, WHITEHOUSE.GOV (July 31, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order> (reporting that almost two-thirds of the fifty largest wage and hour violations and nearly forty percent of the fifty largest workplace health and safety penalties from FY2005 to FY 2009 were at companies that went on to receive new government contracts).

¹⁷ See *Fact Sheet*, *supra* note 4.

¹⁸ See Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.*

²² See *id.*

contract.²³ After the contract has been awarded, the Executive Order requires that each federal contractor and subcontractor, subject to the pre-award notifications, provide updates on any labor law violations every six months for the duration of the contract.²⁴

B. Paycheck Transparency

The Executive Order creates an additional requirement for federal contractors with contracts in excess of \$500,000 to be more transparent with an employee's paycheck.²⁵ Each pay period, contractors must provide all individuals performing work under the contract with a document that clearly details that individual's hours worked, overtime hours, pay, and any additions or deductions made to the individual's pay.²⁶ This requirement is also incorporated for any subcontractors working on the project.²⁷ Additionally, if the contractor is treating an individual performing work under a contract or subcontract as an independent contractor, and not as an employee, the contractor must provide a document clearly informing the individual of this status.²⁸

C. Complaint and Dispute Transparency

The Executive Order limits mandatory pre-dispute arbitration by stating:

(a) Agencies shall ensure that for all contracts where the estimated value of the supplies acquired and services required exceeds \$1 million, provisions in solicitations and clauses in contracts shall provide that contractors agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise. Agencies shall also require that contractors incorporate this same requirement into subcontracts where the estimated value of the supplies acquired and services required exceeds \$1 million.

(b) Subsection (a) of this section shall not apply to contracts or

²³ See Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

²⁴ See *id.*

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.*

²⁸ See Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

subcontracts for the acquisition of commercial items or commercially available off-the-shelf items.

(c) A contractor's or subcontractor's agreement under subsection (a) of this section to arbitrate certain claims only with the voluntary post-dispute consent of employees or independent contractors shall not apply with respect to:

(i) employees who are covered by any type of collective bargaining agreement negotiated between the contractor and a labor organization representing them; or

(ii) employees or independent contractors who entered into a valid contract to arbitrate prior to the contractor or subcontractor bidding on a contract covered by this order, except that a contractor's or subcontractor's agreement under subsection (a) of this section to arbitrate certain claims only with the voluntary post-dispute consent of employees or independent contractors shall apply if the contractor or subcontractor is permitted to change the terms of the contract with the employee or independent contractor, or when the contract is renegotiated or replaced.²⁹

As a result of the Executive Order, with the exception of limited situations,³⁰ all federal contractors with a contract dated after July 31, 2014, in excess of \$1 million, will need to carefully modify their employment contracts to provide for exceptions to arbitrability to provide employees their day in court and avoid violation.³¹

III. THE FRANKEN AMENDMENT – THE BASIS FOR THE EXECUTIVE ORDER

The arbitration provision in the Executive Order is an expansion of an amendment to the 2010 Department of Defense Appropriations Bill,³² which was enacted by Congress in 2009 and applicable only to Department of Defense contractors.³³ The

²⁹ See Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

³⁰ See *id.* (finding certain exceptions are made for commercial items or commercially available off-the-shelf items, employees covered by a collective bargaining agreement, or employees or independent contractors who entered into a valid contract to arbitrate prior to bidding on a federal contract).

³¹ See *Fact Sheet*, *supra* note 4.

³² H.R. 3326, 111th Cong. § 8116 (2009).

³³ See Office of the Press Secretary, *FACT SHEET: Fair Pay and Safe Workplaces Executive Order*, WHITEHOUSE.GOV (July 31, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order> (noting that the Department of Defense is the largest federal contracting agency).

legislation was introduced by Minnesota Senator, Al Franken, and subsequently became known as the Franken Amendment.³⁴ The Franken Amendment was prompted by *Jones v. Halliburton Co.*³⁵ (“*Jones*”), a case involving the rape of Jamie Leigh Jones, a female government contractor, by her co-workers.³⁶ Jones brought an action against her former employer, Kellogg Brown & Root (KBR), for tort claims based on her alleged sexual assault.³⁷ KBR responded with an attempt to compel arbitration per the terms of the employment contract.³⁸ The Fifth Circuit concluded that a valid agreement to arbitrate existed, but ultimately determined that four of Jones’ claims should not be submitted to arbitration, because these claims were not related to the employment contract.³⁹

Compelled by *Jones*, Congress sought to introduce legislation that would prevent similar situations from occurring in the future.⁴⁰ Senator Franken explained his belief that arbitration was an efficient forum for commercial disputes, however, unfit for “claims of sexual assault and egregious violations of civil rights.”⁴¹ Senator Franken authored an amendment which prohibited Department of Defense contractors with contracts in excess of \$1 million from requiring employees to arbitrate claims arising under Title VII of the Civil Rights Act of 1964 or tort claims related to or arising out of sexual assault or harassment.⁴² In order for the amendment to garner enough support to pass, members of the House and Senate required certain modifications to narrow the application of the amendment.⁴³ One modification included the addition of a waiver clause, which granted the Secretary of Defense the authority to bypass the arbitration requirements where “necessary to avoid harm to the national security interests of the United States.”⁴⁴ The

³⁴ Jeffrey Adams, *The Assault of Jamie Leigh Jones: How One Woman’s Horror Story Is Changing Arbitration in America*, 11 PEPP. DISP. RESOL. L.J. 253, 258-61 (2011) (discussing the legislative introduction of the Franken Amendment).

³⁵ *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009).

³⁶ *See generally* *Jones*, 583 F.3d at 228.

³⁷ *See id.*

³⁸ *See id.*

³⁹ *See generally* *Jones*, 583 F.3d at 242 (affirming the district court that the plaintiff’s claims for (1) assault and battery; (2) intentional infliction of emotional distress arising out of the alleged assault; (3) negligent hiring, retention, and supervision of employees involved in the alleged assault; and (4) false imprisonment, do not touch matters related to employment required to go to arbitration).

⁴⁰ 155 Cong. Rec. S10028 (Oct. 1, 2009).

⁴¹ 155 Cong. Rec. S10028 (Oct. 1, 2009) (explaining that due to the privacy of arbitration, serious violations are hidden from the public and also fails to establish precedent for future cases).

⁴² *See* Adams, *supra* note 34.

⁴³ *See* Adams, *supra* note 34.

second modification required was to limit the amendment to apply only to federal contracts with a value greater than \$1 million.⁴⁵

Following the passage of the Franken Amendment, Senator Franken sponsored the Arbitration Fairness Act of 2011.⁴⁶ This legislation stated that no pre-dispute arbitration agreement would be valid or enforceable if it requires arbitration of an employment, consumer, or civil rights dispute.⁴⁷ This proposed expansion on the limits to arbitration was referred to a congressional committee, but eventually failed.⁴⁸ Periodically since 2002, similar legislation has been introduced in Congress, but has consistently failed to gather the requisite support to become binding law.⁴⁹

IV. THE EXECUTIVE ORDER CONTRADICTS THE FEDERAL POLICY FAVORING ARBITRATION

In 1925, Congress enacted the Federal Arbitration Act⁵⁰ (“FAA”) which legitimizes arbitration agreements and establishes a presumption in favor of their enforceability.⁵¹ Included in §1 of the FAA was an employment contract exclusion.⁵² Under this exclusion, the FAA would not apply to the resolution of disputes that arise

⁴⁴ See Jeffrey Adams, *The Assault of Jamie Leigh Jones: How One Woman’s Horror Story Is Changing Arbitration in America*, 11 PEPP. DISP. RESOL. L.J. 253, 258-61 (2011) (“(a) The Secretary of Defense may waive, in accordance with paragraphs (b) through (d) of this section, the applicability of paragraphs (a) or (b) of 222.7402, to a particular contract or subcontract, if the Secretary or the Deputy Secretary personally determines that the waiver is necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm.”).

⁴⁵ See generally Adams, *supra* note 34; see also H.R. 3326, 111th Cong. § 8116 (2009).

⁴⁶ H.R. 1873, 112th Cong. (1st Sess. 2011).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See, e.g., Arbitration Fairness Act of 2002, S. 3026, 107th Cong. (2nd Sess. 2002); see also, Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (1st Sess. 2007); see also, Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (1st Sess. 2009); see also, Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (1st Sess. 2011); see also, Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (1st Sess. 2013).

⁵⁰ 9 U.S.C. §§ 1-16 (2013).

⁵¹ See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983) (concluding that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”).

⁵² The United States Arbitration Act, 43 Stat. 883, codified at 9 U.S.C. § 1 (2013) (“... but nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”).

from employment contracts of workers engaged in interstate commerce.⁵³ Over the years, the U.S. Supreme Court has gradually interpreted the meaning of the text and explained that there should be a narrow reading of the FAA's employment contract exclusion.⁵⁴

The abovementioned narrowing of the FAA's employment contract exclusion is one example of how the U.S. Supreme Court has generally expanded the scope of arbitrability. The following five U.S. Supreme Court cases illustrate how the Court has created general federal policy favoring arbitration.⁵⁵

Initially, in *Alexander v. Gardner-Denver Co.*,⁵⁶ the Court examined under which circumstances, if any, an employee's statutory right to trial under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a CBA.⁵⁷ The Court held that an employee's statutory right to judicial *de novo* review under Title VII was not foreclosed by prior submission of the claim to arbitration under the nondiscrimination clause of a CBA.⁵⁸ This early employment arbitration decision resurrected the old judicial mistrust of arbitrators to oversee important claims, such as Title VII.⁵⁹

In an attempt to resolve a circuit split, in *Circuit City Stores, Inc. v. Adams*,⁶⁰ the Court reviewed the application of the employment exemption in the FAA for employment contracts.⁶¹ In a 5-4 decision, the Court held that the employment contract exemption shall be interpreted to apply only to the employment contracts of workers directly involved in the interstate transport of goods and services.⁶² As a result, employers are permitted to include arbitration requirements within the employment contracts of all other employees.⁶³

⁵³ The United States Arbitration Act, 43 Stat. 883, codified at 9 U.S.C. § 1 (2013)

⁵⁴ See *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 118 (2001) (expanding on the scope of interstate commerce).

⁵⁵ See *Moses H. Cone Mem'l Hosp.*, 460 at 24.

⁵⁶ See *Alexander v. Gardner - Denver Co.*, 415 U.S. 36 (1974).

⁵⁷ See *id.*

⁵⁸ See *id.* at 59-60.

⁵⁹ See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 267 (2009) (referring to the decision in *Gardner - Denver* as "pervaded by . . . 'the old judicial hostility to arbitration.'" as cited in *Rodriguez de Oujias v. Shearson/American Express, Inc.* 490 U.S. 477, 480 (1989)).

⁶⁰ See *Circuit City Stores Inc.*, 532 U.S. at 105.

⁶¹ See *id.* at 109.

⁶² See *Circuit City Stores Inc.*, 532 U.S. at 105.

⁶³ See *id.*

In *14 Penn Plaza LLC v. Pyett*,⁶⁴ the U.S. Supreme Court was faced with answering the question of whether a provision in a collective bargaining agreement that required union members to arbitrate claims arising under the Age Discrimination in Employment Act of 1967 (“ADEA”)⁶⁵ was enforceable.⁶⁶ In another 5-4 decision, the Court held that in a CBA which “clearly and unmistakably”⁶⁷ waived an individuals rights to court and required the arbitration of ADEA claims was enforceable.⁶⁸ Although not clearly stated, this decision repudiated the precedence of *Gardner-Denver* and found the recourse to arbitration of Civil Rights claims to be acceptable and enforceable.⁶⁹

Finally, in 2011, the Court released a monumental opinion with *AT&T Mobility, LLC v. Concepcion*.⁷⁰ The case involved the controversial issue of class action waivers in consumer arbitration contracts.⁷¹ In *Concepcion*, the Court examined whether the savings clause⁷² in § 2 of the FAA preempted state law with regard to class action waivers.⁷³ The Court broadly held that the main goal of the FAA was to ensure the enforcement of private arbitration agreements according to their terms; therefore, conflicting state law was preempted.⁷⁴ Furthermore, the Court also acknowledged the issue of adhesive arbitration agreements and found the agreements to be presumptively valid, regardless of the appearance of a disproportionate bargaining power between the contracting parties.⁷⁵

⁶⁴ See *14 Penn Plaza LLC*, 556 U.S. at 247.

⁶⁵ Age Discrimination in Employment Act of 1967, 81 Stat. 602, codified at 42 U.S.C. §§6101-07 (2014).

⁶⁶ See generally *14 Penn Plaza LLC*, 556 U.S. at 247.

⁶⁷ See *id.* at 274.

⁶⁸ See generally *14 Penn Plaza LLC*, 556 U.S. at 247.

⁶⁹ See *14 Penn Plaza LLC*, 556 U.S. at 249 (“That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned” in reference to *Gardner-Denver*).

⁷⁰ See *Concepcion*, 131 S. Ct. at 1740.

⁷¹ See *id.* at 1744.

⁷² See 9 U.S.C. § 2 (providing that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

⁷³ See *Concepcion*, 131 S. Ct. at 1745 (finding the Discover Bank rule, which disfavors class waivers in consumer contracts, conflicts with the provisions of FAA §2 intended to place arbitration agreements “on equal footing with other contracts.”).

⁷⁴ See generally *Concepcion*, 131 S. Ct. at 1740.

⁷⁵ See *Concepcion*, 131 S. Ct. at 1740; see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (“Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”).

You really should summarize here about the policy or note the evolution towards favoring arbitration. Then add in specifically how the EO impacts this. Otherwise this section seems kind of out of place and unnecessary. Just tie it in to what your point is with the dichotomy between Supreme Court jurisprudence and the EO. It can just be a paragraph.

V. CONSEQUENCES OF THE EXECUTIVE ORDER FOR ALL PARTIES IMPACTED

Although the Executive Order only contains brief language on arbitration, the consequences of this Order are wide-spread for the many parties involved.

A. Federal Government

The Fair Play and Safe Workplaces Executive Order demonstrates the conflicting views on the role of arbitration among the separate branches of government. The President, exercising his executive power, issued the Executive Order prohibiting mandatory pre-dispute arbitration for federal contracts.⁷⁶ The President justifies these actions by claiming that the exclusion will “help improve contractors’ compliance with labor laws.”⁷⁷ Unlike the congressionally approved Franken Amendment, here, the President has unilaterally enacted law to impose a push for greater oversight of labor practices throughout the Federal Government.⁷⁸ The President’s orders will be considered valid only when the issue stems from a statutory delegation or from the U.S. Constitution.⁷⁹ Here, the President anchors his executive authority to issue his Executive Order in not only the U.S. Constitution, but also 40 U.S.C. 121, related to his managerial functions over federal property and administrative services.⁸⁰ As noted by the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*,⁸¹ however, when acting without congressional reinforcement, the President is acting with a lesser variety of power.⁸²

⁷⁶ See generally Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

⁷⁷ See *Fact Sheet*, *supra* note 4.

⁷⁸ See *Fact Sheet*, *supra* note 4.

⁷⁹ Tara L. Branum, *President Or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 63-64 (2002) (citing to *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) quoting *Youngstown*).

⁸⁰ Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

⁸¹ See *Youngstown*, 343 U.S. at 579.

⁸² John C. Duncan Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 385 (2010) (citing to Justice Jackson’s concurring opinion in *Youngstown* where the President can act with congress, when congress is silent, or contrary to congress).

While Congress has failed to pass legislation prohibiting arbitration in similar situations,⁸³ it has remained silent on the issue underlying the Executive Order. Congress has the authority to endorse or revoke all or part of an order, either by directly repealing the order or by removing the underlying authority on which the order is predicated.⁸⁴ A 1999 Cato Institute study examining the congressional review of executive orders found that Congress had modified or revoked 239 executive orders.⁸⁵ Due to the extensive process involved and the current congressional stalemate, Congress is likely to remain silent on the issue of whether the President is overstepping his authority with the Executive Order.⁸⁶ This silent congressional inaction may be mistakenly seen by the U.S. Supreme Court as congressional affirmation.⁸⁷

The U.S. Supreme Court holds an opposing view from the President's Executive Order and appears content on expanding the "federal policy favoring arbitration."⁸⁸ Over the years, the Supreme Court has allowed a majority of issues to proceed to arbitration, including mandatory pre-dispute arbitration agreements in employment contracts and Title VII claims.⁸⁹ Much like the President's Executive Order, the progressive interpretation of the FAA by the Supreme Court has been performed and unchallenged in light of the congressional silence. Although there is judicial deference, the Supreme Court also has the authority to review and overturn the President's Executive Order by declaring the order to be unconstitutional.⁹⁰

⁸³ See generally Arbitration Fairness Act of 2002, S. 3026, 107th Cong. (2nd Sess. 2002); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (1st Sess. 2007); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (1st Sess. 2009); Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (1st Sess. 2011); Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (1st Sess. 2013).

⁸⁴ See Duncan Jr., *supra* note 82.

⁸⁵ See generally Branum, *supra* note 79; see also John Woolley & Gerhard Peters, Executive Orders: Washington – Obama, The American Presidency Project, available at <http://www.presidency.ucsb.edu/data/orders.php> (last modified Oct. 20, 2014) (finding there have been 15,245 Executive Orders issued between 1798 and October, 20, 2014); see also Vivian S. Chu & Todd Garvey, Executive Orders: Issuance, Modification, and Revocation, (April 16, 2014), <http://fas.org/sfp/crs/misc/RS20846.pdf> ("One study has suggested that less than 4% of executive orders have been modified by Congress."); see also Duncan Jr., *supra* note 82.

⁸⁶ Bump, *supra* note 10.

⁸⁷ See Duncan Jr., *supra* note 82.

⁸⁸ *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24 ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.").

⁸⁹ See generally *Circuit City Stores Inc.*, 532 U.S. at 105; *14 Penn Plaza LLC*, 556 U.S. at 249.

⁹⁰ See John C. Duncan Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 376, 392 (2010) (citing Youngstown).

This was the situation in *Chamber of Commerce v. Reich*⁹¹ which related to a challenge on President Clinton's Executive Order 12,954 preventing federal contractors from hiring permanent replacements for striking workers.⁹² The President used his authority⁹³ to create an order designed "to ensure economical and efficient administration and completion of Federal Government contracts."⁹⁴ Similar to the current Executive Order, *Reich* raised the larger issue of whether a president may regulate private employment conduct without intruding on the lawmaking powers of Congress.⁹⁵ Upon judicial review, President Clinton attempted to justify his actions under the Federal Property and Administrative Services Act⁹⁶ ("Procurement Act").⁹⁷ The Court noted, however, that the Procurement Act does not provide the President with unlimited authority to make decisions he believes will likely result in savings to the government.⁹⁸ The Supreme Court ultimately revoked the executive order, finding that the President's actions explicitly violated the National Labor Relations Act ("NLRA")⁹⁹ and hence the will of Congress.¹⁰⁰

After review of *Reich*, it appears possible that an employer organization representing federal contractors could raise a judicial challenge to President Obama's

⁹¹ *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

⁹² See Duncan Jr., *supra* note 82.

⁹³ Exec. Order No. 12954, 60 Fed. Reg. 13023 (Mar. 8, 1995) ("[B]y the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 486(a) and 3 U.S.C. 301 . . .").

⁹⁴ See John C. Duncan Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 389 n.440 (2010) (quoting Exec. Order No. 12954, 60 Fed. Reg. 13023 (Mar. 8, 1995)).

⁹⁵ See Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 231 (1996) ("By effectively implementing the terms of this bill, Executive Order 12,954 appears to be an end-run around Congress."); see also John C. Duncan Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 392 (2010) ("The President's executive order appeared to be attempting to supplant the ordinary legislative process by stretching the meaning of the tangential legislation so as to overturn a significant judicial precedent.").

⁹⁶ *Reich*, 74 F.3d at 1324 (citing 40 USC § 471).

⁹⁷ See Duncan Jr., *supra* note 82, at 390.

⁹⁸ See *Reich*, 74 F.3d at 1330 (referring to the decision in *AFL-CIO v. Kahn*, 618 F.2d 784, 793 (1979)).

⁹⁹ National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935).

¹⁰⁰ See John C. Duncan Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 390 (2010) (explaining how the Court also found that the executive order contradicted the explicit holding of *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938)).

authority to issue the Executive Order impacting labor laws.¹⁰¹ In reality, however, the chances that the courts would overturn the Executive Order are remote.¹⁰²

Additionally, the President's directives that have not been ratified by Congress are only as permanent as the succeeding President.¹⁰³ A new administration has the authority to explicitly amend, replace, or revoke executive orders as simply as signing a new executive order.¹⁰⁴ As a result, certain executive orders have become a political "tug-of-war" with each subsequent administration.¹⁰⁵ Depending on the political affiliation and associated policies, the new administration in 2016 will easily be able to modify the Executive Order if desired.

Moreover, the Executive Order creates financial costs to be incurred by the federal government for ensuring compliance and prosecuting violators of the new labor laws on an on-going basis. The newly created Labor Compliance Advisors will be responsible for enforcing these tasks under the Department of Labor.¹⁰⁶ Unlike the one-time compliance requirements prohibiting arbitration in employment contracts for federal contractors, several parts of the Executive Order requires that the government receive updates from all contractors and sub-contractors every six months.¹⁰⁷

¹⁰¹ See John C. Duncan Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 389 (2010) (referring to Reich, where an employer organization challenged President Clinton's executive order through Robert Reich, former Secretary of Labor responsible for enforcement of the order).

¹⁰² Tara L. Branum, *President Or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 59 (2002) (explaining how Courts have seen eighty-six challenges to Executive Orders, but only two have been wholly overturned, including Youngstown); see also See John C. Duncan Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 389-92 (2010) (citing to the second overturned President Clinton's Executive Order 12954); but see AFL-CIO v. Kahn, 618 F.2d 784, 793 (1979) (upholding President Carter's Executive Order 12092 denying government contracts to bidders who did not meet certain wage and price controls as there was a sufficiently close nexus between the order and the "economy" and "efficiency" criteria in the Federal Property and Administrative Services Act of 1949 statute where the President based his authority).

¹⁰³ See Gaziano, *supra* note 13.

¹⁰⁴ See Gaziano, *supra* note 13; see also Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 284 (1996).

¹⁰⁵ See generally Amy Sullivan, *Shhh. Obama Repeals the Abortion Gag Rule, Very Quietly*, TIME.COM (Jan. 23, 2009), available at <http://content.time.com/time/nation/article/0,8599,1873794,00.html> (describing a 1984 executive order regarding abortion, issued by President Regan, was overturned by President Clinton in 1993, reinstated by President Bush in 2001 and finally overturned by President Obama, two days into his presidency in 2009.)

¹⁰⁶ See Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

¹⁰⁷ See *id.*

B. Federal Government Contractors

As a result of the Executive order, doing business with the US Government has become significantly less attractive for government contractors by prohibiting mandatory arbitration. The administration estimates that the Executive Order will impact 24,000 large and small businesses.¹⁰⁸ These businesses vie for federal contracts in a marketplace worth approximately \$500 billion per year.¹⁰⁹ As a result of the prohibition on mandatory pre-dispute arbitration clauses for employees and independent contractors, businesses will lose significant autonomy, thus creating significant hardships. Recent studies have found that an estimated 25% of all American employers use mandatory pre-dispute arbitration clauses in their employment contracts.¹¹⁰ These employers must now modify their employment contracts not only for employees directly working under a federally-funded contract, but also those employees in non-governmental roles.¹¹¹ Additionally, as stated throughout all portions of the Executive Order, direct contractors now have the added responsibility of enforcing and monitoring the employment contracts in place for any subcontractors utilized to ensure their own compliance.¹¹² This is not only an added expense, but a heavy burden placed on both large and small businesses.

The Executive Order will impact the financial costs of doing business with the federal government. Arbitration functions as an alternative to judicial litigation through less expensive, expedited, and fair proceedings.¹¹³ Contractors will now look to recuperate the potential cost of less efficient and often unpredictable judicial litigation of claims.¹¹⁴ The financial impact of the Executive Order will be felt by employers by increasing the cost, as traditional judicial means tend to be more expensive, and by

¹⁰⁸ See Burr, *supra* note 14.

¹⁰⁹ See Burr, *supra* note 14.

¹¹⁰ Ashley M. Sergeant, *The Corporation's New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. REV. 149, 157 n.98 (2012).

¹¹¹ See Rebekah Mintzer, *Executive Order Requires New Labor Disclosures*, CORPORATE COUNSEL (Aug. 4, 2014), available at <http://www.corpcounsel.com/id=1202665572168/Executive-Order-Requires-New-Labor-Disclosures?slreturn=20140918124200>.

¹¹² See generally Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

¹¹³ See *Circuit City Stores Inc.*, 532 U.S. at 123.

¹¹⁴ See Burr, *supra* note 14; see also Dierich Knauth, *Contractors Say Executive Order Contradicts Labor Laws*, LAW360 (Oct. 15, 2014), available at <http://www.law360.com/articles/586901/contractors-say-executive-order-contradicts-labor-laws> (finding that industry trade group experts estimate that this administration's push for greater oversight could cause contractors compliance costs to raise by as much as 25 percent); see also THOMAS E. CARBONNEAU, *ARBITRATION LAW AND PRACTICE* 500 (6th ed. 2012).

providing potentially increased damage awards to plaintiffs by sympathetic jurors.¹¹⁵ These increased costs for judicial litigation of employment disputes will discourage contract participation, specifically for smaller businesses, leading to larger awarded bids which will ultimately be borne by the U.S. taxpayers.¹¹⁶

Although the Executive Order's full consequential impact on contractors will remain unknown in the near future, contractors will likely attempt to circumvent the associated restriction on mandatory pre-dispute arbitration in a number of ways. Contractors could do so by adding certain modifications to their employment contracts. Contractors may include pre-dispute jury waivers in their contracts to prevent runaway and unpredictable jury trials where excessive awards can cripple a business.¹¹⁷ Alternatively, contractors may attempt to include limits on punitive damages in their employment contracts for judicial awards. This is similar to contracting parties in an arbitration agreement limiting the amount of punitive damages awarded by an arbitrator.¹¹⁸ Contractors may also attempt to limit the impact of the Executive Order to selective employees by creating wholly owned subsidiaries, exclusively for federal contracts. This major transformation would prevent the prohibition on mandatory pre-dispute arbitration from applying to employees within the entire organization. Although these methods of eluding the Executive Order may create their own burdens, contractors that are negatively impacted by the President's actions may be willing to push the boundaries in order to spark a reaction from Congress or challenge the Executive Order in the judicial system.

C. Employees

The intended beneficiaries of the Executive Order are the employees of government contractors who will now be given "a day in court," while still allowing for employees to pursue voluntary post-dispute consensual arbitration.¹¹⁹ During the passage of the Franken Amendment, one Senator in support of the bill estimated that "at least 30 million

¹¹⁵ See Michael M. Rosen, *Franken's Craven 'Anti-Rape' Amendment*, NATIONAL REVIEW ONLINE (Nov. 17, 2009), available at <http://www.nationalreview.com/articles/228600/frankens-craven-anti-rape-amendment/michael-m-rosen/page/0/1>; see also THOMAS E. CARBONNEAU, ARBITRATION LAW AND PRACTICE 500 (6th ed. 2012).

¹¹⁶ See Rosen, *supra* note 115; see also Burr, *supra* note 14; but see Office of the Press Secretary, FACT SHEET: Fair Pay and Safe Workplaces Executive Order, WHITEHOUSE.GOV (July 31, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order> ("Taxpayer dollars shouldn't be used by unscrupulous employers to drive down living standards for our families, neighbors, and communities.").

¹¹⁷ See generally Scott R. McLaughlin, *Jury Waivers as an Alternative to Arbitration Clauses*, LAW360 (March 14, 2007, 12:00 AM), available at <http://www.law360.com/articles/20540/jury-waivers-as-an-alternative-to-arbitration-clauses>.

¹¹⁸ See generally THOMAS E. CARBONNEAU, ARBITRATION LAW AND PRACTICE 32 (6th ed. 2012).

¹¹⁹ See *Fact Sheet*, *supra* note 4.

workers have unknowingly signed employment contracts and waived their constitutional rights to have their civil rights resolved by a jury.”¹²⁰ Proponents of greater employee rights have argued that arbitration is unsuitable for employment issues, specifically for claims of civil rights’ violations or sexual harassment.¹²¹ One argument consistently raised is the lack of transparency in arbitration due to the absence of a jury of one’s peers and no judicial precedence for the arbitrator to respect.¹²² Furthermore, judicial adjudication more frequently allows for an employee to be awarded punitive damages and injunctive relief as a deterrent to undesirable employer behaviors.¹²³ Moreover, proponents argue that the arbitrator is less accountable than a traditional judge.¹²⁴ Employee rights advocates have argued that when the employment contract calls for the employer to pay the arbitrators, this creates the appearance of impropriety with the potential for “repeat players” bias.¹²⁵ Moreover, employees impacted by the Executive Order will now be able to bring a claim in a local forum, reducing their travel costs and other associated expenses.¹²⁶ An additional argument presented is that the privacy offered through arbitration is inappropriate for Civil Rights claims and claims of sexual assault or harassment, as this privacy protection diminishes the public’s retribution for employers.¹²⁷

¹²⁰ See generally, John R. Parkinson, *Naked, Sore, Bruised and Bleeding: Alleged U.S. Contractor Rape Victim Fights for Day in Court*, ABC NEWS (Oct. 7, 2009), available at <http://abcnews.go.com/Blotter/halliburton-employee-jamie-leigh-jones-testifies-senate-rape/story?id=8775641>.

¹²¹ See generally Parkinson, *supra* note 120.

¹²² See generally Parkinson, *supra* note 120.

¹²³ Ashley M. Sergeant, *The Corporation’s New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. REV. 149, 165 (2012) (citing to *Mandatory Arbitration Clauses: Undermining the Rights of Consumers, Employees, and Small Businesses*, CITIZEN.ORG (last visited Nov. 8, 2014), available at http://www.citizen.org/congress/article_redirect.cfm?ID=7332).

¹²⁴ Ashley M. Sergeant, *The Corporation’s New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. REV. 149, 164 n.152 (2012) (citing to *Groups Launch Nationwide Effort to Stop Use of Binding Mandatory Arbitration Clauses*, CITIZEN.ORG (Feb. 24, 2005), available at <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=1884> (discussing how employees lose in arbitration when arbitrators are exempt from justifying a decision or rendering a written decision and the only protection is against arbitrator fraud or manifest disregard of the law)).

¹²⁵ See Sergeant, *supra* note 110.

¹²⁶ See Sergeant, *supra* note 110.

¹²⁷ See generally Jeffrey Adams, *The Assault of Jamie Leigh Jones: How One Woman’s Horror Story Is Changing Arbitration in America*, 11 PEPP. DISP. RESOL. L.J. 264-65 (2011) (discussing that proponents of the Franken Amendment believed that the characteristics of arbitration, including privacy and expertise, are sufficient for protecting proprietary business information but compromise on an employees civil rights claims); *but see* 14 Penn Plaza LLC, 556 U.S. at 247 (confirming the arbitrability of civil rights claims).

One exception permitted under the Executive Order is for employees who are covered by a collective bargaining agreement negotiated between the contractor and representative of the labor organization.¹²⁸ This exception exemplifies the distinction between labor arbitration and employment arbitration. The reasoning for this exception in the Order can be justified by the comparable bargaining power of the union representative and the employer to negotiate the employment contract.¹²⁹ A similar notion exists in the Ninth Circuit, where the Court remains hostile to arbitration.¹³⁰ Additionally, the Executive Order may be a way for President Obama to incentivize the Federal Government to contract or subcontract with unionized employers.¹³¹ While many employee rights groups will likely support the CBA exemption in the Order, the impact of the exemption will presumably be minimal; only 11.3% of the U.S. workforce belongs to a union.¹³² Overall, similar to the Franken Amendment, many employee rights advocates will likely consider that this Executive Order to be a step in the right direction and will eventually lead to further expansion in all employment contracts.

VI. CONCLUSION

With the issuance of the Fair Pay and Safe Workplaces Executive Order, President Obama has single-handedly imposed significant changes to labor laws regulating government contractors in an attempt to increase efficiency and cost savings in the work performed. Specifically, the President's ban on mandatory pre-dispute arbitration agreements in employee contracts for federal contracts and conflicts with the federal policy favoring arbitration. This governmental restriction on arbitration runs contrary to decades of Supreme Court precedent allowing arbitration in many different contexts, including employment agreements and Title VII claims.

¹²⁸ See generally Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

¹²⁹ See generally THOMAS E. CARBONNEAU, ARBITRATION LAW AND PRACTICE 499 (6th ed. 2012).

¹³⁰ See Northern District of California 2014 Judicial Conference, The Enforceability of Pre-Dispute Arbitration Clauses: Are There Any Limits Left?, (April 11-13, 2014), available at <http://events.whitecase.com/ndca-2014/materials/Long-Arbitration-Paper.pdf> (citing *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (Cal. 2000) where arbitration agreement was a contract of adhesion because where imposed on employees as a condition of employment with no opportunity to negotiate); but see *Gilmer*, 500 U.S. at 33 (“Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”); but see *Concepcion* (“Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.”).

¹³¹ See generally Dan Merica, *Obama: 'I'd Join a Union'*, CNN (Sept. 2, 2014, 8:49 AM), available at <http://www.cnn.com/2014/09/01/politics/obama-union-workers/>.

¹³² *Union Members Summary*, BUREAU OF LABOR STATISTICS (Jan. 24, 2014) available at <http://www.bls.gov/news.release/union2.nr0.htm> (reporting the 2013 union membership rate is 11.3%, down from 20.1% thirty years earlier).

As a result of the Executive Order providing employees with the option of pursuing judicial resolution of disputes, there will be negative consequences for both the federal government and potential government contractors. The compliance costs of enforcing the Executive Order will financially impact the federal government, contractors, and ultimately, the U.S. taxpayers. Federal contractors are now forced to scrupulously craft their employment contracts to allow employees to pursue certain claims in the costly and often inefficient, judicial setting. Ultimately, the Executive Order promoting fair pay and safe workplaces in the Federal Government comes with costs that far outweighs the benefits.