
Reclaiming Our Time: Ending the Use of Employment Contracts that Shorten the Statute of Limitations for Title VII Discrimination Claims

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Abstract. Title VII was passed to eradicate workplace discrimination because of race, color, religion, sex, and national origin. The statute's enforcement provisions describe a detailed enforcement scheme and three-part limitations period, utilizing the Equal Employment Opportunity Commission ("EEOC") as the first forum to ensure compliance and remedy discrimination. However, employers have been presenting applicants and employees with a choice: Agree to waive your statute of limitations for employment claims or go look for work elsewhere. These contractual provisions, which are often buried within employment applications and mandatory arbitration agreements, are not open to negotiation by the employee and routinely reduce the limitations period for employment discrimination claims to a mere 180 days. But when it comes Title VII employment discrimination claims, a 180-day statute of limitations raises a significant obstacle for employees seeking to enforce their civil rights—with or without engaging in litigation. This is because Title VII requires that employees first file their claims at the EEOC and allow the agency to investigate and, if appropriate, enforce Title VII on the employee's and public's behalf. Only after attempting to vindicate their rights at the EEOC may employees file their claims in court—an enforcement process that Congress did not limit to 180 days in total.

This Article will argue that limitations periods in employment contracts should not be enforced to shorten the statutory limitations period for Title VII because interfering with the timeline in Title VII's enforcement provision effectively waives the substantive rights available to employees at the EEOC. By interfering with the

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administrative process which affords parties opportunities for cooperation and remedies wholly apart from any later legal process, these contracts not only prevent employees from resolving claims at the EEOC or ultimately filing claims in court or arbitration, but they also interfere with the EEOC's role in enforcing Title VII on behalf of the public. Rather than relying on a patchwork of state contract defenses to challenge these contractual provisions, this Article will propose the key to analyzing such provisions is not a contract analysis at all, but a substantive-rights analysis which takes into account the unique enforcement regime of Title VII. Simply put, Title VII claims are different because their statute of limitations is not a mere procedural right that can be prospectively waived by contract; instead, the statute of limitations is a substantive right that affords specific remedies, which cannot be prospectively bargained away.

Introduction

Employers have been presenting applicants and employees with a choice: Accept a shorter statute of limitations¹ for employment claims or look for work elsewhere. These contractual provisions, which are often inconspicuously buried within standard employment agreements such as employment applications and mandatory arbitration agreements, are almost never open to negotiation by the employee. The provisions routinely reduce the period to file employment claims in arbitration or in court to a mere 180 days. However, for Title VII employment-discrimination claims,² a six-month window to file raises pragmatic and policy concerns for employees seeking to enforce their civil rights and meaningfully resolve complaints of discrimination—with or without engaging in litigation. This is because Title VII complainants must first file their claims with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) and permit this agency to investigate and, if appropriate, conciliate or enforce Title VII on the employee’s and public’s behalf. Only after receiving a dismissal and right-to-sue letter from the EEOC may employees file their claims in court—a process that often takes far longer than 180 days if the parties are engaging in good faith and proceeding as the statute and regulations contemplate.

These agreements, which employees must sign if they want to become or remain employed, raise access-to-justice issues and public policy concerns. In part, this is because Title VII contemplates a detailed

¹ While some would argue that “[c]harge-filing periods and statutes of limitations are conceptually identical,” this Article’s contention is slightly different. Jeremy A. Weinberg, *Blameless Ignorance? The Ledbetter Act and Limitations Periods for Title VII Pay Discrimination Claims*, 84 N.Y.U. L. REV. 1756, 1757 n.3 (2009) (discussing Title VII’s charge-filing regime and using “‘charge-filing period,’ ‘statute of limitations,’ and ‘limitations period’ interchangeably to refer to laws that bar claims not brought within a certain period”). This Article contends that Title VII’s statute of limitations is actually a series of deadlines, including: an administrative-filing period, a period of exclusive agency jurisdiction, and a court-filing period. See *infra* Section I.C.2.

² For brevity, this Article is limited to an analysis of employment-discrimination claims under Title VII of the Civil Rights Act of 1964. However, the author contends that this analysis applies with equal force to other antidiscrimination statutes requiring prelitigation administrative exhaustion at the Equal Employment Opportunity Commission (“EEOC” or “Commission”), including the Age Discrimination in Employment Act of 1967 (“ADEA”) and Americans with Disabilities Act of 1990 (“ADA”), because Title VII’s administrative exhaustion scheme served as a model for these later-enacted antidiscrimination statutes. *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 988 (9th Cir. 2005) (describing Title VII as a model for the ADEA). Consider *Sydnor v. Fairfax County*, where the Court of Appeals for the Fourth Circuit noted:

Modeled after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the ADA incorporates that statute’s enforcement procedures, id. § 12117(a), including the requirement that a plaintiff must exhaust his administrative remedies by filing a charge with the EEOC before pursuing a suit in federal court, see id. § 2000e-5(b), (f)(1).

681 F.3d 591, 593 (4th Cir. 2012).

administrative process that provides the parties with opportunities for cooperation and remedies without engaging in any later litigation or arbitration process, and that also provides the EEOC with the first right of enforcement. This administrative process depends upon the statute of limitations explicitly set forth in Title VII's enforcement provisions. Specifically, as detailed in this article, Title VII permits an employee 180 or 300 days³ after an alleged violation occurs to file a charge of discrimination with the EEOC, after which the EEOC has at least 180 days of exclusive jurisdiction⁴ to investigate the charge and institute enforcement action.⁵ If the EEOC does not resolve the claims in the charge of discrimination, the employee has ninety days after the EEOC dismisses the charge to file a lawsuit in court.⁶ Employment contracts that shorten the filing time to 180 days conflict with and interfere with this administrative process.⁷

Challenges to these contractual provisions have had mixed results. Courts primarily look to state contract law to determine if these contractual provisions are valid, with some trial courts enforcing them and others invalidating them on various grounds. Further, only one federal court of appeals, the Court of Appeals for the Sixth Circuit, has directly considered this issue.⁸ But in holding that contractual provisions which shorten Title VII limitations periods are unenforceable, the court failed to clarify whether these provisions are enforceable when contained within arbitration agreements.⁹

As a consequence, there exists a lack of uniformity that creates uncertainty as to the enforceability of contracts shortening the limitations period for Title VII civil rights claims. This Article argues that state contract law is not the appropriate means for determining whether contracts shortening Title VII's limitations period are enforceable.

³ In three states, Alabama, Arkansas, and Mississippi, employees are required to file within 180 days. Additionally, Georgia and North Carolina require the vast majority of private-sector employees to file within 180 days, with limited exceptions. *See infra* Section I.C.2.b.

⁴ Exclusive jurisdiction is the time period during which the EEOC has the exclusive right to investigate the charge of discrimination and enforce Title VII on behalf of the complainant. *See* 42 U.S.C. § 2000e-5(f)(1). After the expiration of 180 days after filing a charge of discrimination, the EEOC may issue the complainant a right-to-sue letter so that the complainant may, if they so desire, enforce their own rights under Title VII via a lawsuit. *See id.*; 29 C.F.R. § 1601.28 (2023).

⁵ On average, EEOC investigations take more than 300 days (i.e., ten months) to complete. *See What You Can Expect After You File a Charge*, EEOC, <https://perma.cc/Z4CE-ARU9>.

⁶ *See infra* Section I.C.2.b.

⁷ As explained later in Section I.D.2., these agreements have been used both to limit time to file at the EEOC and the time to file a lawsuit in court or arbitration.

⁸ *See Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 825 (6th Cir. 2019) (“This case requires us to determine, as a matter of first impression, whether the statute of limitations of Title VII of the Civil Rights Act of 1964 . . . may be contractually shortened for litigation.”).

⁹ *Id.* at 839.

Instead, this Article advances a substantive-rights analysis that takes into account the purpose, enforcement goals, and rights provided by Title VII during the administrative process. Rather than relying upon a patchwork of state contract defenses, this Article contends that the substantive rights available at the EEOC are not waivable by contract and that the public policy of vindicating Title VII rights trumps the freedom of parties to contract. Because administrative exhaustion at the EEOC is an integral part of Title VII's enforcement mechanism, Title VII's statute of limitations, which builds in time to administratively exhaust remedies at the EEOC, is not a mere procedural formality that can be prospectively waived by employees via contract. Instead, Title VII's statute of limitations functions to protect the substantive rights available to the parties at the EEOC (and the EEOC's ability to enforce Title VII on the employee's and public's behalf). Thus, Title VII's statute of limitations should be treated not as a procedural right but as a substantive right that cannot be bargained away (i.e., shortened) prospectively by contract.

This Article proceeds in four parts. Part I describes the at-will employment relationship that most employees have with their employers. This Part argues that this arrangement leaves employees vulnerable to one-sided form contracts that provide no benefit to the employees other than the illusory possibility of continued at-will employment. Part I also discusses Title VII as an exception to the at-will doctrine and details the Title VII administrative process. Part II considers rationales for statutes of limitations. Part II also analyzes the jurisprudence underpinning shortened contractual limitations periods and discusses the current legal landscape for contracts shortening the limitations period for Title VII claims. Part III argues that contracts shortening statutes of limitations for Title VII claims are unfair due to the power imbalance between employees and their employers. Finally, in Part IV, this Article proposes two paths to remedying the unfairness. The first path offers a judicial approach that does not depend upon state contract defenses but focuses on the administrative regime of Title VII. The judicial approach also posits that the statute of limitations is not merely procedural; it is a substantive right that affords parties remedies without engaging in litigation or arbitration and cannot be prospectively waived. The second path is a legislative proposal to amend Title VII to invalidate prospective contractual waivers of Title VII's statute of limitations.

I. Setting the Stage

The at-will employment doctrine, which governs most employees in the United States, is typically described as the right of an employer to terminate an employee for virtually any "good" reason, any "bad" reason,

or even no reason at all.¹⁰ Commonly, employees in the United States are viewed as falling into two categories: contract employees and at-will employees. However, these categories are not as distinct as one might believe. Indeed, all employment relationships in the United States are governed by principles of contract law.¹¹ Further complicating matters, most at-will employees are, in fact, subject to some pre-dispute employment agreement (i.e., contract) which purports to modify or waive some of the default at-will rights and responsibilities of employees and employers.¹² This section discusses the at-will employment doctrine, exceptions to the doctrine, and the rise of what this Article will refer to as the “at-will form contract.” That is, form contracts that modify or waive existing statutory rights of an at-will employee, almost exclusively to the employee’s detriment.

A. *Employment At-Will and Its Critics*

“At its core, employment is a contractual relationship.”¹³ Yet, employment relationships are divided into two categories based on one important factor: whether or not they are governed by an express contract that requires cause for termination.¹⁴ Employees who do not have an express employment contract that limits an employer’s right to terminate them are, in the vast majority of jurisdictions in the United States, considered at-will employees.¹⁵ In the absence of an express employment

¹⁰ See Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 63 (2008). A “good” reason is generally considered to be one that justifies termination, while a “bad” reason is one which is untrue, unfair, or even malicious. See, e.g., MONT. CODE ANN. § 39-2-903(5) (2023) (defining “good cause” as “any reasonable job-related grounds for an employee’s dismissal” including failure to perform job duties, disruption of business operations, material or repeated violation of an employer policy, or “other legitimate business reasons”); see also J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 361 (1995) (“[E]mployers [can]not discharge employees in bad faith or for an unjust cause An employer’s breach of the covenant of good faith gives rise to a suit for unjust dismissal by the employee.”).

¹¹ RESTATEMENT (THIRD) OF EMP. L. § 2.01 cmt. a. (AM. L. INST. 2015) (describing the at-will doctrine as “the contract-law default rule for the employment relationship”).

¹² See Meredith R. Miller, *Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process*, 75 TENN. L. REV. 365, 392–404 (2008) (discussing the rise in contracts to create pre-dispute limitations on employment claims, including discovery and the statute of limitations). In some cases, this includes an employee’s civil or constitutional rights. See, e.g., Andrew Gray, *Saving the Jury-Trial Waiver Through Forum Selection*, 67 DEPAUL L. REV. 1, 11–13 (2017) (discussing the rise of pre-dispute jury waiver clauses in employment).

¹³ RESTATEMENT (THIRD) OF EMP. L. § 2.01 cmt. b (AM. L. INST. 2015).

¹⁴ This Article focuses solely on those employees who do not have a “for cause” employment contract.

¹⁵ See *McNichols v. Dep’t of Transp.*, 804 A.2d 1264, 1267 (Pa. Commw. Ct. 2002) (“An at-will employee is defined as one whose employment is not governed by a written contract for a specific

contract to the contrary, forty-nine states and the District of Columbia default to the at-will employment doctrine.¹⁶ These at-will “employment relationships typically are not formalized in a written document.”¹⁷ In recent years, some experts estimate that approximately seventy-four percent of employees are “at-will.”¹⁸

The at-will employment doctrine is the rebuttable presumption that employers and employees may terminate the employment relationship at any time and for any reason.¹⁹ Indeed, neither the employer nor employee is required to give any notice or reason for the termination of the employment relationship.²⁰ This longstanding doctrine appears to have grown out of a misstatement of existing law by a treatise-writer seeking to reconcile contradicting court decisions in America in 1877.²¹ The misstatement was later accepted and quoted by the New York Court of Appeals, which “gave credibility and dominant authority to the employment at-will doctrine, and by 1930, the doctrine had become embedded in American law.”²² Accordingly, there is no dearth of scholarship criticizing the at-will presumption.²³

term and who is terminable at the will of either the employer or the employee.”); *see also* Porter, *supra* note 10, at 63 (“[T]he vast majority of employees in the United States are at-will employees . . .”). *See generally* Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 66–70 (2000) (discussing historical roots of at-will employment).

¹⁶ RESTATEMENT (THIRD) OF EMP. L. § 2.01 cmt. b (AM. L. INST. 2015). Montana is the sole state that has codified a “good cause” standard for the termination of employees. *See* MONT. CODE ANN. § 39-2-904(1)(b) (2023) (“A discharge is wrongful only if . . . the discharge was not for good cause and the employee had completed the employer’s probationary period of employment . . .”). Thus, Montana does not default to the at-will employment doctrine.

¹⁷ Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 638 (2007).

¹⁸ Garth Coulson, *At-Will Employment: Complete Guide with State Information and Definition*, BETTERTEAM (Jan. 20, 2021), <https://perma.cc/3P2T-PMMY>.

¹⁹ *See* RESTATEMENT (THIRD) OF EMP. L. § 2.01 (AM. L. INST. 2015).

²⁰ *See id.* § 2.01 cmt. b.

²¹ This treatise writer, Horace Wood, “sought to distinguish the English decisions and resolve contradictions in American law.” Summers, *supra* note 15, at 67. This led him to state a “blanket presumption that all indefinite hirings were at will,” a misstatement of existing law. *Id.* (explaining that H.G. Wood likely had little support for the at-will rule endorsed in his treatise). *See also* Porter, *supra* note 10, at 66 (explaining that the at-will rule was adopted after it was endorsed in a treatise written by H.G. Wood in 1877).

²² Summers, *supra* note 15, at 67–68.

²³ *See, e.g.,* William Homer, *Just Cause for Trust: Honoring the Expectation of Loyalty in the At-Will Employment Relationship*, 45 FLA. ST. U. L. REV. 833, 852–58 (2018); Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 4–5 (2010) (“To be sure, for the last fifty years, employment law scholars have evinced a near consensus that employment at will . . . ought to be abolished.”); *see also* Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 687 (2000) (“The future of employment-at-will . . . is that it has no future.”); *cf.* Porter, *supra* note 10, at 66 (“However, in recent years, there has been a shift away from the strict

Professor Clyde W. Summers has likened the power imbalance between employers and employees created by the at-will doctrine to that of a king and his subjects:

The employer, as owner of the enterprise, is legally endowed with the sole right to determine all matters concerning the operation of the enterprise. This includes the work performed and the continued employment of its employees. The law, by giving total dominance to the employer, endows the employer with the divine right to rule the working lives of its subject employees.²⁴

The limits of the monarch-like power of employers in at-will employment relationships “are set largely by statute and certain baseline common law assumptions.”²⁵ Even when an employee negotiates certain terms of employment above the baseline limits, such “negotiated terms of employment are likely to be memorialized, if at all, in a brief offer letter or job description” rather than an explicit employment contract.²⁶

Despite the criticisms of many scholars that the at-will doctrine is unjust due to the imbalance of power between employees and employers, courts and legislatures have not taken any meaningful steps to abolish it. Thus, in the absence of an express employment contract to the contrary, the presumption that employees are “at-will” remains for the vast majority of workers in the United States.²⁷

B. *At-Will Form Contracts*

Despite being “at-will,” many employees enter into written agreements with their employers regarding certain terms of their employment.²⁸ These agreements range in variety and scope, but may include mandatory arbitration agreements,²⁹ noncompete agreements,³⁰

employment at-will standard in favor of giving employees more protection against unjust dismissal. This movement has been initiated by both courts and legislators.”)

²⁴ Summers, *supra* note 15, at 65.

²⁵ Arnow-Richman, *supra* note 17, at 638.

²⁶ *Id.*

²⁷ The Restatement (Third) of Employment Law describes the default rule of at-will employment as a “[r]ebutable presumption” that applies when there are no “[a]greements and binding employer promises or employer policy statements that would overcome the presumption of at-will employment.” § 2.01 cmts. b, c (AM. L. INST. 2015); *see also* Porter, *supra* note 10, at 66–78 (discussing the at-will presumption, its exceptions, and issues).

²⁸ Arnow-Richman, *supra* note 17, at 638 (“Recently, however, companies have gravitated toward the use of standardized agreements to ‘contractualize’ discrete aspects of workers’ obligations.”).

²⁹ *See id.*; Jane Flanagan & Terri Gerstein, “Sign on the Dotted Line”: How Coercive Employment Contracts Are Bringing Back the *Lochner* Era and What We Can Do About It, 54 U.S.F. L. REV. 441, 450 (2020).

³⁰ *See* Arnow-Richman, *supra* note 17, at 638; Flanagan & Gerstein, *supra* note 29, at 448.

jury waivers,³¹ confidentiality agreements,³² and nondisparagement agreements.³³ Usually, these are “standardized documents unilaterally drafted by an employer” and are introduced as part of the standard package of new-hire documents setting out terms and conditions of employment.³⁴ While presented as part of the standard employment package, these documents are, in fact, drafted “for the purposes of extracting a waiver of certain rights.”³⁵ Further, they are often not negotiated between parties with legal representation.³⁶ In fact, they are often presented to low wage earners,³⁷ sometimes before an employee will be considered for the job³⁸ or after an employee has accepted the job, in

³¹ See Michael H. LeRoy, *Jury Revival or Jury Reviled? When Employees Are Compelled to Waive Jury Trials*, 7 U. PA. J. LAB. & EMP. L. 767, 769–70 (2005) (“[S]ome employers are discarding arbitration to return to court, but with a condition: employees must waive access to a jury and agree to a bench trial.”).

³² Flanagan & Gerstein, *supra* note 29, at 452–53.

³³ *Id.* at 455–56.

³⁴ *Id.* at 444.

³⁵ *Id.*

³⁶ See, e.g., Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77, 81 (2003) (noting the “coercive aspects and lack of employee bargaining power” in mandatory arbitration agreements with employers).

³⁷ Even President Joe Biden acknowledged the problem of noncompete agreements for low wage workers as part of his state of the union:

For too long, workers have been getting stiffed.

Not anymore.

We’re beginning to restore the dignity of work.

For example, 30 million workers had to sign noncompete agreements when they took a job. So a cashier at a burger place can’t cross the street to take the same job at another burger place to make a couple bucks more.

Joe Biden, U.S. President, State of the Union Address (Feb. 7, 2023) in Remarks of President Joe Biden—State of the Union Address as Prepared for Delivery, White House (Feb. 7, 2023), <https://perma.cc/5DLA-DMSL>.

³⁸ See, e.g., *Johnson v. DaimlerChrysler Corp.*, No. C.A. 02-69 GMS, 2003 WL 1089394, at *3 (D. Del. Mar. 6, 2003) (examining employment application containing provision shortening statute of limitations for employment claims to six months “after the date of the employment action that is the subject of the claim or lawsuit”); *Smith v. TA Operating LLC*, No. 10-2563, 2011 WL 3667507, at *1 (D.N.J. Aug. 19, 2011) (examining employment application containing provision requiring “any claim or lawsuit relating to [the employee’s] service with TA or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit”); *Rodriguez v. Raymours Furniture Co.*, 138 A.3d 528, 530 (N.J. 2016) (invalidating provision in employment application shortening statute of limitations for employment claims); *Hamilton v. Norton Healthcare, Inc.*, No. 2019-CA-0885, 2020 WL 5742828, at *1, *3 (Ky. Ct. App. Sept. 25, 2020) (declining to enforce six-month statute of limitations in employment application where plaintiff brought employment discrimination claims under state civil rights act); *Fayak v. Univ. Hosps.*, No. 109279, 2020 WL 7062683, at *4–5 (Ohio Ct. App. Dec. 3, 2020) (enforcing six-month statute of limitations in employment application and dismissing plaintiff’s state law sex harassment and sex discrimination claims).

which case the employee has the options of quitting or accepting the newly presented terms of employment.³⁹ In some instances, the agreement is presented after an employee has worked for an employer for years.⁴⁰ Courts tend to view this as a term or condition of *continued* employment.⁴¹ In other words: Sign your rights away, or else you're out of a job. And sometimes, courts hold an employee to the agreement *even when the employee refused to sign and the employer continued to employ them*, as the employee's continued employment manifested implied acceptance of the terms.⁴²

Simply put, "[t]he at-will presumption authorizing an employer to discharge or demote an employee similarly and necessarily authorizes an employer to unilaterally alter the terms of employment, provided that the alteration does not violate a statute or breach an implied or express contractual agreement."⁴³ As a consequence, one scholar has described such documents as "mass-market boilerplate right deletions."⁴⁴ This Article refers to such agreements as "at-will form contracts," as they typically reduce the rights of employees while failing to provide the protection of an express contract which requires cause for termination.

These "[b]oilerplate, coercive employment contracts are now widely used for many (if not the majority of) private sector, nonunionized employees in the United States, including lower-wage hourly workers."⁴⁵ Although little research exists regarding the full panoply of boilerplate agreements employees are asked to sign, one 2018 study found that more than fifty-six percent of workers were subject to mandatory arbitration, and that number continues to grow.⁴⁶ Similarly, a 2019 study found that noncompete agreements were becoming more common around the United States and noted that noncompete agreements were common both for employees with high levels of education and pay and employees with lower education and pay.⁴⁷

³⁹ See, e.g., *Diaz v. Sohnen Enters.*, 245 Cal. Rptr. 3d 827, 829 (Ct. App. 2019).

⁴⁰ See generally *id.*

⁴¹ See *id.* at 830 ("California law in this area is settled: when an employee continues his or her employment after notification that an agreement to arbitration is a condition of continued employment, that employee has impliedly consented to the arbitration agreement.").

⁴² See *id.* at 831 ("In any event, because the employment agreement between Diaz and Sohnen was at-will, Sohnen could unilaterally change the terms of Diaz's employment agreement, as long as it provided Diaz notice of the change.").

⁴³ *Schachter v. Citigroup, Inc.*, 218 P.3d 262, 269 (Cal. 2009).

⁴⁴ Margaret Jane Radin, *Response: Boilerplate in Theory and Practice*, 54 CAN. BUS. L.J. 292, 294 (2013).

⁴⁵ Flanagan & Gerstein, *supra* note 29, at 443.

⁴⁶ Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. 5 (2018), <https://perma.cc/EW4W-DEPK>.

⁴⁷ Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements*, ECON. POL'Y INST. 2 (2019), <https://perma.cc/RQW2-NQYQ>.

Less discussed, however, is the subject of this Article: agreements that prospectively shorten the statute of limitations for employees to bring employment claims. These agreements are sometimes included as provisions in mandatory agreements to arbitrate.⁴⁸ In fact, the well-known drafting tool, Thomson Reuter's Westlaw Practical Law, provides a sample form arbitration agreement noting that employers may choose to shorten the statute of limitations for claims.⁴⁹ However, they also arise in other contexts. Perhaps most surprisingly, these provisions are included as part of job applications⁵⁰ and as agreements required to be signed during onboarding or during the course of employment.⁵¹ In the context of employment applications, these provisions are typically included in small print immediately above the signature line with other common disclaimers and waivers that apply to the application process. Applicants might not understand and appreciate how these provisions govern the terms and conditions of their employment.

For example, applications may include language such as:

I agree that any claim or lawsuit arising out of my employment with, or my application for employment with, [Employer] or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. While I understand that the statute of limitations for claims arising out of an employment action may be longer than six (6) months, I agree to be bound by the six (6) month period of limitations set forth herein, and I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY.⁵²

These agreements prematurely foreclose potentially legitimate claims from being remedied at both the EEOC level and in the courts. Additionally, they create uncertainty that may discourage victims of discrimination from moving forward with claims.⁵³ Further, they elevate

⁴⁸ See, e.g., *Durruthy v. Charter Commc'ns, LLC*, No. 20-CV-1374-W, 2020 WL 6871048, at *7-9 (S.D. Cal. Nov. 23, 2020) (examining arbitration agreement including provision shortening the statutory limitations period for plaintiff to file employment claims). Although employers initially sought arbitration as a cost saving measure, high arbitration costs and no limits on punitive damages have led to some employers rethinking this strategy; see also *LeRoy*, *supra* note 31, at 768-69 (suggesting that employers began drafting separate jury waiver agreements to avoid both juries and the rising costs of arbitration).

⁴⁹ Practical Law Labor & Employment, *Mutual Agreement to Arbitrate Employment-Related Disputes (US)*, THOMSON REUTERS, <https://perma.cc/V8WY-Q723>.

⁵⁰ See, e.g., *supra* note 38 and accompanying text.

⁵¹ See, e.g., *Diaz v. Sohnen Enters.*, 245 Cal. Rptr. 3d 827, 829 (Ct. App. 2019).

⁵² *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 826 (6th Cir. 2019).

⁵³ See, e.g., *Flanagan & Gerstein*, *supra* note 29, at 456-57 (noting that provisions in employment contracts may discourage filings); Yonathan A. Arbel & Shmuel I. Becher, *Contracts in the Age of Smart Readers*, 90 GEO. WASH. L. REV. 83, 127 (2022) ("Based on various studies, it seems that laypeople generally take contracts too seriously: they erroneously assume that contract terms are strictly enforced and do not consider that certain terms may be unenforceable."); see also Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. ECON. & ORG. 633, 655 (2020) (finding that noncompete clauses are equally as effective in jurisdictions that enforce them as jurisdictions that do not).

the importance of the freedom of contract over civil rights—not only by ultimately truncating litigation of substantive claims in court, but also by truncating the time to access remedies at the federal agency tasked with enforcing Title VII. This Article argues that although the waiver of a statute of limitations is merely a procedural issue for some claims, under Title VII, it is, in fact, a waiver of substantive rights. As discussed *infra*, this leaves federal civil rights at the mercy of state contract law, and, in some cases, state legislatures.⁵⁴

C. Title VII Exception to At-Will Employment

Several important exceptions to this at-will employment doctrine exist. For purposes of this Article, the most important exception is that the “at-will” doctrine must give way to constitutional and statutory civil rights of employees.⁵⁵

⁵⁴ Four state legislatures prohibit the enforcement of contractually shortened limitations periods:

* Alabama:

Except as may be otherwise provided by the Uniform Commercial Code, any agreement or stipulation, verbal or written, whereby the time for the commencement of any action is limited to a time less than that prescribed by law for the commencement of such action is void.

ALA. CODE § 6-2-15 (1975).

* Florida:

Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void.

FL. STAT. § 95.03 (1974).

* South Carolina:

No clause, provision or agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action, but the action may be brought notwithstanding such clause, provision or agreement if brought within the time prescribed by the statute of limitations in reference to like causes of action.

S.C. CODE ANN. § 15-3-140 (1977).

* Texas:

Except as provided by Subsection (b), a person may not enter a stipulation, contract, or agreement that purports to limit the time in which to bring suit on the stipulation, contract, or agreement to a period shorter than two years. A stipulation, contract, or agreement that establishes a limitations period that is shorter than two years is void in this state.

TEX. CIV. PRAC. & REM. CODE ANN. § 16.070(a) (West 1991).

⁵⁵ See Porter, *supra* note 10, at 66–70 (discussing statutory and common law exceptions to at-will presumption).

1. Title VII of the Civil Rights Act of 1964

Title VII prohibits employers from making employment decisions based on an “individual’s race, color, religion, sex, or national origin.”⁵⁶ It also protects employees from retaliation for opposing “any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation” related to Title VII violations.⁵⁷ Title VII has also been interpreted to protect against harassment that is based on any of the protected classifications.⁵⁸

On both the federal and state levels, statutes prohibiting discriminatory termination on the basis of certain protected characteristics like race, color, religion, sex, national origin, age, or disability trump the at-will doctrine’s default rule.⁵⁹ In other words, although an at-will employee can be terminated for no reason or even a bad reason, that employee cannot be terminated for a reason protected by statute.⁶⁰ Thus, employment civil rights statutes, like Title VII, are exceptions to the at-will presumption and limit the reasons for which an employer may terminate an at-will employee.⁶¹

2. Title VII’s Enforcement Procedures and Limitations Period

It is well accepted that the statutory limitations period set forth in Title VII is relatively short.⁶² Further, unlike most civil claims, Title VII (as well as most other federal employment discrimination statutes) requires litigants to meet multiple deadlines and complete a mandatory

⁵⁶ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

⁵⁷ *Id.* § 2000e-3(a).

⁵⁸ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65–67 (1986) (holding harassment based on a protected characteristic is actionable under Title VII where it creates a hostile work environment).

⁵⁹ At the federal level, Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a), prohibit discrimination in employment. In addition, every state has enacted statutes prohibiting employers from engaging in discrimination on specific bases. See, e.g., COLO. REV. STAT. ANN. § 24-34-402 (West 2024); FLA. STAT. ANN. § 760.10 (West 2016); IND. CODE ANN. § 22-9-5-19 (West 2014); MICH. COMP. LAWS ANN. § 37.2202 (West 2013); MINN. STAT. ANN. § 363A.08 (West 2012); NEV. REV. STAT. ANN. § 613.330 (West 2014); N.J. STAT. ANN. § 10:5-12 (West 2013); OR. REV. STAT. ANN. § 659A.030 (West 2013); 43 PA. STAT. AND CONS. STAT. ANN. § 955 (West 2020).

⁶⁰ See Porter, *supra* note 10, at 68–70.

⁶¹ See 42 U.S.C. § 2000e-2(a)(1) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin.”); Porter, *supra* note 10, at 68–70 (discussing statutory exceptions to at-will presumption).

⁶² See, e.g., *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) (describing Title VII’s filing period as “quite short”).

administrative process, rather than meet a single filing deadline. Indeed, the Supreme Court has described the limitations period as “a series of deadlines measured by numbers of days—rather than months or years.”⁶³ As will be discussed further below, Title VII requires employees to (1) properly file their initial charge of discrimination in either 180 or 300 days from the date the challenged employment action occurred, (2) wait at least 180 days for the EEOC to investigate and decide whether to take action, and (3) file their lawsuit within ninety days of the EEOC dismissing the charge.⁶⁴

a. *Expansion of Title VII Enforcement & Remedies*

Congress created the Equal Employment Opportunity Commission when enacting Title VII.⁶⁵ The EEOC enforces Title VII of the Civil Rights Act of 1964,⁶⁶ and other later enacted federal laws prohibiting discrimination in the workplace, including the Age Discrimination in Employment Act (“ADEA”)⁶⁷ and the Americans with Disabilities Act (“ADA”).⁶⁸ Over time, Congress has expanded Title VII’s enforcement, via both the EEOC’s power and the remedies available to victims of discrimination.

The EEOC is tasked with the intake, investigation, and resolution or “conciliation” of charges of discrimination.⁶⁹ When enacted in 1964, Title VII authorized only two types of actions: (1) private actions brought by individuals; and (2) actions brought on the public’s behalf by the Attorney General involving a “pattern or practice” of discrimination.⁷⁰ At that time, the EEOC’s authority was limited to investigating and, if appropriate, conciliating charges of discrimination.⁷¹ Thus, the EEOC’s power to

⁶³ *Id.* at 825–26.

⁶⁴ See *infra* Section I.C.2.b. Moreover, the EEOC typically takes an average of ten months to process and investigate charges of discrimination, rather than the 180-day minimum (roughly six months) during which it has exclusive jurisdiction. See *What You Can Expect After You File a Charge*, *supra* note 5.

⁶⁵ Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 705(a), 78 Stat. 241, 258 (codified at 42 U.S.C. § 2000e-4(a)).

⁶⁶ 42 U.S.C. § 2000e-5(a).

⁶⁷ 29 U.S.C. § 626(d).

⁶⁸ 42 U.S.C. § 12117(a).

⁶⁹ See *id.* § 2000e-5(b).

⁷⁰ *Id.* § 2000e-6(a) (describing process for Attorney General to bring civil action).

⁷¹ See *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 325–27 n.8 (1980) (“[U]nder the procedural structure created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigation claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.” (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977))).

eliminate unlawful employment practices was limited to “informal methods of conference, conciliation, and persuasion.”⁷² “Congress became convinced, however, that the ‘failure to grant the EEOC meaningful enforcement powers has proven to be a major flaw in the operation of Title VII.’”⁷³

Accordingly, Congress expanded the enforcement of Title VII with an amendment to Title VII in 1972, authorizing the EEOC to bring its own enforcement actions in federal district courts.⁷⁴ “The purpose of the amendments, plainly enough, was to secure more effective enforcement of Title VII.”⁷⁵ While individuals retained their ability to bring private actions on their own behalf, “[t]he EEOC was to bear the primary burden of litigation.”⁷⁶ With the 1972 amendments, “Congress sought to implement the public interest as well as to bring about more effective enforcement of private rights.”⁷⁷ Congress enabled the EEOC to bring federal litigation on behalf of individuals, which in turn provided compelling incentives for both parties to cooperate during the administrative process. Namely, plaintiffs who fail to cooperate may foreclose EEOC litigation on their behalf and perhaps foreclose their ability to properly exhaust administrative remedies for their own lawsuit,⁷⁸ while defendants increase the possibility of facing agency-led federal litigation if they fail to cooperate.⁷⁹

In 1991, Congress amended Title VII to expand the remedies available by permitting the recovery of compensatory and punitive damages by both private parties and the EEOC.⁸⁰ Following the 1991 amendments to Title VII, the EEOC has authority to initiate litigation, as well as intervene in private litigation of Title VII claims; to enjoin an employer from engaging in unlawful employment practices; and to pursue reinstatement,

⁷² *Id.* at 325 (quoting 42 U.S.C. § 2000e-5(b)).

⁷³ *Id.* (quoting S. REP. NO. 92-415, at 4 (1971)).

⁷⁴ 42 U.S.C. § 2000e-5(f).

⁷⁵ *General Telephone*, 446 U.S. at 325.

⁷⁶ *Id.* at 326.

⁷⁷ *Id.*

⁷⁸ Some courts have held that where a complaining plaintiff refused to cooperate with the EEOC during the investigatory process, that plaintiff failed to exhaust administrative remedies. *See, e.g., Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1306 (10th Cir. 2005) (holding Title VII, ADEA & ADA plaintiffs are required to cooperate with EEOC to properly exhaust administrative remedies), *abrogated by Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166 (10th Cir. 2018). *But see Doe v. Oberweis Dairy*, 456 F.3d 704, 709–10 (7th Cir. 2006) (holding Title VII does not impose a duty of cooperation on plaintiffs to exhaust properly administrative remedies).

⁷⁹ Employers who fail to cooperate with the EEOC increase the likelihood of being issued subpoenas for the EEOC to obtain documents, to interview employee witnesses, and to gain entry to inspect company facilities. 42 U.S.C. § 2000e-9 (providing subpoena powers included in 29 U.S.C. § 161).

⁸⁰ 42 U.S.C. § 1981a(a)(1).

backpay, and compensatory or punitive damages in Title VII actions.⁸¹ Thus, “[a]s a complaining party, the EEOC may bring suit to enjoin an employer from engaging in unlawful employment practices, and to pursue reinstatement, backpay, and compensatory or punitive damages.”⁸²

Most recently, Congress expanded the remedies available to Title VII plaintiffs under the Lilly Ledbetter Fair Pay Act of 2009.⁸³ This Act amended Title VII to state that an unlawful employment action occurs “when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.”⁸⁴ This amendment essentially resets the beginning of the limitations period each time an employee receives a paycheck, effectively allowing victims of pay discrimination “who would have been time-barred under the *Ledbetter* decision to file suit much later, provided they have received a ‘tainted’ paycheck within the limitations period.”⁸⁵ Congress enacted this amendment to reverse the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,⁸⁶ because, according to congressional findings, the *Ledbetter* decision “significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades.”⁸⁷

b. Agency Filing Requirements & Limitations Period

Despite the expanded protections created by Congress, Title VII’s filing requirements remain somewhat complex. On the surface, there are two prerequisites plaintiff-employees must complete to file a lawsuit in court under Title VII: “(i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon

⁸¹ See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 285–88 (2002) (discussing the development of Title VII in addition to listing the EEOC’s new abilities under the 1991 amendments).

⁸² *Id.* at 287.

⁸³ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(b), 123 Stat. 5, 6 (2009) (codified at 42 U.S.C. § 1981a(a)(2)).

⁸⁴ 42 U.S.C. § 2000e-5(e)(3)(A).

⁸⁵ Weinberg, *supra* note 1, at 1762, 1791–92 (2009) (arguing that the Ledbetter Act fails to effectively promote equal pay). In *Ledbetter*, the Court held that the plaintiff’s pay discrimination claims were untimely, which makes filing a claim more difficult for the likely case of plaintiffs unaware of the pay discrimination against them. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 632 (2007); Weinberg, *supra* note 1, at 1768. The Court decided that plaintiff Ledbetter’s pay discrimination claims accrued when the decision to underpay her was made, rather than when she received each paycheck or discovered the underpayment. See *Ledbetter*, 550 U.S. at 628, 640.

⁸⁶ 550 U.S. 618 (2007).

⁸⁷ Lilly Ledbetter Fair Pay Act § 2(1).

the Commission's statutory notice of the right to sue."⁸⁸ To receive a right-to-sue letter, complainants must first allow the EEOC at least 180 days to investigate and, if it chooses, enforce the antidiscrimination statute at issue.⁸⁹ Thus, the limitations period for Title VII and other employment discrimination claims depends on administrative exhaustion at the EEOC. In part, this is because Title VII "mandates that the EEOC . . . must afford noncompliant employers the chance to voluntarily cure their violations before Title VII litigation may be brought against them."⁹⁰

Accordingly, Title VII has a three-part series of deadlines that make up its statute of limitations to file a lawsuit in court.⁹¹ First, the administrative charge filing deadline. Second, the period of exclusive jurisdiction required to administratively exhaust the claims in the charge of discrimination, during which the EEOC investigates and may choose to enforce the antidiscrimination statute at issue. And third, the court filing deadline after administrative exhaustion is complete. These deadlines are discussed in detail below.

Before pursuing a Title VII claim in court, a plaintiff must file a timely charge of discrimination with the EEOC.⁹² A charge of discrimination is a written, signed, and verified statement⁹³ "by or on behalf of any person claiming to be aggrieved" by discrimination, detailing an alleged violation of a federal employment discrimination statute enforced by the EEOC.⁹⁴ Charges of discrimination are subject to strict time limitations. The complainant's window to file a charge of discrimination with the EEOC depends on whether they live in a deferral jurisdiction or nondeferral jurisdiction.⁹⁵ A deferral jurisdiction is one that has a "[s]tate or local law prohibiting the unlawful employment practice alleged,"⁹⁶ and "a [s]tate or local agency with authority to grant or seek relief from such practice."⁹⁷ For example, Pennsylvania is a deferral jurisdiction because it has enacted the Pennsylvania Human Relations Act, which prohibits discrimination based on race, color, age, sex, ancestry, national origin, religion, and

⁸⁸ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973) (citing 42 U.S.C. § 2000e-5(a), (e)). Although the Supreme Court characterized these prerequisites as "jurisdictional," it later held that timely filing an EEOC charge of discrimination was not a bar to subject matter jurisdiction, but instead "a processing rule, albeit a mandatory one." See *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849, 1851 (2019).

⁸⁹ 29 C.F.R. § 1601.28(a) (2023).

⁹⁰ *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 827 (6th Cir. 2019) (citing *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367–68 (1977)).

⁹¹ See Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e)–(f).

⁹² *Id.* § 2000e-5(e)(1); see also 29 C.F.R. § 1601.6.

⁹³ 29 C.F.R. § 1601.9.

⁹⁴ 29 C.F.R. § 1601.7(a).

⁹⁵ See 42 U.S.C. § 2000e-5(c)–(e).

⁹⁶ *Id.* § 2000e-5(c).

⁹⁷ *Id.* § 2000e-5(e)(1).

disability.⁹⁸ This Act is enforced by the Pennsylvania Human Relations Commission.⁹⁹

In deferral jurisdictions,¹⁰⁰ which currently include all but five states for private-sector employees,¹⁰¹ a complainant is required to file a charge of discrimination with the state or local agency first.¹⁰² For the next sixty days, the complainant may not file a charge of discrimination with the EEOC unless the state or local agency ends its proceedings on the charge early.¹⁰³ During this sixty-day period (or until the agency terminates proceedings), that state or local agency has “exclusive jurisdiction” over the charge.¹⁰⁴ After the sixty days conclude, the complainant has the earlier of “three hundred days after the alleged unlawful employment practice occurred,” or thirty days after being notified that the state or local agency proceedings have concluded, to file a charge of discrimination with the EEOC.¹⁰⁵ However, “the time that the state agency spends with the complaint (up to sixty days) effectively trims the 300-day limitation period by that much.”¹⁰⁶

Title VII explicitly authorizes the EEOC to “enter into written agreements” with state and local agencies to promote “effective enforcement” of the Act on the complainant’s behalf.¹⁰⁷ Additionally, courts have determined that the EEOC may initiate proceedings with the state or local agency on behalf of the complainant, as Worksharing Agreements between the state or local agencies and the EEOC generally designate the EEOC as the deferral state or jurisdiction’s agent to receive a charge and initiate proceedings on its behalf.¹⁰⁸ Similarly, courts have

⁹⁸ See 16 PA. STAT. AND CONS. STAT. ANN. §§ 951, 955 (West 2020).

⁹⁹ See *id.* §§ 954(f), 960.

¹⁰⁰ Deferral jurisdictions are those in which the EEOC must first defer to the State or local agency for sixty days. 42 U.S.C. § 2000e-5(c).

¹⁰¹ A complete list of state and local fair employment practices agencies (“FEPAs”) is available at 29 C.F.R. § 1601.80 (2023).

¹⁰² See 42 U.S.C. § 2000e-5(c); see also *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1846–47 (2019) (describing the administrative requirements of Title VII); *Love v. Pullman Co.*, 404 U.S. 522, 523 (1972).

¹⁰³ See 42 U.S.C. § 2000e-5(c).

¹⁰⁴ See *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 827–28 (6th Cir. 2019).

¹⁰⁵ 42 U.S.C. § 2000e-5(e)(1); see also *Fort Bend County*, 139 S. Ct. at 1846.

¹⁰⁶ *Logan*, 939 F.3d at 828 (citing *Mohasco Corp. v. Silver*, 447 U.S. 807, 814 n.16 (1980)); see also 42 U.S.C. § 2000e-5(c), (e)(1).

¹⁰⁷ 42 U.S.C. § 2000e-8(b).

¹⁰⁸ See, e.g., CAL. DEP’T OF FAIR EMP. AND HOUS. & U.S. EQUAL EMP. OPPORTUNITY COMM’N, FY 2019 EEOC/FEPA MODEL WORKSHARING AGREEMENT BETWEEN CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING AND THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LOS ANGELES DISTRICT OFFICE FOR FISCAL YEAR 2019, at 2. In relevant part, the Worksharing Agreement states:

In order to facilitate the assertion of employment rights, the EEOC and the FEPA each designate the other as its agent for the purpose of receiving and drafting charges, including those that are not jurisdictional with the agency that initially

held that the EEOC may act on behalf of the complainant to initiate proceedings at the deferral state or jurisdiction agencies.¹⁰⁹ Accordingly, if the state or local agency in the deferral jurisdiction has a Worksharing Agreement with the EEOC, the complainant is not required to file with both the EEOC and the state or local agency; instead, the complainant may file with one agency, and that agency is obligated to notify the other agency of the charge.¹¹⁰ In these instances, the Worksharing Agreement specifies that the state or local agency waives its sixty days of exclusive jurisdiction and gives the EEOC the right to take immediate action, thus giving the complainant the full benefit of 300 days after the alleged unlawful employment practice occurs to file the charge with the EEOC.¹¹¹ These Worksharing Agreements also allow the complainant to file a charge directly with the EEOC, rather than with the deferral agency.¹¹²

In nondeferral jurisdictions—that is, the states that do not have a state or local agency enforcing a state or local law prohibiting discrimination in employment—complainants must file a charge of discrimination with the EEOC “within one hundred and eighty days after the alleged unlawful employment practice occurred.”¹¹³ Currently, only five states are not deferral states: Alabama, Arkansas, Georgia (with the exception of state employees), North Carolina (with minor exceptions),

receives charges. The EEOC’s receipt of charges on the FEPA’s behalf will automatically initiate the proceedings of both the EEOC and the FEPA

Id.

¹⁰⁹ See *Mohasco*, 447 U.S. at 816 (“[I]n *Love v. Pullman Co.*, 404 U.S. 522, 525 [(1972)], we held that ‘[n]othing in [Title VII] suggests that the state proceedings may not be initiated by the EEOC acting on behalf of the complainant rather than by the complainant himself’”); *Tewksbury v. Ottaway Newspapers*, 192 F.3d 322, 327–28 (2d Cir. 1999) (holding when the charge is presented only to the EEOC after 180 days, it is deemed immediately and “initially” filed with the FEPA); *Griffin v. City of Dallas*, 26 F.3d 610, 612–13 (5th Cir. 1994) (holding the same).

¹¹⁰ See 29 C.F.R. § 1601.13(a)(3) (2023); *Fort Bend County*, 139 S. Ct. at 1846.

¹¹¹ See *Logan*, 939 F.3d at 828 (quoting *EEOC v. Com. Off. Prods. Co.*, 486 U.S. 107, 121 (1988)); see also FLA. COMM’N ON HUM. RELS. & U.S. EQUAL EMP. OPPORTUNITY COMM’N, FY 2023 EEOC/FEPA WORKSHARING AGREEMENT BETWEEN FLORIDA COMMISSION ON HUMAN RIGHTS AND THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, MIAMI DISTRICT OFFICE FOR FISCAL YEAR 2023, ¶ III.A.1 (“For charges originally received by the EEOC . . . the FEPA waives its right of exclusive jurisdiction to initially investigate such charges for . . . 60 days [to allow] the EEOC to proceed immediately with the investigation . . . before the 61st day.”).

¹¹² See, e.g., FLA. COMM’N ON HUM. RELS. & U.S. EQUAL EMP. OPPORTUNITY, *supra* note 111, at ¶ II.A. For example, a Worksharing agreement might state the following:

In order to facilitate the assertion of employment rights, the EEOC and the FEPA each designate the other as its agent for the purpose of receiving and drafting charges, including those that are not jurisdictional with the agency that initially receives the charges. The EEOC’s receipt of charges on the FEPA’s behalf will automatically initiate the proceedings of both the EEOC and the FEPA for the purposes of Section 706(c) and (e)(1) of Title VII.

Id.

¹¹³ Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e)(1).

and Mississippi.¹¹⁴ Thus, in the vast majority of states, complainants have 300 days to file a charge of discrimination.

EEOC regulations provide that when an aggrieved individual in a deferral state or jurisdiction files a charge with the EEOC, “the charge is deemed to be filed with the Commission upon receipt of the document. Such filing is timely if the charge is received within 300 days from the date of the alleged violation.”¹¹⁵ Once a charge of discrimination is filed, the EEOC has exclusive jurisdiction to investigate and resolve the dispute for 180 days.¹¹⁶ Thus, in order to properly exhaust administrative remedies, a plaintiff-employee must both timely file a charge of discrimination with the EEOC and permit the EEOC the statutory period of exclusive jurisdiction to investigate and decide whether or not to enforce the law on the plaintiff-employee’s behalf.

c. *Agency Outcome & Court Filing Limitations Period*

When the Commission receives a charge, it investigates and decides whether it has found reasonable cause to believe that the respondent violated the law.¹¹⁷ “[I]n contrast to agencies like the National Labor Relations Board . . . and the Merit Systems Protection Board, . . . [the EEOC] does not adjudicate the claim.”¹¹⁸ Once its investigation is complete, the EEOC issues a determination on the charge. If the EEOC does find reasonable cause,¹¹⁹ “it must try to eliminate the alleged discriminatory practice ‘by informal methods of conference, conciliation, and persuasion.’”¹²⁰ Importantly, these informal methods of resolution are private: “Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.”¹²¹

If the EEOC is unable to resolve the matter through informal methods, it issues the charging party a “right-to-sue” letter informing that party of its right to file a lawsuit in court. When the charging party

¹¹⁴ These states are not listed as having FEPAs to which the EEOC will defer. A complete list of FEPAs is available at 29 C.F.R. § 1601.80 (2023).

¹¹⁵ 29 C.F.R. § 1601.13(a)(4)(ii)(A).

¹¹⁶ 42 U.S.C. § 2000e-5(f).

¹¹⁷ *Id.* § 2000e-5(b); see *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977).

¹¹⁸ *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1846 (2019) (cleaned up) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)).

¹¹⁹ The EEOC defines “reasonable cause” as the “EEOC’s determination based upon the evidence obtained in the investigation that it believes discrimination did occur.” *Definitions of Terms*, EEOC (May 2020), <https://perma.cc/UEX4-RV77>.

¹²⁰ *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 595 (1981) (quoting 42 U.S.C. § 2000e-5(b)).

¹²¹ 42 U.S.C. § 2000e-5(b).

receives the right-to-sue letter, the party has only ninety days to file a lawsuit related to the subject matter of the charge.¹²² Similarly, if the EEOC determines “there is not reasonable cause to believe” that discrimination occurred, it dismisses the charge of discrimination and issues the complainant a right-to-sue letter notifying the charging party that it has the right to file a lawsuit within ninety days.¹²³ Thus, plaintiff-employees cannot sue the respondent until they receive a right-to-sue notice from the EEOC.¹²⁴ In all cases, the charging party has only ninety days from receipt of the right-to-sue notice to file suit.¹²⁵

D. *Understanding Title VII’s Statute of Limitations*

Descriptions of Title VII’s statute of limitations frequently discuss only the administrative charge filing deadline. Such descriptions give an incomplete picture of the intricacies of the deadlines to perfect a Title VII claim in federal court. This section clarifies that Title VII’s statute of limitations includes an administrative charge filing deadline, a period of exclusive agency jurisdiction, and a court filing deadline.

1. Three-Step Limitations Period for Court

The Supreme Court has described Title VII’s limitations period as “a series of deadlines measured by numbers of days—rather than months or years.”¹²⁶ Indeed, as explained earlier in this Article, Title VII has a three-part series of deadlines which make up its statute of limitations to file a lawsuit in court.¹²⁷ However, the series of deadlines differ depending on whether the state in which the challenged employment action takes place is a deferral state or nondeferral state.¹²⁸ The below chart demonstrates Title VII’s statute of limitations in a very simplistic form:

¹²² *Id.* § 2000e-5(f)(1).

¹²³ *Id.* § 2000e-5(b), (f)(1).

¹²⁴ 29 C.F.R. § 1601.28 (2023).

¹²⁵ 42 U.S.C. § 2000e-5(f)(1).

¹²⁶ *Mohasco Corp. v. Silver*, 447 U.S. 807, 825–26 (1979).

¹²⁷ *See* 42 U.S.C. § 2000e-5(e)(1), (f)(1).

¹²⁸ *See* discussion *infra* Sections 1.C.2.b–c.

| | Charge Filing Deadline | Period of EEOC Exclusive Jurisdiction | Court Filing Deadline | Total Days |
|----------------------------------|---|---|---|--|
| Deferral Jurisdictions | Within 300 days from challenged employment practice | At least 180 days from the date the charge is filed | Within 90 days from the right-to-sue letter | 570 days from the date of the challenged employment practice |
| Nondeferral Jurisdictions | Within 180 days from challenged employment practice | At least 180 days from the date the charge is filed | Within 90 days from the right-to-sue letter | 450 days from the date of the challenged employment practice |

Assuming the plaintiff-employee: (1) timely files a charge of discrimination with the EEOC, (2) allows the EEOC 180 days to investigate and make enforcement decisions, and (3) timely files a lawsuit in court within ninety days from receiving a right-to-sue letter from the EEOC, the plaintiff-employee's Title VII claim is timely. While timely filing of a charge of discrimination is mandatory, failure to properly exhaust does not strip the federal courts of subject matter jurisdiction over the claim.¹²⁹ Instead, it is an affirmative defense that the defendant-employer may raise as a bar to the lawsuit.¹³⁰ Thus, although it is not jurisdictional, "plaintiffs [have] scant incentive to skirt" the exhaustion requirement.¹³¹ However, a defendant-employer's failure to raise that the lawsuit is untimely or premature may result in the waiver of this affirmative defense.¹³²

2. Limitations Period for Arbitration

The Federal Arbitration Act ("FAA") governs agreements to arbitrate.¹³³ Agreements to arbitrate are written contracts in which the

¹²⁹ See *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1851–52 (2019).

¹³⁰ See *id.*

¹³¹ *Id.* at 1851.

¹³² See *id.* at 1851–52.

¹³³ See 9 U.S.C. §§ 1–16.

parties agree to resolve certain legal disputes outside of court.¹³⁴ However, arbitration should affect only the choice of forum, not substantive rights.¹³⁵ Although sometimes criticized by scholars as bad for workers,¹³⁶ the Supreme Court permits arbitration of employment civil rights claims.¹³⁷

The Supreme Court has not addressed the statute of limitations for Title VII claims subject to mandatory arbitration.¹³⁸ Indeed, there is a question of whether administrative exhaustion of Title VII claims is required to arbitrate. Unlike lawsuits filed in court, Title VII does not expressly state that arbitration requires a right-to-sue letter from the EEOC evidencing that the plaintiff-employees satisfactorily completed administrative exhaustion of their Title VII claims. The enforcement provisions of Title VII state that “within ninety days after the giving of such notice [of a right-to-sue] a *civil action* may be brought against the respondent named in the charge.”¹³⁹ While “civil action” is not defined in Title VII, the enforcement provisions refer to “the court” within that same subsection, supporting the conclusion that “civil action” refers to a lawsuit in court.¹⁴⁰ Nowhere in the enforcement provisions of Title VII is any

¹³⁴ See Noor-ul-ain S. Hasan, “Defects, Political and Social”: *Abrogating the Supreme Court’s Federal General Common Law of Arbitration*, 61 U. LOUISVILLE L. REV. 513, 524 (2023) (“Arbitration is an alternative dispute resolution mechanism to civil litigation.”); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630 (1985) (“[A]n agreement to arbitrate before a specified tribunal [as], in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.” (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974))).

¹³⁵ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (“[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628)).

¹³⁶ See, e.g., Ryan H. Nelson, *An Employment Discrimination Class Action by Any Other Name*, 91 FORDHAM L. REV. 1425, 1429–30 (2023) (arguing that mandatory arbitration restricts access to justice for workers); Robert J. Landry, III & Benjamin Hardy, *Mandatory Pre-Employment Arbitration Agreements: The Scattering, Smoothing and Covering of Employee Rights*, 19 U. FLA. J.L. & PUB. POL’Y 479, 484 (2008). See generally Mark L. Adams, *Compulsory Arbitration of Discrimination Claims and the Civil Rights Act of 1991: Encouraged or Proscribed?*, 44 WAYNE L. REV. 1619, 1637–56 (1999) (arguing that Congress intended that Title VII plaintiffs should have the right to bring a claim directly in federal court and not be forced to submit to compulsory arbitration).

¹³⁷ See, e.g., *Gilmer*, 500 U.S. at 26–27 (enforcing private arbitration agreement for age discrimination claims under the ADEA).

¹³⁸ The Supreme Court has not addressed whether administrative exhaustion is a required prerequisite for arbitration, or how the lack of this requirement may affect the statute of limitations. See *id.* at 28–29 (finding that a victim of discrimination may file a charge with the EEOC despite being subject to an arbitration agreement, but also noting that “the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration”).

¹³⁹ Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) (emphasis added).

¹⁴⁰ *Id.* Consider the following statutory language:

alternative dispute resolution mentioned, except as tools the EEOC may use to attempt to resolve the dispute through cooperation during the administrative process.¹⁴¹

Few courts have had occasion to consider whether administrative exhaustion is required to file a Title VII case in arbitration. In *Virk v. Maple-Gate Anesthesiologists, P.C.*,¹⁴² the Court of Appeals for the Second Circuit took up the issue in deciding whether a motion to compel arbitration was properly granted.¹⁴³ There, the plaintiff-employee argued that the arbitration agreement he signed was unenforceable because administrative exhaustion of his Title VII and ADA claims would take longer than the six-month limitations period provided in his arbitration agreement.¹⁴⁴ The court first noted that neither Title VII nor the ADA's enforcement provisions' "terms[] require exhaustion before engaging in private arbitration."¹⁴⁵ Additionally, the court noted that

even if [administrative exhaustion] would otherwise apply to an arbitration, . . . "an arbitration provision that requires an employment discrimination claim to be arbitrated before statutory exhaustion procedures could possibly be completed is easily construed as reflecting the parties' agreement to waive such requirement, as well as any defense based on that requirement."¹⁴⁶

Finally, the court held that it was appropriate for the arbitrator, not the court, to decide issues related to whether: (1) Virk was required to administratively exhaust his federal employment discrimination claims;

[W]ithin ninety days after the giving of such notice a *civil action* may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as *the court* may deem just, *the court* may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, *the court* may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Id. (emphasis added). *But see* *Bradley v. Fountain Bleu Health & Rehab. Ctr., Inc.*, No. 19-cv-12396, 2022 WL 856159, at *10–11 (E.D. Mich. Mar. 22, 2022) (deciding this was not the only "permissible" interpretation of the statute).

¹⁴¹ See 42 U.S.C. § 2000e-5(b).

¹⁴² 657 F. App'x 19 (2d Cir. 2016) (summary order).

¹⁴³ *Id.* at 21.

¹⁴⁴ *Id.* at 22–23.

¹⁴⁵ *Id.* at 23.

¹⁴⁶ *Id.* (quoting *Virk v. Maple-Gate Anesthesiologists, P.C.*, 80 F. Supp. 3d 469, 480 (W.D.N.Y. 2015)).

(2) the arbitration agreement should be interpreted as waiving the administrative exhaustion requirement; (3) Virk commenced arbitration by filing a charge of discrimination at the EEOC; and (4) the arbitration agreement's six-month statute of limitations was enforceable as applied to Virk's federal employment discrimination claims.¹⁴⁷ Thus, the Court of Appeals for the Second Circuit effectively punted the issue to an arbitrator for decision.¹⁴⁸

It appears that "no authority exists squarely addressing and deciding whether Title VII's exhaustion requirement applies to an arbitration clause that does not explicitly or implicitly require exhaustion."¹⁴⁹ However, without deciding whether exhaustion was mandatory for arbitration of Title VII claims, some courts have approved arbitrators' decisions applying the same three-part statute of limitations to arbitration as would be applied to a lawsuit in court, including administrative exhaustion.¹⁵⁰ In other instances, however, courts have approved arbitrator decisions deciding that administrative exhaustion was not required to arbitrate a Title VII claim.¹⁵¹ Unfortunately, these decisions only create more uncertainty and lack of uniformity for Title VII enforcement.

¹⁴⁷ *Id.*

¹⁴⁸ *Virk*, 657 F. App'x at *23–34. Similarly, when it comes to shortened limitations period provisions within arbitration agreements for employment claims, after finding that the arbitration agreement is valid, courts generally decide that it is the province of the arbitrator to decide whether challenged provisions, like a shortened limitations period, are enforceable. *See, e.g.*, *Escobar-Noble v. Luxury Hotels Int'l of P.R., Inc.*, 680 F.3d 118, 125–26 (1st Cir. 2012) (concluding arbitrator should decide whether state law prohibits shortened limitations period for state antidiscrimination claims where arbitration agreement is enforceable); *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 231 (3d Cir. 1997) (finding arbitration agreement valid and that "[a]ny argument that the provisions of the Arbitration Agreement involve a waiver of substantive rights afforded by the state [antidiscrimination] statute may be presented in the arbitral forum"). Thus, once an arbitration agreement is held to be valid, courts decline to decide challenges to shortened limitations provisions. *Id.*; *see also* *Ragone v. Atl. Video*, 595 F.3d 115, 123–26 (2d Cir. 2010) (finding arbitration agreement with ninety-day shortened limitations period for Title VII and other antidiscrimination claims enforceable where defendant affirmatively waived enforcement of the shortened limitations period).

¹⁴⁹ *CACI Premier Tech., Inc. v. Faraci*, 464 F. Supp. 2d 527, 533 (E.D. Va. 2006).

¹⁵⁰ *See, e.g.*, *Bradley v. Fountain Bleu Health & Rehab. Ctr., Inc.*, No. 19-CV-12396, 2022 WL 856159, at *11–12 (E.D. Mich. Mar. 22, 2022) (denying motion to vacate on the ground that arbitrator disregarded federal law by applying Title VII's ninety-day limitations period from the date the plaintiff received a right-to-sue letter from the EEOC to an arbitration claim); *Hagan v. Katz Commc'ns, Inc.*, 200 F. Supp. 3d 435, 445–46 (S.D.N.Y. 2016) (same); *Anthony v. Affiliated Comput. Servs., Inc.*, 621 Fed. App'x 49, 51–52 (2d Cir. 2015) (same).

¹⁵¹ *See, e.g.*, *CACI*, 464 F. Supp. 2d at 533–34 (denying motion to vacate arbitrator's award on ground that plaintiff-employee failed to properly exhaust all Title VII claims at EEOC).

II. The Shortened Statute of Limitations Issue

When discussing contractual modifications to the limitations periods for Title VII, it is important to first understand the theoretical underpinning behind statutes of limitations generally. This Part discusses the justifications for statutes of limitations in American jurisprudence before analyzing the current state of court decisions examining contractually shortened limitations periods for employment discrimination claims.

A. Rationales for Statute of Limitations

Statutes of limitations are mechanisms that set forth time limitations on when a party may initiate legal proceedings. Even though limitations periods block access to courts for plaintiffs, courts have long reasoned that their use is justified to protect defendants:

Statutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.¹⁵²

Scholars who have examined the rationales for limitations periods have come to differing conclusions as to whether statutes of limitations are justified in the arena of constitutional and civil rights litigation.¹⁵³ And even when the goals of limitations periods are served, the question remains whether the “the goals themselves are less important relative to other societal values.”¹⁵⁴

While the main justification for statutes of limitations appears to be “providing fairness to the defendant,” they are also justified by promoting

¹⁵² Ord. of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348–49 (1944).

¹⁵³ Compare Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 73 (2005) (contending that applying limitations law to time-bar certain reparations claims is against public policy, including because the rationales justifying limitations periods are outmoded), and Ariel R. Mendlin, Note, *Reclaiming What’s Rightfully Mine: Removing Hurdles in Holocaust Art Restitution Claims*, 17 CHARLESTON L. REV. 183, 214 (2022) (arguing that all statutes of limitations for restitution claims of property stolen by the Nazi regime should be waived), with Weinberg, *supra* note 1, at 1763, 1769 (2009) (arguing that limitations period set forth in the Lilly Ledbetter Fair Pay Act gave “[i]nadequate [w]eight to [e]mployer [i]nterests” and “reduces employees’ incentives to seek out and discover pay discrimination”).

¹⁵⁴ Malveaux, *supra* note 152, at 74; see also Mendlin, *supra* note 152, at 199 (“In the context of Holocaust restitution claims specifically, the disadvantages of statutes of limitation outweigh the benefits.”).

efficiency in the legal system.¹⁵⁵ Fairness to the defendant can be described as “(1) providing repose for the defendant, (2) promoting accuracy in fact finding, and (3) curtailing plaintiff misconduct.”¹⁵⁶ The justification for repose is simply that the defendant, whether culpable or not, should have the peace of mind of knowing that they may not be held accountable for conduct after sufficient time has elapsed.¹⁵⁷ Additionally, statutes of limitations derive from the idea that claims brought earlier have the benefit of more accurate witness memories and less likelihood that evidence will be compromised.¹⁵⁸ This is thought to curtail plaintiff misconduct by ensuring that claims are based on evidence that can be verified and that a frivolous claim can be proven as such.¹⁵⁹ In turn, curtailing plaintiff misconduct and garnering higher quality evidence is thought to promote efficiency in the legal system by reducing dockets, lowering litigation costs related to the discovery and admissibility of evidence, and requiring less judicial intervention and decision making.¹⁶⁰

Putting policy arguments to the contrary aside, if these rationales are sufficient to justify truncating the filing of nonfrivolous claims, it seems that enforcing contracts shortening the limitations period unfairly tips the balance in favor of defendants. This is especially true for Title VII claims, which, as discussed below, already have a short initial filing period which puts the defendant on notice early and compels the preservation of evidence. Indeed, due to Title VII’s administrative process, defendants will in all cases have notice of claims in less than one year.

B. *Contracts Shortening the Statute of Limitations*

The Supreme Court has long held that parties may, with some limitations, agree in a contract to change the statute of limitations for some claims.¹⁶¹ The framework lower courts use for determining whether

¹⁵⁵ Malveaux, *supra* note 152, at 74–75; *see also* David Crump, *Statutes of Limitations: The Underlying Policies*, 54 U. LOUISVILLE L. REV. 437, 438–44 (2016) (noting the importance of memory and availability of evidence in the case). Additionally, statutes of limitations are sometimes justified as “ensuring institutional legitimacy.” Malveaux, *supra* note 152, at 81–82.

¹⁵⁶ Malveaux, *supra* note 152, at 75 (footnotes omitted). Plaintiff misconduct is the idea that a plaintiff may unfairly wait until a defendant loses evidence and memories fade to bring a claim. *Id.* at 76.

¹⁵⁷ *Id.* at 75–76.

¹⁵⁸ *Id.* at 76–77.

¹⁵⁹ *Id.* at 77–78.

¹⁶⁰ *Id.* at 79–81.

¹⁶¹ *See* *Ord. of United Com. Travelers of Am. v. Wolfe*, 331 U.S. 586, 608 (1947); *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 386 (1868) (upholding validity of contractual limitations period in insurance policy); *Mo., Kan. & Tex. Ry. Co. v. Harriman Bros.*, 227 U.S. 657, 672–73 (1913) (“The policy of statutes of limitations is to encourage promptness in the bringing of actions. . . . [T]here is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short.”).

a contract altering the limitations period is valid, including employment discrimination and civil rights claims, comes from the Supreme Court's 1947 decision in *Order of United Commercial Travelers of America v. Wolfe*¹⁶²—despite the fact that *Wolfe* was an insurance benefits claim sitting in diversity.¹⁶³ Thus, while it seems clear that the *Wolfe* analysis framework applies to insurance agreements and perhaps even contracts for other claims sitting in diversity, there is nothing in the Supreme Court's decision which requires or even suggests that the *Wolfe* analysis should be applied to federal employment civil rights claims. Despite this, lower courts continue to apply the *Wolfe* analysis to all types of claims that involve contracts shortening the limitations period.

1. *Wolfe* Analysis

In *Order of United Commercial Travelers of America v. Wolfe*, the Supreme Court examined whether South Dakota courts were required by the Full Faith and Credit Clause to apply Ohio law in interpreting the enforceability of an insurance certificate issued by a fraternal benefit society organized by the state of Ohio.¹⁶⁴ There, Edward C. Wolfe, an Ohio citizen, sued the Order of United Commercial Travelers, an Ohio corporation, in a state court in South Dakota to recover benefits for the death of an insured society member who had been a citizen of South Dakota during his membership in the society.¹⁶⁵ According to the agreement giving rise to the claim, actions for benefits had to be brought no later than six months after the society's denial of the benefits.¹⁶⁶ Under Ohio law, the statute of limitations in the agreement was valid and Wolfe's claim was untimely.¹⁶⁷ However, the claim was timely under South Dakota's general limitations period for contract claims, which Wolfe argued was applicable.¹⁶⁸

In deciding this issue, the South Dakota court declined to enforce the society's limitation period and instead followed South Dakota law to allow the claim to proceed.¹⁶⁹ The society appealed and argued that the Full Faith and Credit clause required the South Dakota court to enforce the contractual limitation period.¹⁷⁰ The Supreme Court agreed, stating:

¹⁶² 331 U.S. 586 (1947).

¹⁶³ *See id.* at 590–92.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 598.

¹⁶⁶ *Id.* at 588.

¹⁶⁷ *Id.* at 599.

¹⁶⁸ *Wolfe*, 331 U.S. at 600–01.

¹⁶⁹ *See id.* at 600.

¹⁷⁰ *See id.* at 592.

[I]n the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.¹⁷¹

The Court's statement has been given great significance when lower courts are tasked with determining the enforceability of provisions shortening limitations periods in contracts between parties. This is logical for cases interpreting contracts between corporate parties or insurance agreements because *Wolfe* was, at heart, an insurance benefits dispute. However, it has also been used to interpret agreements between employers and employees—even employees who signed under threat of the employer's refusal to consider them for the job should they decline.¹⁷²

This statement is often treated as though it creates a general presumption that contractual provisions shortening statutes of limitations are valid. However, as recently as 2013 in *Heimeshoff v. Hartford Life & Accident Insurance Company*,¹⁷³ the Supreme Court explicitly recognized the continued application of two exceptions set forth in *Wolfe*. As discussed below, *Wolfe* states that a contract provision shortening the statute of limitations is valid only if: (1) there is no “controlling statute to the contrary” and (2) the shorter time period is not unreasonably short.¹⁷⁴

First, the *Wolfe* analysis treats such a contract as valid only if there is no “controlling statute to the contrary.”¹⁷⁵ Indeed, the *Heimeshoff* Court “recognized that some statutes of limitations do not permit parties to choose a shorter period by contract.”¹⁷⁶ To illustrate this exception, the Court noted the continuing salience of *Louisiana & Western Railroad Co. v. Gardiner*,¹⁷⁷ a 1927 case, in which the Court held that a contractual provision shortening the statute of limitations was invalid because an applicable federal statute deemed “unlawful any limitation shorter than

¹⁷¹ *Id.* at 608.

¹⁷² See, e.g., *Taylor v. W. & So. Life Ins. Co.*, 966 F.2d 1188, 1203–06 (7th Cir. 1992) (affirming lower court's enforcement of six-month statute of limitations in employment agreement and dismissing employee's 42 U.S.C. § 1981 claims); *Johnson v. DaimlerChrysler Corp.*, No. C.A. 02–69 GMS, 2003 WL 1089394, at *3–4 (D. Del. Mar. 6, 2003) (upholding six-month statute of limitations set forth in employment agreement and dismissing plaintiff's Title VII claims); *Thurman v. DaimlerChrysler, Inc.*, 397 F.3d 352, 357–59 (6th Cir. 2004) (upholding six-month statute of limitations set forth in employment agreement and dismissing 42 U.S.C. § 1981 claims); *Erskine v. Con-Way Transp. Servs., Inc.*, No. CV 05-B-2564, 2006 WL 8437007, at *2–3 (N.D. Ala. Sept. 28, 2006) (declining to enforce six-month limitations period set forth in offer letter to dismiss plaintiff's Title VII and 42 U.S.C. § 1981 claims).

¹⁷³ 571 U.S. 99 (2013).

¹⁷⁴ *Id.* at 107 (citing *Wolfe*, 331 U.S. at 608).

¹⁷⁵ See *id.* (quoting *Wolfe*, 331 U.S. at 608).

¹⁷⁶ *Id.* (citing *Louisiana & W.R. Co. v. Gardiner*, 273 U.S. 280, 284 (1927)).

¹⁷⁷ 273 U.S. 280 (1927).

two years from the time notice is given of the disallowance of the claim.”¹⁷⁸ Thus, the Court continues to take seriously *Wolfe*’s statement that its default analysis applies only “in the absence of a controlling statute to the contrary.”¹⁷⁹

However, the Court did not further clarify whether a “statute to the contrary” must be a statute explicitly prohibiting the shortening of the limitations period of a particular category of claims, or whether a statute containing its own explicit limitations period might be, in itself, “a controlling statute to the contrary.”¹⁸⁰ Notably, the claims at issue in *Wolfe*, *Gardiner*, and *Heimeshoff* did not involve claims based upon statutes that contained their own limitations periods; instead, they involved claims to which a general statute of limitations applied.¹⁸¹ This remains an important unresolved issue, as Title VII contains its own explicit limitations period that is contrary to contractual limitations periods.¹⁸²

The Court has yet to rely upon the second exception to the *Wolfe* analysis, that “the period is unreasonably short,” to “prevent[] the limitations provision from taking effect.”¹⁸³ Again, an examination of *Heimeshoff* proves useful in determining when this exception is triggered. Although the parties in *Heimeshoff* did not argue that the three-year contractual limitations period was unreasonably short “on its face,” Justice Clarence Thomas, writing for the majority, examined whether the contractual limitations period was unreasonable “as applied.”¹⁸⁴ This case involved Wal-Mart Store employee Heimeshoff’s claim for long-term disability benefits based on an employee benefit plan covered by the Employee Retirement Income Security Act of 1974 (“ERISA”).¹⁸⁵ The plan covering the long-term disability benefit policy stated that any lawsuit seeking to recover benefits must be filed within three years after “proof of loss” was due.¹⁸⁶ Petitioner Heimeshoff filed a claim for long-term disability benefits, but was denied.¹⁸⁷ Heimeshoff challenged this denial, exhausting the mandatory administrative review process under ERISA.¹⁸⁸

¹⁷⁸ *Id.* at 284.

¹⁷⁹ *Wolfe*, 331 U.S. at 608.

¹⁸⁰ *See id.*

¹⁸¹ *See, e.g., Heimeshoff*, 571 U.S. at 102 (“ERISA does not, however, specify a statute of limitations for filing suit under § 502(a)(1)(B).”).

¹⁸² This may also raise questions about whether Title VII preempts state laws that would enforce such contractual limitations periods. While such an analysis is outside the scope of this Article, the author intends to explore Title VII preemption in a later work.

¹⁸³ *Id.* at 109 (citing *Wolfe*, 331 U.S. at 608).

¹⁸⁴ *Id.* at 109–10.

¹⁸⁵ *Id.* at 102.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 103.

¹⁸⁸ *Heimeshoff*, 571 U.S. at 103.

At the end of this process, she received a final denial of her claim.¹⁸⁹ Almost three years after that final denial, but more than three years after proof of loss was due, Heimeshoff filed a claim for judicial review pursuant to ERISA § 502(a)(1)(B) against both Wal-Mart and Hartford, the administrator of Wal-Mart's long-term disability plan.¹⁹⁰ Hartford and Wal-Mart moved to dismiss on the ground that the claim was untimely under the contractual limitations period set forth in the plan documents.¹⁹¹

In its analysis, the Court first noted there was no “controlling statute to the contrary” that applied to the ERISA claim.¹⁹² In fact, ERISA does not contain its own statute of limitations. Instead, the state law general limitations period that applied to contracts would apply if the contractual limitations period was invalid.¹⁹³

The Court then looked to the second exception—whether the contractual limitations period was unreasonably short. Importantly, the Court discussed that the ERISA claim at issue required an administrative exhaustion of an internal review process before the plaintiff could file in court to seek judicial review of the final denial.¹⁹⁴ However, the provision prohibited legal action “3 years after the time written proof of loss is required to be furnished according to the terms of the policy.”¹⁹⁵ Thus, the clock started to run on the limitations period under the plan documents not when the cause of action accrued, but earlier during the administrative process. Although the plan set out that this period began before the cause of action accrued, the Court deemed this permissible because, even after the plan's administrative review process, the beneficiary would have at least a year to file suit.¹⁹⁶ Accordingly, the Court gave effect to the plan's limitations provision.¹⁹⁷

The Court characterized the three-year period as a “common contractual limitations provision.”¹⁹⁸ Notably, it found that the three-year period was reasonable even though the administrative review process in *Heimeshoff* consumed nearly two years of the three and left the plan participant with only one year in which to file suit.¹⁹⁹ The Court reasoned,

Heimeshoff does not dispute that a hypothetical 1-year limitations period commencing at the conclusion of internal review would be reasonable. . . . We cannot fault a limitations

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *See id.* at 104–06.

¹⁹³ *See id.* at 104.

¹⁹⁴ *Heimeshoff*, 571 U.S. at 102.

¹⁹⁵ *Id.* at 103.

¹⁹⁶ *See id.* at 109–10.

¹⁹⁷ *Id.* at 110.

¹⁹⁸ *Id.*

¹⁹⁹ *See id.* at 109–10.

provision that would leave the same amount of time in a case with an unusually long internal review process while providing for a significantly longer period in most cases.²⁰⁰

The Court added, “Heimeshoff, drawing on a study by the American Council of Life Insurers of recent § 502(a)(1)(B) cases where timeliness was at issue, states that exhaustion can take 15 to 16 months in a typical case. . . . In our view, that still leaves ample time for filing suit.”²⁰¹

Therefore, under *Heimeshoff*, whether the contractually agreed upon period is unreasonably short requires at least a consideration of the practical realities: here, the timing of any administrative exhaustion requirement embedded in the shortened period.

2. State Law Contract Analysis

Finally, in addition to the exceptions supporting the *Wolfe* analysis that statutes of limitations can be validly shortened by contract, there is the requirement that the contract be otherwise valid. Thus, there remain other bases to invalidate contracts shortening limitations periods for employment claims, namely state law contract defenses. Most commonly for the purposes of this Article, these defenses include arguments that the agreements are against public policy or unconscionable.²⁰² However, as might be expected when courts are applying contract law of different states, outcomes and analyses are inconsistent.²⁰³ Some courts have held

²⁰⁰ *Heimeshoff*, 571 U.S. at 109.

²⁰¹ *Id.* at 109 n.4.

²⁰² See, e.g., *Zaborowski v. MHN Gov't Servs., Inc.*, 601 F. App'x 461, 463 (9th Cir. 2014) (holding a contract's sixth-month limitations period substantively unconscionable); *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1077–78 (9th Cir. 2007) (holding a one-year limitation period substantively unconscionable); *Stang v. Paycor, Inc.*, 582 F. Supp. 3d 563, 567 (S.D. Ohio 2022) (holding a provision shortening statute of limitations for claims brought under an Ohio wage-and-hour law unreasonable and against public policy); *De Leon v. Pinnacle Prop. Mgmt. Servs., LLC*, 72 Cal. App. 5th 476, 486 (2021) (holding a shortened statute of limitation period for statutory wage-and-hour claims unconscionable); *Ali v. Daylight Transp., LLC.*, 59 Cal. App. 5th 462, 478 (2020) (holding an arbitration provision shortening the statute of limitations to bring wage claims substantively unconscionable); *Baxter v. Genworth N. Am. Corp.*, 16 Cal. App. 5th 713, 731 (2017) (holding a shortened limitations period unreasonable); *Pfeifer v. Fed. Express Corp.*, 304 P.3d 1226, 1234 (Kan. 2013) (holding a contractual limitation period shortening the time to bring a retaliatory discharge claim is against public policy); *Jackson v. S.A.W. Ent. Ltd.*, 629 F. Supp. 2d 1018, 1029 (N.D. Cal. 2009) (holding a shortened statute of limitations unconscionable); *Martinez v. Master Prot. Corp.*, 118 Cal. App. 4th 107, 117–18 (2004) (“The shortened limitations period . . . is unconscionable and insufficient to protect its employees’ right to vindicate their statutory rights.”); *Durruthy v. Charter Commc'ns, LLC*, No. 20-CV-1374, 2020 WL 6871048, at *7–9 (S.D. Cal. Nov. 23, 2020) (holding a provision shortening the time to bring an employment discrimination claim substantively unconscionable); *Hermosillo v. Davey Tree Surgery Co.*, No. 18-CV-00393, 2018 WL 3417505, at *20 (N.D. Cal. July 13, 2018) (holding a six-month statute of limitations substantively unconscionable).

²⁰³ Compare cases cited *supra* note 202, with *Oswald v. Bae Indus., Inc.*, 483 F. App'x. 30, 33–34 (6th Cir. 2012) (holding a six-month contractual limitations period reasonable), and *Soltani v. W. & S.*

that such agreements are enforceable, irrespective of employee challenges.²⁰⁴

Uncertainty with respect to outcome has consequences of its own. Practitioners tend to accept employment discrimination cases on a contingency fee basis.²⁰⁵ This means lawyers do not get paid for their work unless they recover for the employee. As employment discrimination claims are already famously difficult to win, this additional hurdle has magnified the difficulty that employees with otherwise valid or meritorious claims might face in obtaining counsel.

C. *State of the Law for Contracts Shortening Limitations Period for Title VII Claims*

Lower courts have applied differing analyses when considering contracts shortening the statute of limitations for Title VII and other employment civil rights claims that require exhaustion at the EEOC. These mixed results highlight the larger consequence of these types of agreements for employees and practitioners: uncertainty and lack of uniformity.

Life Ins. Co., 258 F.3d 1038, 1044 (9th Cir. 2001) (“[T]he six-month contractual limitation provision is not substantively unconscionable under California law.”), and *Taylor v. W. & S. Life Ins. Co.*, 966 F.2d 1188, 1205 (7th Cir. 1992) (holding a six-month limitations provision reasonable and not contrary to public policy), and *Myers v. W.-S. Life Ins. Co.*, 849 F.2d 259, 261 (6th Cir. 1988) (finding a provision shortening limitations period to six months reasonable), and *Morgan v. Fed. Express Corp.*, 114 F. Supp. 3d 434, 444 (S.D. Tex. 2015) (holding a six-month contractual limitations period reasonable for 42 U.S.C. § 1981 claims), and *Dunn v. Gordon Food Servs., Inc.*, 780 F. Supp. 2d 570, 576 (W.D. Ky. 2011) (holding one-year contractual limitations period reasonable), and *Badgett v. Fed. Express Corp.*, 378 F. Supp. 2d 613, 626 (M.D.N.C. 2005) (holding a provision shortening the limitations period to six months reasonable), and *Hicks v. EPI Printers, Inc.*, 702 N.W.2d 883, 890 (Mich. Ct. App. 2005) (holding a one-year period of limitations for plaintiff’s sexual harassment claim is reasonable), and *Clark v. DaimlerChrysler Corp.*, 706 N.W.2d 471, 475 (Mich. Ct. App. 2005) (holding a six-month limitations period as not procedurally or substantively unconscionable), and *Wright v. DaimlerChrysler Corp.*, 220 F. Supp. 2d 832, 839 (E.D. Mich. 2002) (holding a provision shortening limitations period to six months reasonable), and *Timko v. Oakwood Custom Coating, Inc.*, 625 N.W.2d 101, 105 (Mich. Ct. App. 2001) (holding a six-month limitations period reasonable), and *Rayford v. Am. House Roseville I, LLC*, No. 355232, 2021 WL 5984155, at *4 (Mich. Ct. App. Dec. 16, 2021) (holding an employment agreement shortening a limitations period to 180 days was not unconscionable), and *Keller v. About, Inc.*, No. 21-CV-228, 2021 WL 1783522, at *3 (S.D.N.Y. May 5, 2021) (holding a six-month contractual limitations period enforceable), and *Sams v. Common Ground*, No. 329600, 2017 WL 430233, at *4 (Mich. Ct. App. Jan. 31, 2017) (finding a one-year limitations period was not unconscionable), and *Posselius v. Springer Pub. Co.*, No. 306318, 2014 WL 1514633, at *1 (Mich. Ct. App. Apr. 17, 2014) (per curiam) (enforcing a six-month contractual limitations period).

²⁰⁴ See cases cited *supra* note 201; *Davies v. Waterstone Cap. Mgmt., L.P.*, 856 N.W.2d 711, 719 (Minn. Ct. App. 2014) (holding ninety-day limitations period in arbitration agreement reasonable).

²⁰⁵ Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs’ Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 EMORY L.J. 59, 97 (2013).

Some courts apply state law to determine whether shortened limitations periods are enforceable, without regard to the type of federal claims at issue. For example, in *Vrana v. FedEx Freight, Inc.*,²⁰⁶ the United States District Court for the Central District of Illinois held that a six-month contractual limitations period contained in the plaintiff's employment application barred her Title VII lawsuit.²⁰⁷ The court concluded that the shortened time period was "(1) knowingly and voluntarily accepted, (2) reasonable, and (3) not inconsistent with public policy" under Illinois law.²⁰⁸ Therefore, it was enforceable and barred plaintiff's Title VII claims.²⁰⁹

Similarly, in *Clymer v. Jetro Cash & Carry Enterprises, Inc.*,²¹⁰ the United States District Court for the Eastern District of Pennsylvania considered whether a one-year contractual limitations period included in an arbitration agreement was unconscionable as applied to Title VII claims.²¹¹ There, the plaintiff, Nadine Clymer, signed an arbitration agreement (both at her hire on August 18, 2008, and later during the course of her employment on May 6, 2009) that required claims for "discriminatory termination" to be filed in arbitration within one year.²¹² Clymer brought a lawsuit in federal court claiming that the shortened limitations period in the arbitration agreement rendered the arbitration agreement unconscionable.²¹³ Applying Pennsylvania law on the contract defense of unconscionability, the court analyzed whether the contract was both procedurally and substantively unconscionable.²¹⁴ The court found that the contract was a procedurally unconscionable contract of adhesion because the unequal bargaining power between Clymer and the company meant that Clymer had no meaningful choice whether or not to sign.²¹⁵ However, when analyzing substantive unconscionability, the court reached a different conclusion. Clymer argued that the shortened limitations period interfered with her ability to pursue resolution of her claims at the EEOC and to administratively exhaust her claims.²¹⁶ The court disagreed, concluding that Clymer could pursue her administrative remedies concurrently with arbitration.²¹⁷ The court did not, however,

²⁰⁶ 638 F. Supp. 3d 927 (C.D. Ill. 2022).

²⁰⁷ *Id.* at 930.

²⁰⁸ *Id.* (quoting *Taylor*, 966 F.2d at 1203–04).

²⁰⁹ *Id.*; see also *Ravenscraft v. BNP Media, Inc.*, No. 09 C 6617, 2010 WL 1541455, at *3 (N.D. Ill. Apr. 15, 2010) (enforcing a six-month contractual limitations period for Title VII claims).

²¹⁰ 334 F. Supp. 683 (E.D. Pa. 2018).

²¹¹ *Id.* at 687, 689–91.

²¹² *Id.* at 687–88.

²¹³ *Id.* at 689.

²¹⁴ *Id.* at 691.

²¹⁵ *Id.*

²¹⁶ *Clymer*, 334 F. Supp. 3d at 694.

²¹⁷ *Id.*

address the wasted resources in pursuing the same claims in different forums at the same time or the fact that resolution of the claims in either forum, including in the EEOC via mediation, settlement, or conciliation, would foreclose further remedy in the other forum.

Other courts have reached the opposite conclusion. For example, in *Harris v. FedEx Corp.*,²¹⁸ the United States District Court for the Southern District of Texas considered whether to enforce a shorter contractual limitations period to bar the plaintiff's claims of race discrimination under Title VII and 42 U.S.C. § 1981.²¹⁹ There, the plaintiff, Jennifer Harris, had signed and submitted an employment application to FedEx in 2007 which contained a provision which stated: "To the extent the law allows an employee to bring legal action against the Company, I agree to bring that complaint within the time prescribed by law or 6 months from the date of the event forming the basis of my lawsuit, whichever expires first."²²⁰ Harris worked at FedEx until she was terminated in January 2020.²²¹ She filed her lawsuit against the company in May 2021—more than a year after her termination.²²² FedEx filed a motion for summary judgment arguing that Harris was required to file all her employment related claims within the six-month contractual limitations period—including her Title VII claims.²²³ The court, however, rejected FedEx's argument on public policy grounds, stating that the shortened limitations period "cut[] against public policy and sidestep[ped] a federal administrative process designed to meet and defeat long-standing policies of bias and discrimination in the workplace."²²⁴

Similarly, in *Cole v. Convergys Customer Management Group, Inc.*,²²⁵ the United States District Court for the District of Kansas held that a six-month contractual limitations period in the plaintiff's employment application was unenforceable with respect to plaintiff's Title VII claims.²²⁶ Here, the court explained that the defendant employer "Convergys has the additional burden to show an express reference to and waiver of the time period for filing federal civil rights claims."²²⁷ Additionally, the court held that Convergys' six-month limitation "abrogate[d] Cole's rights under Title VII" by interfering with her ability exhaust administrative remedies

²¹⁸ No. 21-CV-01651, 2022 WL 4003876 (S.D. Tex. Aug. 31, 2022), *rev'd in part sub nom.* *Harris v. FedEx Corp. Servs., Inc.*, 92 F.4th 286 (5th Cir. 2024).

²¹⁹ *Id.* at *2.

²²⁰ Defendant's Memorandum of Law in Support of Its Motion for Summary Judgment at 11–12, *Harris*, 2022 WL 4003876 (No. 21-cv-01651) [hereinafter Defendant's Memorandum].

²²¹ *Harris*, 2022 WL 4003876, at *1.

²²² Defendant's Memorandum, *supra* note 220, at 11.

²²³ *Harris*, 2022 WL 4003876, at *2; Defendant's Memorandum, *supra* note 220, at 12–13.

²²⁴ *Harris*, 2022 WL 4003876, at *2.

²²⁵ No. 12-2404, 2012 WL 6047741 (D. Kan. Dec. 5, 2012).

²²⁶ *Id.* at *4.

²²⁷ *Id.* at *2.

at the EEOC.²²⁸ The court noted that the “exhaustion requirement provides the EEOC the opportunity to investigate issues while enabling the EEOC to attempt to obtain voluntary compliance on the part of employers and to promote peacemaking efforts for the benefit of both parties.”²²⁹ Because the shortened contractual limitations period interfered with the EEOC process, the court held that it was “unenforceable, unreasonable, and against public policy.”²³⁰

Moreover, some courts rely upon legislative intervention to invalidate provisions shortening the limitation period.²³¹ The *Wolfe* analysis applies only if there is no “controlling statute to the contrary.”²³² *Erskine v. Conway Transportation Services, Inc.*²³³ illustrates a lower court applying this exception with respect to a Title VII claim. In *Erskine*, the United States District Court for the Northern District of Alabama considered whether to grant summary judgment to the defendant-employer on the grounds that the plaintiff had filed outside the statute of limitations.²³⁴ The plaintiff, a former employee of defendant, brought race discrimination claims under Title VII, alleging he had been subjected to a racially hostile work environment and then terminated because of his race.²³⁵

The defendant-employer moved for the plaintiff’s claims to be dismissed on summary judgment because, as condition of the acceptance of the plaintiff’s employment, the plaintiff had signed an offer letter agreeing

“[n]ot to commence any action or suit relating to [his] employment . . . more than six (6) months after the occurrence which [was] the basis of the action or suit or more than six (6) months after [his] termination . . . which ever occur[red] first,” and “[t]o waive any statute of limitation contrary to the above.”²³⁶

It was undisputed that the plaintiff filed his claims more than six months after his termination; therefore, the defendant employer argued it was entitled to summary judgment.²³⁷ The court, however, disagreed.

The court first acknowledged that “*Wolfe* repeatedly has been cited in upholding reasonable shorter limitations periods set by employers as a condition of employment.”²³⁸ However, it held that the *Wolfe* analysis did

²²⁸ *Id.* at *4.

²²⁹ *Id.* at *3.

²³⁰ *Id.* at *4.

²³¹ See *supra* note 54 and accompanying text.

²³² See *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 107 (2013) (quoting *Ord. of United Com. Travelers of Am. v. Wolfe*, 331 U.S. 586, 608 (1947)).

²³³ No. CV 05-B-2564, 2006 WL 8437007 (N.D. Ala. Sept. 28, 2006).

²³⁴ See *id.* at *1.

²³⁵ See *id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at *3.

not apply because the Alabama legislature had enacted a statute to the contrary that invalidated the contractual provision.²³⁹ “In Alabama, [e]xcept as may be otherwise provided by the Uniform Commercial Code, any agreement or stipulation, verbal or written, whereby the time for the commencement of any action is limited to a time less than that prescribed by law for the commencement of such action is *void*.”²⁴⁰ The court held that this statute was a “controlling statute to the contrary” and fell squarely within the *Wolfe* exceptions.²⁴¹ Therefore, the provision was void and unenforceable.

Although several courts have had opportunities to consider employment civil rights cases where a contractually shortened limitations period was at issue,²⁴² only one federal appellate court, the Court of Appeals for the Sixth Circuit, has squarely addressed whether the statute of limitations for Title VII claims may be shortened by contract.²⁴³ This Article argues that the Court of Appeals for the Sixth Circuit fails to correctly analyze shortened limitations provisions when they are part of arbitration agreements.

In *Logan v. MGM Grand Detroit Casino*,²⁴⁴ the Court of Appeals for the Sixth Circuit examined whether the statute of limitations for a Title VII sex discrimination claim could be contractually shortened in an employment application.²⁴⁵ In this case, Barbrie Logan, a former cook for MGM Grand, sued the casino under Title VII.²⁴⁶ Logan had resigned from the casino in December 2014, alleging she was constructively discharged

²³⁹ See *Erskine*, 2006 WL 8437007, at *2.

²⁴⁰ *Id.* (quoting ALA. CODE. § 6-2-15 (1975)).

²⁴¹ *Id.* (quoting *Ord. of United Com. Travelers of Am. v. Wolfe*, 331 U.S. 586, 608 (1947)).

²⁴² See, e.g., *Harris v. FedEx Corp.*, No. 21-CV-01651, 2022 WL 4003876, at *2 (S.D. Tex. Aug. 31, 2022), *rev'd in part sub nom. Harris v. FedEx Corp. Services, Inc.*, 92 F.4th 286 (5th Cir. 2024) (“[T]he contractual six-month period of limitations within which ‘any’ suit might be filed against the defendant cuts against public policy and sidesteps a federal administrative process designed to meet and defeat long-standing policies of bias and discrimination in the workplace.”); *Clymer v. Jetro Cash & Carry Enters., Inc.*, 334 F. Supp. 3d 683, 695–96 (E.D. Pa. 2018) (discussing the pursuit of administrative remedies and holding a shortened limitations period enforceable with respect to Title VII claims); *Boaz v. FedEx Customer Info. Servs., Inc.*, 725 F.3d 603, 606 (6th Cir. 2013) (holding a shortened limitations period valid as to Title VII claims); *O’Phelan v. Fed. Express Corp.*, No. 03 C00014, 2005 WL 2387647, at *4 (N.D. Ill. Sept. 27, 2005) (“[A] six-month limitation on claims effectively prevents the plaintiff from having any mechanism for redress under Title VII due to administrative requirements.”); *Lewis v. Harper Hosp.*, 241 F. Supp. 2d 769, 772 (E.D. Mich. 2002) (holding a shortened limitations period not valid with respect to Title VII claims).

²⁴³ See *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 825 (6th Cir. 2019) (“This case requires us to determine, as a matter of first impression, whether the statute of limitations of Title VII of the Civil Rights Act of 1964 . . . may be contractually shortened for litigation.”).

²⁴⁴ 939 F.3d 824 (6th Cir. 2019).

²⁴⁵ *Id.* at 825–26.

²⁴⁶ *Id.*

due to sex discrimination and retaliation.²⁴⁷ She filed an EEOC charge 216 days after resigning (i.e., the date of the constructive discharge) and filed her Title VII lawsuit in federal court in February 2016, 440 days after resigning.²⁴⁸ The casino moved for summary judgment, maintaining that her employment agreement required her to bring a complaint within six months, and consequently, her suit was untimely. The district court agreed and granted summary judgment for the casino.²⁴⁹ Logan appealed.²⁵⁰

The Court of Appeals for the Sixth Circuit reversed, holding that Title VII's limitations period could not be contractually shortened because it (1) interfered with the pre-suit administrative EEOC process that was part of Title VII's enforcement scheme,²⁵¹ and (2) conflicted with Congress's uniform nationwide process for Title VII lawsuits.²⁵² Thus, Logan's claims were not foreclosed by the shortened limitations period contained in her employment application.

While it would seem that the Court of Appeals for the Sixth Circuit's opinion clarified the law, at least for the courts in the Sixth Circuit, this has not been the case. In fact, the court spent considerable time distinguishing an earlier case, *Morrison v. Circuit City Stores, Inc.*,²⁵³ determining whether a shortened limitations period provision was a basis to invalidate an arbitration agreement. In that case, the court upheld the validity of the arbitration agreement that contained the shortened statute of limitations provision.²⁵⁴ Piggybacking on this analysis, many lower courts in the Sixth Circuit have interpreted *Logan* in a very limited manner. These federal district courts distinguish *Logan* whenever a shortened limitations period is included as a provision of an arbitration agreement and continue to enforce these provisions shortening the statute of limitations for employment civil rights claims that are required to be exhausted at the EEOC.²⁵⁵ And while some district courts have acknowledged that the law is "evolving" with respect to Title VII claims,

²⁴⁷ *Id.* at 826.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Logan*, 393 F.3d at 826.

²⁵¹ *Id.* at 827–29.

²⁵² *Id.* at 831–33.

²⁵³ 317 F.3d 646 (6th Cir. 2003) (en banc).

²⁵⁴ *Id.* at 653.

²⁵⁵ See, e.g., *Brown v. Heartland Emp. Servs., LLC*, No. 19-11603, 2020 WL 2542009, at *6 (E.D. Mich. May 19, 2020) ("*Logan* provides scant evidence of the Sixth Circuit's willingness to interfere with arbitration agreements . . ."); see also *Thompson v. Fresh Prods., LLC*, 985 F.3d 509, 520–21 (6th Cir. 2021) ("Because it incorporates Title VII's self-contained limitations period, the ADA's time limitation is a substantive right that may not be waived."). Notably, *Thompson* marked the Sixth Circuit Court of Appeals's decision to extend its *Logan* reasoning to ADA and ADEA claims, and did not involve an arbitration agreement. See *id.*

they have been reluctant to examine how this evolution might affect shortened limitations periods where arbitration agreements are involved.²⁵⁶

These differing analyses result in a lack of uniformity that creates uncertainty as to whether exploited employees can enforce their civil rights. Indeed, the only way to provide uniformity for a federal claim is to use an analysis that relies on the purpose, enforcement, and rights provided by Title VII, rather than a patchwork of state contract defenses and general principles related to freedom of contract. Because much more than contract law is implicated, the key to analyzing such claims is not contract analysis, but rather a substantive-rights analysis considering the enforcement regime of Title VII. Simply put, Title VII claims are different because the statute of limitations is not a mere procedural right that can be prospectively waived in employment agreements or arbitration agreements. Instead, it includes substantive rights that afford specific remedies to the parties that cannot be bargained away.

III. Problems with Shortening Title VII's Statute of Limitations by Contract

From a policy perspective, many contracts between employers and at-will employees should be scrutinized because they lack basic fairness due to the power imbalance described in Part I of this Article. As discussed in this Part, contracts shortening statutes of limitations for Title VII claims are exploitative of employees yet are often justified by the belief that those employees with strong or nonfrivolous legal claims are more likely to file claims sooner than employees with weaker claims. This assumption is likely unfounded, and, in any case, fails to justify allowing freedom of contract to trump antidiscrimination law.

A. *Employee Exploitation*

Contracts that shorten the filing time for employment discrimination claims are based on the fiction that employees understand the legal consequences of what they are required to sign to gain or maintain employment and possess sufficient bargaining power to negotiate different terms. In other words, these contracts presume that the waiver of the statute of limitations is knowing and voluntary.

These fictions are further compounded by the reality that if an employee did not understand the legal consequences of the documents

²⁵⁶ See, e.g., *Hines v. Sherwood Food Distribs.*, No. 19-13390, 2021 WL 1144146, at *8 (E.D. Mich. Mar. 25, 2021) (declining to decide whether provision in arbitration agreement shortening statute of limitations for Title VII claim was enforceable and characterizing the law as “evolving” in the Sixth Circuit due to lack of clarity with respect to arbitration).

the employee was asked to sign, that employee is unlikely to remember the documents or have retained originals or copies to provide to potential legal counsel. Thus, unlike litigation between commercial parties, often the employer may be the only party whose counsel has reviewed a copy of these agreements *before* litigation is filed—the time that is most important for employees and their legal counsel to evaluate the strength of their case and prepare for such legal hurdles. Indeed, when legal counsel knows of these agreements prior to the running of the contractually shortened statute of limitations, it allows counsel time to determine whether to request a tolling agreement to extend the limitations period or attempt to comply with the purported shortened statute of limitations, thereby avoiding any later court battle over whether the agreement is enforceable and the case untimely.

Critically, if an employee did not retain a copy of the agreement, legal counsel and the employee might be limited in their ability to obtain a copy prior to filing a lawsuit in court and engaging in discovery. In fact, although these agreements are often contained in the personnel files of employees, there is no federal law permitting private employees to access their personnel files. Only twenty states have statutes permitting private employees to access their personnel files, and that right is often granted with limitations on the timing and type of access.²⁵⁷ Where there is no state law addressing the issue, employers are free to make their own policies with respect to whether to grant requests for employee personnel files.²⁵⁸ This leaves employees at a disadvantage when employers later attempt to use employment agreements as a defense to litigation. How can an employee (or the employee's legal counsel) file a lawsuit in time to meet a

²⁵⁷ See ALASKA STAT. ANN. § 23.10.430 (West 2007) (permitting employer to charge copying fee); CAL. LAB. CODE § 1198.5 (West 2020) (permitting inspection or copying of personnel records); COLO. REV. STAT. ANN. § 8-2-129 (West 2013); CONN. GEN. STAT. § 31-128b, 31-128h (West 2011) (permitting inspection twice per year); DEL. CODE ANN. tit. 19, § 732 (West 2006) (permitting inspection upon request of employee); 820 ILL. COMP. STAT. ANN. 40/2 (West 2019) (permitting inspection twice per calendar year); IOWA CODE § 91B.1 (2021) (permitting employer to charge copying fee); ME. STAT. tit. 26, § 631 (2007) (specifying employers may not charge employees for copies); MASS. GEN. LAWS ch. 149, § 52C (2013) (permitting access to personnel files); MICH. COMP. LAWS § 423.503 (2022) (same); MINN. STAT. § 181.961 (2018) (permitting access once per six-month period); MONT. ADMIN. R. 2.21.6615 (2009) (permitting access to personnel files); NEV. REV. STAT. § 613.075 (2014) (permitting inspection after six months of employment and within six months of termination); N.H. REV. STAT. ANN. § 275:56 (2023) (permitting access to personnel files); OR. REV. STAT. ANN. § 652.750 (West 2013) (same); 43 PA. STAT. AND CONS. STAT. § 1322 (West 2020) (same); 28 R.I. GEN. LAWS § 28-6.4-1 (2024) (permitting inspection up to three times per calendar year and allowing employer to charge copying fee); VA. CODE ANN. § 8.01-413.1 (West 2017) (permitting access to personnel file); WASH. REV. CODE ANN. § 49.12.240 (West 2022) (permitting access to personnel file at least once per year); WIS. STAT. ANN. § 103.13 (West 2018) (permitting access at least twice per calendar year).

²⁵⁸ Notably, some employment defense attorneys caution client employers from granting employee personnel file requests in the absence of law requiring it. See Reggie Gay, *Just Say 'No' to Copies*, S.C. EMP. L. LETTER (M. Lee Smith Publishers LLC, Brentwood, T.N.), Apr. 2008, at 3.

contractually shortened limitations period, if the employee does not know of or have access to a copy of the contract provision in question? Thus, employees may not know the legal consequences of what they signed, may have no copy of it, and may have no legal right to obtain a copy of it from their employer. Yet, they may find their employer or former employer arguing that the agreement bars their employment civil rights claims.

B. *Privilege to Litigate Should Not Be Impaired by Contract*

Despite these rationales, the Supreme Court has long recognized that “[s]tatutes of limitation find their justification in necessity and convenience rather than in logic.”²⁵⁹ In candid language, the Court has described limitations periods as “by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate.”²⁶⁰

How then can statutes of limitations continue to be generally accepted as a fair, though perhaps unfortunate, bar to litigation? The answer is likely embedded in this idea of “privilege to litigate”—that is, judgment about the merit of claims that are not filed promptly.²⁶¹ This implied rationale—that weak claims are the ones which are delayed, and thus undeserving of the “privilege to litigate”—appears, in this author’s view, to lack any supporting evidence. Nevertheless, according to the Supreme Court, the argument is rooted in “the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected.”²⁶² This thinking, however, is biased against those plaintiffs who would have the most difficulty bringing a lawsuit quickly because they have historically lacked economic, social, and political power.²⁶³ When discussing this in the context of the Civil Rights Act of 1964, virtually *all* plaintiffs will historically lack such power.

Moreover, in all cases, Title VII requires that the defendant be put on notice of the claim via a plaintiff’s filing of a charge of discrimination with

²⁵⁹ Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

²⁶⁰ *Id.*

²⁶¹ See Malveaux, *supra* note 152, at 80 (“[S]tatutes of limitations are used to reduce the number of undesirable claims—such as those that lack merit or curry disfavor with the legislature.”); Crump, *supra* note 154, at 444 (“Nevertheless, the reference in so many cases to the purpose of eliminating stale claims may be an indirect expression of the idea that the long-delayed filing of a suit suggests a suit lacking in merit. A ‘stale’ claim, in other words, may mean a claim that is weak.”).

²⁶² Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 390 (1868).

²⁶³ See Daniel M. Isaacs, *Rebalancing Current Limitations Periods to Reflect a Society that Values Its Members as Much as Their Money*, 44 STETSON L. REV. 43, 63–67 (2014) (arguing that Title VII filing requirements evidence unjust societal priorities).

the EEOC within 300 days from the date of the employment action giving rise to the claim—negating any defendant’s argument that Title VII claims are not promptly filed or would unfairly surprise the defendant-employer. Additionally, Title VII’s detailed administrative process affords the parties opportunity for cooperation and remedies wholly apart from any later legal process. This administrative process is integrated into the time limitations set forth in Title VII, which require much longer than the six-month limitations period often used in at-will form contracts. Specifically, as detailed above, in most cases, Title VII permits employees 300 days to file their initial charge of discrimination, at least 180 days for the EEOC to investigate and take action after receipt of the charge, and ninety days for the employee to file suit in federal court if the EEOC dismisses the charge.²⁶⁴ In total, this would guarantee an employee 570 days (on the outside) to file their Title VII claims in court, compared to the 180 days set forth in most contractual provisions.²⁶⁵

As one scholar noted:

In providing different limitations periods for different claims, legislatures value the interests of some claimholders over others by providing relatively longer periods of time for them to ask that the state enforce the claim at issue. As such, statutes of limitations are not mere procedural devices. They serve to foster or limit the ability of people to enforce their claims.²⁶⁶

While the fairness of requiring such a short filing period to enforce civil rights claims is certainly questionable when compared to other causes of action,²⁶⁷ when examining statutes of limitations in the context of contractual agreements shortening them, the rationales supporting the limitations period look even more dubious.²⁶⁸

Contracts serving to shorten the statute of limitations for Title VII claims serve only one purpose: to provide a repose windfall to the employer-defendant at the expense of employee-plaintiff’s privilege to litigate their civil rights claims. They usurp Congress’s intent and unreasonably shorten the time to file, not in a way that discourages weak claims or prompt filing, but rather in a way that unfairly benefits the party with the most power—the employer. Employers should not be permitted to exploit their superior bargaining position to contractually shorten the limitations period for individuals deciding whether to enforce their civil rights. Indeed, it is likely that even state legislatures lack the authority to

²⁶⁴ See *supra* Section I.C.2.b.

²⁶⁵ Moreover, the EEOC typically takes an average of ten months to process and investigate charges of discrimination, rather than the 180-day minimum during which it has exclusive jurisdiction. See *What You Can Expect After You File a Charge*, *supra* note 5.

²⁶⁶ Isaacs, *supra* note 263, at 63.

²⁶⁷ See *id.* at 63–64, 67–68.

²⁶⁸ See *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (“[E]xperience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.”).

shorten Title VII's limitations periods.²⁶⁹ Like the Court's decision in *Ledbetter*, contracts waiving the limitations period for Title VII "unduly restrict[] the time period in which victims of discrimination can challenge and recover" for discriminatory practices.²⁷⁰

C. Antidiscrimination Law Trumps Freedom of Contract

The bulk of scholarship discussing whether limitations periods are substantive or procedural in federal court focus on conflict-of-laws issues.²⁷¹ Typically, this scholarship analyzes statutes of limitations for state law claims brought in federal court.²⁷² Where federal claims are discussed, rarely do authors take up the issue of whether a federal statute containing its own limitations period is to be treated as substantive or procedural.²⁷³

However, despite the dearth of scholarship on this issue, case law and scholarship on the conflict of laws provide indications that Title VII's limitations period is, in fact, substantive rather than procedural. For example, the Supreme Court explained in *Davis v. Mills*²⁷⁴ that if a law contains its own internal limitations period, that limitations period may be a substantive right.²⁷⁵ Additionally, in *Bournias v. Atlantic Maritime Co.*²⁷⁶—the case considered "[t]he most definitive federal judicial statement on the classification of limitations for choice-of-law purposes"²⁷⁷—the Court of Appeals for the Second Circuit explained that limitations periods which are contained in the same statute that created

²⁶⁹ See *EEOC v. Com. Off. Prods. Co.*, 486 U.S. 107, 122–25 (1988) (FEPA charge need not be timely under state law); *Nichols v. Muskingum Coll.*, 318 F.3d 674, 679–80 (6th Cir. 2003) ("[S]tate statute of limitations" are "irrelevant . . . in determining entitlement to the 300-day filing period.").

²⁷⁰ See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5, 5 (codified at 42 U.S.C. § 2000e-5).

²⁷¹ See, e.g., Sam Walker, *Forum Shopping for Stale Claims: Statutes of Limitations and Conflict of Laws*, 23 AKRON L. REV. 19 (1989).

²⁷² See *id.* at 19.

²⁷³ See, e.g., Kimberly Jade Norwood, *Double Forum Shopping and the Extension of Ferens to Federal Claims that Borrow State Limitation Periods*, 44 EMORY L.J. 501, 507–08 (1995). Based on this author's review, there appears to be scant recent scholarship on this issue.

²⁷⁴ 194 U.S. 451 (1904).

²⁷⁵ *Id.* at 454 ("It is true . . . that the ordinary limitations of actions are treated as laws of procedure But where it has been possible to escape that distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability whenever he is sued. . . . [T]he limitation goes to the right created and accompanies the obligation everywhere. . . . [I]f the limitation . . . was directed to the newly created liability so specifically as to warrant saying that it qualified the right.").

²⁷⁶ 220 F.2d 152 (2d Cir. 1955).

²⁷⁷ Donald L. Doernberg, "The Tempest": *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*: *The Rules Enabling Act Decision That Added to the Confusion—But Should Not Have*, 44 AKRON L. REV. 1147, 1172 n.153 (2011).

the right the plaintiff seeks to enforce are more likely to be substantive in nature.²⁷⁸ “The common case [where limitations are treated as ‘substantive’] is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not.”²⁷⁹

Title VII contains its own limitations period, which was enacted at the same time as the rest of the enforcement provisions.²⁸⁰ This suggests that the statutory limitations period contained in Title VII should be treated as a substantive right. And if it is substantive rather than procedural, it may not be waived prospectively. Alternatively, even if the statute of limitations itself is not considered to be substantive, it must be treated as such because it is a series of deadlines requiring a mandatory administrative process, rather than a single filing deadline.²⁸¹ This mandatory administrative process should not merely be treated as pro forma hurdle to get to court, but as an independent forum for remedies that are not available in litigation—namely mediation, informal conferences, and conciliation that are kept confidential and cannot be used as evidence in later litigation.²⁸² Permitting a shortened limitations period interferes with the EEOC’s ability to engage in informal methods of resolution and encourages parties to rush the process rather than engage in good faith.

IV. Invalidating Contracts that Shorten the Limitations Periods for Title VII Claims

This Part proposes paths to invalidating contracts shortening Title VII’s statute of limitations, both for claims brought by individuals and by the Commission. First, it discusses a judicial approach to invalidate these contracts that does not depend on the peculiarities of individual state contract law defenses, but rather focuses on federal jurisprudence and the administrative regime of Title VII. This Part argues that the statute of limitations affords parties substantive rights and remedies during the administration process, as well as during litigation, and that neither these administrative nor litigation rights and remedies can be prospectively interfered with or waived. Second, this Part discusses a legislative proposal to amend Title VII to invalidate prospective contractual waivers of Title VII’s statute of limitations.

A. *Employees Cannot Be Required to Prospectively Waive Substantive*

²⁷⁸ *Bournias*, 220 F.2d 152, 155 (2d Cir. 1955).

²⁷⁹ *Id.* (quoting *Davis v. Mills*, 194 U.S. 451, 454 (1904)).

²⁸⁰ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5.

²⁸¹ *See Mohasco Corp. v. Silver*, 447 U.S. 807, 825–26 (1980).

²⁸² *See* 42 U.S.C. § 2000e-5(b).

Rights as a Condition of Employment

This Article proposes invalidating these contracts in light of the nature of the right at issue and the filing regime of the statute. As posited above, Title VII's statute of limitations should be considered substantive in nature, rather than procedural.²⁸³ Title VII's administrative process further bolsters this conclusion. Specifically, Title VII has a detailed administrative process which affords parties opportunities for cooperation and remedies wholly apart from any later legal process. The Supreme Court has held that "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy."²⁸⁴ Thus, waiver is not "allowed where it would thwart the legislative policy which it was designed to effectuate."²⁸⁵

In *Alexander v. Gardner-Denver Co.*,²⁸⁶ the Supreme Court discussed Congress's intent when creating the EEOC and Title VII's administrative process:

Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.²⁸⁷

According to the Supreme Court, Congress intended for individuals seeking to enforce their rights under Title VII to have an opportunity to resolve disputes during the administrative process.

Alexander examined whether an employee could prospectively waive these substantive rights under Title VII as part of a union's collective bargaining agreement.²⁸⁸ The Court wrote,

[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII. . . . Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII.²⁸⁹

There is no reason that this prohibition on prospective waivers would not apply with equal force to contracts between employers and employees. Indeed, here the prohibition on prospective waivers is *more*

²⁸³ See *supra* Section II.C.

²⁸⁴ *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945).

²⁸⁵ *Id.*

²⁸⁶ 415 U.S. 36 (1974), *abrogated in part by* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625–26 (1985).

²⁸⁷ *Id.* at 44.

²⁸⁸ See *id.* at 47–51.

²⁸⁹ *Id.* at 51.

justified than in *Alexander* because of the substantial imbalance in bargaining power between individual employees and their employers as compared to the collective bargaining power of unions. Permitting parties to enforce contracts that waive the statutory limitations period set forth in Title VII impedes resolution of disputes at the administrative level and prevents the EEOC from wielding its enforcement powers. Permitting employers to require employees to waive these rights as a condition of employment robs the parties and the EEOC of the necessary time for the EEOC to process, investigate, and attempt to resolve charges of discrimination.

Moreover, the EEOC enforces Title VII and other federal antidiscrimination laws both administratively, by investigating and resolving charges, and judicially, via litigation in court. In amending Title VII in 1972, Congress deliberately chose to ensure that the EEOC had this dual enforcement power to effectively enforce civil rights:

The purpose of the [1972] amendments, plainly enough, was to secure more effective enforcement of Title VII. . . . Congress became convinced . . . that the 'failure to grant the EEOC meaningful enforcement powers has proven to be a major flaw in the operation of Title VII.'²⁹⁰

For this reason, the 1972 amendments gave the EEOC the power to bring lawsuits in federal district courts to enforce Title VII against private employers.²⁹¹ In order to enforce the law as Congress intended, the EEOC depends on individuals filing charges so that it can investigate and conduct enforcement litigation.²⁹² Indeed, "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses."²⁹³ Contracts shortening the filing period for Title VII claims impedes the EEOC's enforcement ability by severely truncating the time for employees to file charges.

Moreover, Congress signaled that it intended for employees to have more time to file charges, not less, by extending the charge-filing periods from 90 to 180 days in nondeferral jurisdictions and from 210 to 300 days in deferral jurisdictions in the 1972 amendments.²⁹⁴ As the conference report on this provision explained:

It is intended by expanding the time period for filing charges in this subsection that aggrieved individuals, who frequently are untrained laymen and who are not always aware of

²⁹⁰ Gen. Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 325 (1980) (quoting S. REP. NO. 92-415, at 4 (1971)).

²⁹¹ *Id.*; see also Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 361-66 (1977) (summarizing a congressional debate in 1971 and 1972 that resulted in giving the EEOC direct litigation authority).

²⁹² See EEOC v. Shell Oil Co., 466 U.S. 54, 68 (1984) ("The function of a Title VII charge . . . is to place the EEOC on notice that someone (either a party claiming to be aggrieved or a Commissioner) believes that an employer has violated the title. The EEOC then undertakes an investigation into the complainant's allegations of discrimination.")

²⁹³ Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006).

²⁹⁴ 92 CONG. REC. 7167 (1972).

*the discrimination which is practiced against them, should be given a greater opportunity to prepare their charges and file their complaints. . . . [W]ide latitude should be given individuals in such cases to avoid any prejudice to their rights as a result of government inadvertence, delay or error.*²⁹⁵

Because charge-filing is required for the enforcement of Title VII, several federal courts of appeals have held that waivers of the right to file a charge are void as against federal public policy.²⁹⁶

Contractual provisions that shorten the charge-filing period lead to the same result as waivers of the right to file a charge: they effectively suppress charge filing. Thus, these contractual provisions should similarly be void. As simply put by the Supreme Court: “[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.”²⁹⁷ While employers have an interest in limiting the number of employment discrimination charges and lawsuits against them, that interest should be outweighed by the public interest in EEOC enforcement of Title VII when such agreements are applied to prospective violations of rights.²⁹⁸ “There can be little doubt that the filing of charges and participation by employees in EEOC proceedings are instrumental to the EEOC’s fulfilling its investigatory and enforcement missions.”²⁹⁹

Finally, this conclusion follows from the importance of the uniform application of policies created by Congress in enacting Title VII. Congress created a “uniform, nationwide system” to resolve discrimination claims; “[t]here is no reason to think that the national policies and integrated procedure that are central to EEOC actions are less important to private

²⁹⁵ *Id.* (emphasis added).

²⁹⁶ See, e.g., *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 456 (6th Cir. 1999) (“[A]n individual may not contract away her right to file a charge with the EEOC, as such contracts are void as against public policy.”); *Am. Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 118 n.7 (1st Cir. 1998) (explaining that contractual provisions barring employees from filing ADEA charges or participating in EEOC proceedings violate 29 U.S.C. § 626(f)(4)); *EEOC v. Bd. of Governors of State Colls. & Univs.*, 957 F.2d 424, 431 (7th Cir. 1992); *EEOC v. Cosmair, Inc., L’Oreal Hair Care Div.*, 821 F.2d 1085, 1090 (5th Cir. 1987) (“We hold that an employer and an employee cannot agree to deny to the EEOC the information it needs to advance this public interest. A waiver of the right to file a charge is void as against public policy.”). See generally *EEOC, EMPLOYER EEO RESPONSIBILITIES: THE LAW ON RECRUITMENT AND HIRING AND EEO INVESTIGATIVE PROCEDURES 2–5* (1998) (noting that there is a “strong public policy interest” that “prohibits interference with the right to file a charge with EEOC” and observing that courts “have consistently recognized that individuals possess a nonwaivable right to file charges with the EEOC”); *supra* Section III.A.

²⁹⁷ *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (examining agreement purporting to waive plaintiff’s Section 1983 claims in exchange for the dismissal of criminal charges).

²⁹⁸ See *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 744–45 (1st Cir. 1996) (explaining that since the EEOC’s enforcement activities depend on receiving charges and information from employees, “any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest”).

²⁹⁹ *EEOC v. Sundance Rehab. Corp.*, 446 F.3d 490, 499 (6th Cir. 2006).

actions under Title VII.”³⁰⁰ To conclude otherwise “would certainly ‘frustrate or interfere with the implementation of [the] national policies’ of Title VII, . . . while derailing the ‘integrated, multistep enforcement procedure.’”³⁰¹

B. *Contracts Shortening Title VII’s Limitations Period Fail the Wolfe Analysis Because They Are Unreasonably Short*

Enforcing shortened contractual limitations periods means that fewer employees will be able to timely enforce their civil rights. This directly conflicts with Congress’s stated intent in enacting the time periods in the 1972 amendments to Title VII. Congress emphasized that the “individual’s rights to redress are paramount under the provisions of Title VII.”³⁰² Contractually shortened limitation periods override Title VII’s extended charge-filing period and the ninety-day suit-filing period by making it virtually impossible to timely file in court. Furthermore, to the extent these agreements are interpreted as requiring only a charge filing in the EEOC, a 180-day contractual limitations period still unjustifiably and severely truncates the 300-day period that applies to the vast majority of employees.³⁰³ As detailed above, in most cases, Title VII permits employees 300 days to file their initial charge of discrimination, at least 180 days for the EEOC to investigate and take action after a charge is filed, and ninety days for the employee to file suit in federal court if the EEOC dismisses the charge.³⁰⁴ In total, an average employee is entitled to 570 days to file their Title VII claims in court, compared with the 180 days set forth in most contractual provisions.³⁰⁵

As the Supreme Court has observed, Title VII’s overall purposes are to eliminate employment discrimination and to provide make-whole relief to victims.³⁰⁶ The goal of ending employment discrimination in particular

³⁰⁰ Logan v. MGM Grand Detroit Casino, 939 F.3d 824, 832 (2019).

³⁰¹ *Id.* at 831–33 (quoting Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 359, 367 (1977)).

³⁰² 92 CONG. REC. 7167 (1972).

³⁰³ Further, in the five states where the EEOC charge filing deadline is 180 days, those agreements are litigated solely because the employer is attempting to truncate the entire statutory limitations regime, including the EEOC investigatory period and ninety-day filing period, rather than just the 180-day charge filing deadline. See *Erskine v. Con-way Transp. Servs., Inc.*, No. CV 05-B-2564, 2006 WL 8437007, at *1–2 (N.D. Ala. Sept. 28, 2006) (arguing that a six-month contractual limitations period required plaintiff to file his Title VII lawsuit in court within six months of the occurrence giving rise to claims).

³⁰⁴ See *supra* Section I.C.2.b.

³⁰⁵ Moreover, the EEOC typically takes an average of ten months (approximately 300 days) to process and investigate charges of discrimination, rather than the 180-day minimum during which it has exclusive jurisdiction. See *What You Can Expect After You File a Charge*, *supra* note 5.

³⁰⁶ See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975).

has the “highest priority.”³⁰⁷ To achieve these goals, Congress gave the EEOC the authority to enforce Title VII and established an “integrated, multistep enforcement procedure” that the Commission, employees, and applicants must follow.³⁰⁸

Congress empowered the EEOC to investigate alleged violations of Title VII based on charges of discrimination.³⁰⁹ Contractual limitations periods that require employees to file their Title VII claims within a period of time shorter than that set forth in Title VII interfere with the statute’s integrated enforcement scheme and, depending upon the time period at issue, may completely preclude employees and applicants from suing to enforce their rights. This fails to acknowledge Congress’s intent in providing the EEOC with broad enforcement power based upon charges filed by individuals. While Congress was unequivocal that it wanted statutory compliance to be achieved as often as possible through voluntary cooperation and informal methods of resolution like conciliation,³¹⁰ Title VII simultaneously “makes private lawsuits by aggrieved employees an important part of its means of enforcement.”³¹¹

Further, contractually shortened limitations periods unfairly punish employees for timing that is not within their control. The employee who files a charge has no control of the pace of the EEOC’s administrative process. The Supreme Court and Courts of Appeals have recognized that the EEOC sometimes takes far longer than the 180-day period of its exclusive jurisdiction to investigate charges due to its workload.³¹² Rushing this process to get to court to comply with a shortened limitations period simply does not permit the EEOC sufficient time to assist the parties in voluntary compliance or informal methods resolution. However, to balance the concerns about the EEOC’s backlog and “to make sure that the person aggrieved does not have to endure lengthy delays,” the employee has a right to obtain a right-to-sue notice after 180 days of the EEOC’s exclusive jurisdiction.³¹³ This time period of exclusive jurisdiction would run out the clock on most of these contractual provisions which provide only 180 days to file an employment related claim. Thus, even if the employee filed a charge with the EEOC on the day the alleged

³⁰⁷ See *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976).

³⁰⁸ *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977).

³⁰⁹ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(a); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 63–64 (1984).

³¹⁰ 42 U.S.C. § 2000e-5(b); see also *Occidental Life*, 432 U.S. at 367–68.

³¹¹ *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 595 (1981).

³¹² See, e.g., *Occidental Life*, 432 U.S. at 362–64 (reviewing the legislative history of the 1972 amendments to Title VII, noting discussion that the EEOC’s “burgeoning workload” caused “increasing backlogs” in investigating and resolving charges, with the result that investigating and conciliating a charge sometimes takes two to three years); *Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1276 (10th Cir. 2001) (noting the EEOC’s continuing backlog of charges).

³¹³ 92 CONG. REC. 7168 (1972).

discriminatory employment action occurred, requested a right-to-sue letter the day after the EEOC's exclusive jurisdiction expired, and filed in court the day they received the letter, the employee would still be unable to comply with the contractual limitations period. Accordingly, employees who have to comply with a shortened limitations period would rarely be able to vindicate their rights in court, with very few exceptions.³¹⁴

C. *Arbitration Agreements May Not Be Enforced to Waive Title VII Substantive Rights*

While the above analysis answers whether provisions shortening Title VII's limitations period outside of an arbitration agreement are valid, it does not directly address the issue of arbitration agreements containing such provisions. Indeed, as noted above, even the Court of Appeals for the Sixth Circuit, which recently held that contracts containing shortened statutes of limitations for Title VII claims were invalid, has not clarified or directly addressed this issue.

In fact, the Court of Appeals for the Sixth Circuit spent considerable time distinguishing its earlier caselaw involving a contractually shortened limitations period provision that was part of an arbitration agreement.³¹⁵ The case it distinguished, *Morrison v. Circuit City Stores, Inc.*, considered whether arbitration agreements were enforceable with respect to Title VII claims.³¹⁶ In that case, one of the plaintiffs, Lillian Morrison, signed an arbitration agreement with a one-year contractually shortened limitations period and agreed to waive any other limitations period.³¹⁷ Although not an issue raised by plaintiff Morrison, in a footnote the Court of Appeals for the Sixth Circuit ruled "Morrison has failed to show that the one-year limitations period in the agreement unduly burdened her or would unduly burden any other claimant wishing to assert claims arising from their employment."³¹⁸

³¹⁴ See, e.g., *Njang v. Whitestone Grp.*, 187 F. Supp. 3d 172, 180 (D.D.C. 2016) ("[M]erely by complying with the administrative exhaustion requirements of Title VII, plaintiffs are typically precluded from bringing their claims in court within six months of the challenged conduct, which means that a six-month limitations period has the practical effect of waiving employees' substantive rights under Title VII."); *Mazurkiewicz v. Clayton Homes, Inc.*, 971 F. Supp. 2d 682, 686–89 (S.D. Tex. 2013) ("[A] six-month limitations period is unenforceable against claims that require an EEOC right-to-sue letter" because it "effectively bars [an ADA plaintiff] from bringing suit"); *Fritz v. FinancialEdge Cmty. Credit Union*, 835 F. Supp. 2d 377, 382–83 (E.D. Mich. 2011) (explaining that since the EEOC has at least 180 days to investigate a charge, enforcing a six-month contractual limitation period "would have the effect of abrogating Plaintiff's ability to bring a Title VII suit").

³¹⁵ See *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 836–39 (2019).

³¹⁶ *Morrison v. Cir. City Stores, Inc.*, 317 F.3d 646, 652 (6th Cir. 2003) (en banc).

³¹⁷ See *id.* at 654, 673 n.16.

³¹⁸ *Id.* at 673 n.16.

In distinguishing this case in *Logan*, the court noted that *Morrison* did not control because it primarily involved arguments to invalidate an arbitration agreement—a situation that was not presented in *Logan*.³¹⁹ Piggybacking on this analysis, many lower courts within the Sixth Circuit have interpreted *Logan* in a very limited manner. These federal district courts distinguish *Logan* whenever an arbitration agreement is involved and continue to enforce provisions shortening the statute of limitations for employment discrimination claims.³²⁰ And while some district courts have acknowledged that the law is “evolving” with respect to Title VII claims, they have displayed reluctance to examine how this evolution might affect shortened limitations periods where arbitration agreements are involved.³²¹

This approach, however, is intellectually dishonest. Once it is determined that the statute of limitations for Title VII claims is a substantive right that cannot be prospectively waived (as in *Logan*), it necessarily follows that it cannot be prospectively waived as part of an arbitration agreement enforced under the Federal Arbitration Act either.³²²

The Supreme Court has explained that the purpose of the FAA “was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”³²³ The FAA provides that a written provision in “a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³²⁴ Employment contracts, other than those for workers engaged in transportation, are covered by the FAA.³²⁵

³¹⁹ *Logan*, 939 F.3d at 838–39.

³²⁰ See, e.g., *Brown v. Heartland Emp. Servs., LLC*, No. 19-11603, 2020 WL 2542009, at *6 (E.D. Mich. May 19, 2020) (“*Logan* provides scant evidence of the Sixth Circuit’s willingness to interfere with arbitration agreements . . .”). In *Thompson v. Fresh Products, LLC*, the Court of Appeals for the Sixth Circuit further extended its *Logan* reasoning to ADA and ADEA claims, holding that “[b]ecause it incorporates Title VII’s self-contained limitations period, the ADA’s time limitation is a substantive right that may not be waived.” 985 F.3d 509, 520–21 (6th Cir. 2021). However, neither the *Thompson* nor *Logan* cases involved arbitration agreements. See *id.* at 515; *Logan*, 939 F.3d at 826.

³²¹ See, e.g., *Hines v. Sherwood Food Distribs.*, No. 19-13390, 2021 WL 1144146, at *8 (E.D. Mich. Mar. 25, 2021) (declining to decide whether provision in arbitration agreement shortening statute of limitations for Title VII claim was enforceable).

³²² See generally Federal Arbitration Act, 9 U.S.C. §§ 1–16.

³²³ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

³²⁴ 9 U.S.C. § 2.

³²⁵ See *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

However, the Supreme Court has been clear that the FAA merely “directs courts to place arbitration agreements on *equal footing with other contracts*.”³²⁶ Thus, it follows that any provision that is unenforceable in other contracts is unenforceable in the context of an arbitration agreement. While this does not require that an arbitration agreement be wholesale invalidated (as was the plaintiff’s request in *Morrison*), it does compel the conclusion that the provision shortening the limitations period should be void.

In such cases, courts must determine whether the unenforceable provision can be severed from the arbitration agreement. Such determinations have already been applied to arbitration agreements to sever shortened limitations periods for other types of claims.³²⁷ For example, in *Clymer*, the court determined that a shortened limitations period must be severed from an arbitration agreement with respect to the plaintiff’s FMLA claims.³²⁸ Similarly, arbitration agreements containing shortened limitations periods for Title VII claims should be enforced (if otherwise valid) with the shortened limitations period severed.

D. *Contracts Shortening Statutes of Limitations for Title VII Claims Are Unenforceable Against the EEOC*

In addition to the reasons for why contracts are unenforceable for Title VII claims brought by individual employees, such contracts shortening statutes of limitations are also unenforceable for Title VII claims brought by the EEOC. As explained above, an aggrieved party may bring their own action at the expiration of the 180-day period of exclusive EEOC administrative jurisdiction if the agency has failed to resolve the charge. However, in addition to an aggrieved employee’s private right of action, the EEOC may also choose to bring its own enforcement action. While the aggrieved person may also intervene in the EEOC’s enforcement action, “the EEOC is not merely a proxy for the victims of discrimination.”³²⁹ For this reason, the EEOC’s enforcement suits are not representative actions subject to Rule 23 of the Federal Rules of Civil Procedure.³³⁰

³²⁶ EEOC v. Waffle House, Inc., 534 U.S. 279, 293 (2002) (emphasis added).

³²⁷ See, e.g., *Clymer v. Jetro Cash & Carry Enters., Inc.*, 334 F. Supp. 3d 683, 696–97 (E.D. Pa. 2018) (severing shortened limitations period from arbitration agreement for FMLA claims); see also *Gannon v. Cir. City Stores, Inc.*, 262 F.3d 677, 681 (8th Cir. 2001) (severing invalid provision limiting punitive damages from arbitration agreement); *Hochbaum ex rel. Hochbaum v. Palm Garden of Winter Haven, LLC*, 201 So. 3d 218, 223 (Fla. Dist. Ct. App. 2016) (severing unenforceable provision limiting statutory attorney’s fees from arbitration agreement).

³²⁸ *Clymer*, 334 F. Supp. 3d at 696–97.

³²⁹ See *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 326 (1980).

³³⁰ *Id.*

Although the EEOC can secure specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimination victims, the agency is guided by “the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.” 118 Cong. Rec. 4941 (1972). When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.³³¹

Thus, even when an employee has entered into an otherwise-valid contract with an employer settling and releasing Title VII claims, the EEOC is not barred from bringing its own enforcement action. In part, this is due to two reasons. First, the EEOC can seek injunctive relief that can benefit the general public, rather than just the individual employee.³³² As these remedies are not victim specific, recovery by the individual employee does not bar the EEOC’s enforcement to enjoin the discriminatory behavior. Indeed, courts have acknowledged the “EEOC’s unique role in vindicating the public interest makes this type of suit for injunctive relief acceptable, even where the employee has entered into a settlement with the employer.”³³³

Second, the EEOC is not bound by the employer-employee contract. In *EEOC v. Waffle House, Inc.*,³³⁴ the Supreme Court examined whether an arbitration agreement between the employer and employee could “bar[] the [EEOC] from pursuing victim-specific judicial relief” on behalf of the employee.³³⁵ In *Waffle House*, as a condition of employment, employees

³³¹ *Id.*

³³² See *EEOC v. Novartis Pharms. Corp.*, No. 05cv0404, 2006 WL 2290410, at *3–4 (W.D. Pa. Aug. 8, 2006). However, the EEOC may not pursue victim specific relief, including money damages, where the employee has entered into a binding settlement agreement. See *id.* at *4 (“[B]ecause Brandstatter’s claim for damages has been completely resolved, it is necessary to hold that that part of the EEOC’s claim which seeks damages for Brandstatter as an individual employee (i.e., victim-specific relief) is barred.”). This is based upon the reasoning that plaintiffs should not receive a windfall of double recovery.

³³³ *EEOC v. Bay Ridge Toyota, Inc.*, 327 F. Supp. 2d 167, 173–74 (E.D.N.Y. 2004) (holding employee-employer settlement agreement did not bar EEOC enforcement action); see also *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 303 (2d Cir. 1998) (holding that the EEOC may seek injunctive relief in federal court for employees even when those employees have entered into binding arbitration agreements), *abrogated by* *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1010 (6th Cir. 1975) (noting that an employee’s acceptance of arbitration award and settlement does not “preclude[] EEOC’s right to bring an action in the public interest to eliminate discriminatory practices”); *EEOC v. United Parcel Serv.*, 860 F.2d 372, 375 (10th Cir. 1988) (noting that a plaintiff’s settlement of case with employer does not moot EEOC action because EEOC intends to “vindicate the public interest in preventing employment discrimination”); *EEOC v. Am. Express Co.*, No. 76 Civ. 365 (GLG), 1977 WL 804, at *2 (S.D.N.Y. Jan. 10, 1977) (“While the settlement between [employee] and [defendant] would preclude any further recovery on his behalf by [EEOC], it does not bar [an EEOC] suit based upon the [employee’s] discrimination charge.”).

³³⁴ 534 U.S. 279 (2002).

³³⁵ *Id.* at 282.

were required to sign a mandatory arbitration agreement.³³⁶ Plaintiff Eric Baker signed the arbitration agreement and began working.³³⁷ After having a medical emergency at work, Baker was terminated and filed a timely charge of discrimination with the EEOC, but failed to initiate arbitration proceedings.³³⁸ The EEOC was unable to resolve the claim in the administrative process and filed an enforcement action in federal court.³³⁹ Baker was not a named party in the EEOC's case, but the complaint requested both injunctive relief and victim-specific relief on Baker's behalf in the form of backpay, reinstatement, and compensatory damages, as well as award of punitive damages.³⁴⁰

In response to the EEOC's lawsuit, Waffle House petitioned the trial court to compel arbitration, or dismiss the case pursuant to the FAA and the arbitration agreement Baker had signed.³⁴¹ On appeal, the Supreme Court considered whether an arbitration agreement between Baker and Waffle House had any effect on the EEOC's power to bring an enforcement action in the public interest and on behalf of Baker.³⁴²

The Court noted that once the EEOC files an enforcement claim, the aggrieved employee has no independent private right of action.³⁴³ Instead, the individual may only intervene in the EEOC's enforcement suit.³⁴⁴ "The statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake."³⁴⁵ Thus, the Court emphasized that the EEOC does not stand in the shoes of the aggrieved employee and is not a party to the contract. Additionally, the Court emphasized that "[t]he FAA directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.'"³⁴⁶ "Here there is no ambiguity. No one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims. It goes without saying that a contract cannot bind a nonparty."³⁴⁷ For these reasons, the Court

³³⁶ *Id.* at 282–83.

³³⁷ *Id.*

³³⁸ *Id.* at 283.

³³⁹ *Id.*

³⁴⁰ *Waffle House*, 534 U.S. at 283–84.

³⁴¹ *Id.* at 284. *See generally* Federal Arbitration Act, 9 U.S.C. §§ 2–3 (requiring courts to recognize and enforce arbitration agreements as valid contracts).

³⁴² *See Waffle House*, 534 U.S. at 284.

³⁴³ *Id.* at 291.

³⁴⁴ *Id.*

³⁴⁵ *Id.* "In fact, the EEOC takes the position that it may pursue a claim on the employee's behalf even after the employee has disavowed any desire to seek relief." *Id.*

³⁴⁶ *Id.* at 293 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

³⁴⁷ *Id.* at 294.

held that the arbitration agreement could not bind the nonparty EEOC and could not be used to limit the relief it sought under Title VII.

For these same reasons, contractual provisions shortening the statute of limitations for Title VII claims should not bar enforcement claims brought by the EEOC after the contractual period has expired. As in *Waffle House*, the EEOC is simply not a party to agreements between employees and employers and the contract is, therefore, not binding on the EEOC. In such cases, the waiver of the statutory limitations period would have no effect on the EEOC's enforcement action, even if a court were to find the contract was otherwise valid.

Furthermore, such shortened limitations periods should have no effect on the EEOC's power to investigate or administratively resolve such charges of discrimination. As noted earlier, the EEOC's power, in most cases, is triggered by aggrieved employees' filing charges of discrimination.³⁴⁸ Enforcing a shortened limitations period for filing a lawsuit in court (often 180 days) where most charges are subject to a limitations period of 300 days simply to file the charge and begin the administrative process, significantly truncates the time to file a charge of discrimination such that the EEOC is likely to receive far fewer charges. Moreover, this consequence is further compounded by a lengthy period during which the EEOC has exclusive jurisdiction (180 days) after the charge is filed and the significant time period the EEOC needs to investigate charges. Thus, even in nondeferral jurisdictions which permit 180 days to file at the EEOC, where contracts that shortened the limitations period are interpreted as requiring that the employee file in court in 180 days, this shortened timeline interferes with the EEOC process in order to beat the shortened filing deadline.

E. *A Proposal to Amend Title VII*

In addition to the incremental court-based approach discussed above, this Article proposes a simpler solution: an amendment to Title VII to invalidate these contractual limitations shortening provisions.

While not aimed at Title VII, a handful of state legislatures have passed legislation which limits contractual shortening of limitations periods.³⁴⁹ Adding unambiguous language to Title VII's enforcement provision would provide a nationwide, uniform cure to this problem moving forward. For instance, language should be added to 42 U.S.C. § 2000e, Title VII's enforcement provision which sets out the EEOC's powers and limitations period for Title VII, stating: "For purposes of sections (e) & (f) of this provision, any contract or agreement reducing the time for filing charges or to bring a civil action is void."

³⁴⁸ See *supra* note 292 and accompanying text.

³⁴⁹ See *supra* note 54.

Moving forward, such an amendment would prevent employers from enforcing such agreements. While an amendment might seem unlikely, Congress has shown a willingness to pass amendments to the limitations period of Title VII where Congress's intent has been undermined, as it did with the Lilly Ledbetter Pay Act of 2009. However, for prior signed agreements that may be sitting in an employee's personnel file, court adjudication may be necessary to resolve the validity of these agreements. As argued above, courts have sufficient bases to declare these provisions unenforceable, and should do so.

Conclusion

It is time to reexamine contractually shortened limitations periods for Title VII claims to ensure employees, who have little choice but to accept the terms of offered employment contracts, do not sign away their substantive rights relating to employment discrimination claims. In evaluating these provisions, courts must think outside state contract law and begin to consider the substantive rights available in the EEOC's administrative process, as well as the public's interest in the EEOC's enforcement of Title VII. This substantive-rights analysis will demonstrate that all contractual provisions shortening the limitations period for Title VII claims should be invalid. Alternatively, an amendment to Title VII explicitly invalidating any contractual provisions purporting to shorten the limitations period for Title VII claims would protect the interests of the parties and the public and send a message: Civil rights are valued above predatory and unfair provisions in unbargained-for private employment contracts.