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Time's Up: Against Shortening Statutes of Limitation by Employment Contract

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TIME'S UP: AGAINST SHORTENING STATUTES OF LIMITATION BY EMPLOYMENT CONTRACT

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ABSTRACT

Employers are increasingly adding clauses to contracts with employees that purport to shorten the statutes of limitation for employees to pursue claims against their employers (SOL Clauses). SOL Clauses are being imposed on employees in various stages of the contracting process. They have turned up in job applications, offer letters, arbitration clauses, employment agreements, and employee handbooks. Where they have been enforced by the courts, the justification has been a prioritization of "freedom of contract" over any other policy concerns. This Article argues that, in the employment context, "freedom of contract" should not be prioritized over other competing concerns, which include the potential for overreaching given the inherent imbalance of bargaining power between employer and employee.

A very small minority of states have statutes that either prohibit or limit the enforceability of SOL Clauses. In states without relevant statutory authority, the courts have reached differing conclusions concerning whether to enforce SOL Clauses—sometimes with courts reaching different conclusions on the same exact clause from the same employer's standard contract.

This Article begins with an exhaustive review of how SOL Clauses have been treated by courts. At least two state Supreme Courts have held that an SOL Clause undermines the policy supporting the employee's underlying claim and, as such, is against public policy. In larger number, other courts have refused to enforce SOL Clauses as "unreasonable," often under the guise of a substantive unconscionability analysis. At the same time, other courts have held that the clauses are inherently reasonable and enforceable. The result is a current patchwork of often irreconcilable outcomes. In light of the current landscape, this Article discusses the benefits and drawbacks of each of the current approaches, and relates those approaches to well-worn discussions of rules and standards in law design.

Ultimately, this Article argues that public policy is a profitable avenue to void SOL Clauses. It does so by referencing recent scholarship that looks to the third-party harm that a contract or clause may cause. This Article argues that this lens justifies invalidating SOL Clauses, which clauses may have the effect of erecting procedural barriers that prevent

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employees from holding employers accountable on the merits, and might allow employers to continue repeated bad behavior without deterrence or redress. This is especially problematic given that SOL Clauses are presented to employees in standard form contracts. Employers are using these agreements to re-write the rules of the workplace and potentially override legislative judgments about the appropriate limitations period for an employee to pursue a claim.

CONTENTS

INTRODUCTION

EMPLOYERS are increasingly adding clauses to contracts with employees that purport to shorten the statutes of limitation for employees to pursue claims against their employers (SOL Clauses).[1] A very small minority of states have statutes that either prohibit or limit the enforceability of SOL Clauses. In states without relevant statutory authority, the courts have reached differing conclusions concerning whether to enforce SOL Clauses—sometimes with courts reaching different conclusions on the same clause from the same employer's standard contract.[2] This Article argues that, as a matter of public policy, SOL Clauses should not be enforced.

In a 2008 article, this author previously identified what appeared to be the beginning of a trend of employers using SOL Clauses in arbitration agreements to effectively shorten the limitations period for an employee to bring a claim.[3] Now, SOL Clauses are being imposed on employees in various stages of the contracting process—they have turned up in job applications, offer letters, arbitration clauses, employment agreements, and employee handbooks. Where they have been enforced by the courts, the justification has been a prioritization of "freedom of contract" over any other policy concerns.

In the employment context, however, consent is constrained at best. Does an applicant signing a job application understand that there is a clause in the application form providing that, should they be hired, their time to sue for any employment-related claims is being shortened to a matter of months? Does the applicant understand what a statute of limitations

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1. For purposes of this discussion, the term "SOL Clauses" is solely intended to refer to clauses in employment contracts that purport to shorten the limitations period to bring an employment-related claim. The term is not intended to refer to similar clauses that may appear in other types of agreements.

2. There are some repeat employers in the cases—namely, Raymour & Flanigan, Federal Express (FedEx), and DaimlerChrysler. *See, e.g.*, Rodriguez v. Raymours Furniture Co., 138 A.3d 528, 530 (N.J. 2016) (Raymour SOL Clause not enforced); Castellanos v. Raymours Furniture Co., 291 F. Supp. 3d 294, 301 (E.D.N.Y. 2018) (Raymour SOL Clause not enforced); Hunt v. Raymour & Flanigan, 963 N.Y.S.2d 722, 724 (App. Div. 2013) (Raymour SOL Clause enforced); Boaz v. FedEx Customer Info. Servs., Inc., 725 F.3d 603, 607 (6th Cir. 2013) (FedEx SOL Clause not enforced); Ray v. FedEx Corp. Servs., Inc., 668 F. Supp. 2d 1063, 1067–68 (W.D. Tenn. 2009) (FedEx SOL Clause enforced); Pfeifer v. Fed. Express Corp., 304 P.3d 1226, 1234 (Kan. 2013) (FedEx SOL Clause not enforced); Harris v. FedEx Corp., No. 4:21-cv-01651, 2022 WL 4003876, at *2 (S.D. Tex. Aug. 31, 2022) (FedEx SOL Clause not enforced); Wright v. DaimlerChrysler Corp., 220 F. Supp. 2d 832, 839 (E.D. Mich. 2002) (DaimlerChrysler SOL Clause enforced); Clark v. DaimlerChrysler Corp., 706 N.W.2d 471, 474 (Mich. Ct. App. 2005) (DaimlerChrysler SOL Clause enforced); Johnson v. DaimlerChrysler Corp., No. C.A. 02-69-GMS, 2003 WL 1089394, at *6 (D. Del. Mar. 6, 2003) (DaimlerChrysler SOL Clause enforced).

3. 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, 398–99 (2008).

is and the effect of agreeing to shorten it? What would happen if the applicant carefully read the application (an unlikely event) and understood the limits it imposed (a more unlikely event) and then objected (an even more unlikely event)? The employer probably would not offer the applicant the job.

There is a Seinfeld reference that underscores the likely lack of knowledge and understanding of an applicant filling out a form or a newly hired employee signing away a stack of standardized Human Resources (HR) paperwork:

> *Kramer:* Anyway, it's been two years. I mean, isn't there a statue of limitations on that?
> *Jerry:* Statute.
> *Kramer:* What?
> *Jerry:* Statute of limitations, it's not a statue.
> *Kramer:* No, it's statue!
> *Jerry:* Fine, it's a sculpture of limitations!
> *Kramer:* Wait a minute, just wait a minute . . . Elaine, Elaine! Now, you're smart. Is it statute or statue of limitations?
> *Elaine:* Statute.
> *Kramer:* Oh, I really think you're wrong![4]

All to say, even if there is an awareness of the SOL Clause in the application or standardized HR paperwork, it is very unlikely that the applicant or new hire understands the nature and effect of the clause.

The case law presents many compelling examples of the potential unfairness of SOL Clauses. Sergio Rodriguez's story is one such example. In August 2007, Mr. Rodriguez, recently laid off from his previous job, sought to apply for a position in New Jersey with Raymour & Flanigan, a furniture company.[5] He went to the company's local customer service center and obtained a job application.[6] Mr. Rodriguez, an Argentinian native, was not proficient in English and brought the application home.[7] A friend assisted Mr. Rodriguez in completing the application, and translated sections requiring that Mr. Rodriguez provide information.[8] The bottom of the second page contained a section titled "Applicant's Statement" and alerted the applicant: "READ CAREFULLY BEFORE SIGNING—IF YOU ARE HIRED, THE FOLLOWING BECOMES PART OF YOUR OFFICIAL EMPLOYMENT RECORD AND PERSONNEL FILE."[9] In addition to affirming that, if employed, his employment would be at will, and waiving a jury trial for certain claims, that section provided:

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4. *Seinfeld: The Cafe* (NBC television broadcast Nov. 6, 1991) (alteration in original). Thanks to my colleague Marc Rapaport for pointing me to this gem.

5. *Rodriguez*, 138 A.3d at 530.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

> I AGREE THAT ANY CLAIM OR LAWSUIT RELATING TO MY SERVICE WITH RAYMOUR & FLANIGAN 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. I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY.[10]

Mr. Rodriguez returned the signed application and was hired by the company the following month.[11]

A few years into his employment, Mr. Rodriguez was injured at work and, after surgery and rehabilitation, was able to return to work on light duty.[12] Shortly thereafter, he was terminated from employment.[13] The company claimed that his termination was part of company-wide layoffs, but Mr. Rodriguez believed that the company was discriminating against him based on his disability and retaliating against him for filing a workers' compensation claim.[14] Therefore, nearly seven months after his termination, he filed a complaint alleging employment discrimination based on an actual or perceived disability, in violation of the New Jersey discrimination statute, and retaliation for obtaining workers' compensation benefits, in violation of the New Jersey workers compensation statute.[15] The company argued that the complaint, which was filed more than six-months after the termination, was time-barred based on the clause Mr. Rodriguez signed in his application for employment.[16]

Shariecia Hamilton faced similar hurdles to pursuing claims against her employer. In 2015, when Ms. Hamilton applied for a job with Norton Healthcare, Inc. (Norton) in Kentucky, she signed a form that stated:

> I agree that any claim or lawsuit relating to my service with Norton Healthcare, Inc., or any of its subsidiaries or related entities 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. I waive any statute of limitations to the contrary. My signature certifies that I have read and understand the contents of this employment application, and that I am fully able and competent to complete it and that the statements I made herein are true.[17]

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10. *Id.* at 531 (emphasis removed).

11. *Id.*

12. *Id.* at 531–32.

13. *Id.* at 532.

14. *Id.*

15. *Id.*

16. *Id.*

17. Hamilton v. Norton Healthcare, Inc., No. 2019-CA-0885-MR, 2020 WL 5742828, at *1 (Ky. Ct. App. Sept. 25, 2020).

Below this paragraph there was a checkbox with a sentence stating, "By checking this box I acknowledge that all information submitted is true and complete."[18] The form also required Ms. Hamilton to sign and date the page. Ms. Hamilton checked the box and signed the page, as indicated on the application form.[19] She was hired and began employment as a newborn nurse for Norton.[20]

About two years into her employment with Norton, Ms. Hamilton "reported a few botched circumcisions that left the newborns with deformities."[21] After Ms. Hamilton reported the issue, Norton undertook an investigation of Ms. Hamilton "for violating policies and procedures relating to patient and employee privacy."[22] Norton then terminated Ms. Hamilton's employment.[23] The following year, Ms. Hamilton brought an action for retaliation, wrongful termination, and race discrimination.[24] Norton argued that Ms. Hamilton's claims were time-barred because the statute of limitations had been shortened by contract to six months.[25]

Mr. Rodriguez and Ms. Hamilton faced an increasingly common predicament for employees. The courts have struggled with whether—and to what extent—SOL Clauses should be enforced. With mixed success, employees have challenged the clauses as unconscionable and/or void as against public policy. Both Mr. Rodriguez and Ms. Hamilton were able to successfully convince courts not to enforce the SOL Clauses in their contracts, but many other employees have not been as lucky.

Where SOL Clauses have been enforced, the courts have allowed employers, by contract, to erect procedural barriers that, in turn, prevent employees from raising substantive claims. Indeed, in an Ohio case, an SOL Clause shortening the limitations period to six months foreclosed an employee from bringing discrimination and sexual harassment claims against her former employer.[26] The employee sought to appeal to the Ohio Supreme Court, which declined the appeal.[27] In dissenting from the decline of the appeal, Justice Michael P. Donnelly wrote:

> It is, at the least, ironic that in an era when victims of sexual harassment have assembled in a nationwide movement to say, "Time's Up," an employer could contractually escape civil liabil-

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. Fayak v. Univ. Hosps., 166 N.E.3d 1247, 1248 (Ohio 2021) (Donnelly, J., dissenting), *dismissing appeal from* 2020-Ohio-5512, 2020 WL 7062683, at *5 (Ohio Ct. App. Dec. 3, 2021) (enforcing employer's shortening of statute of limitations for employee to commence discrimination and sexual harassment claim).
27. *Id.*

> ity for alleged sexual harassment and other alleged tortious conduct by saying, "time's up" to its employee, notwithstanding that the employee met a statute of limitations that is specifically prescribed by state law.[28]

SOL Clauses fall squarely into a broader theoretical tension in contract law, with differing views on whether and when to prioritize private autonomy or, "freedom of contract," over a concern for the possibility of overreaching by a party with superior bargaining power. In commercial deals between sophisticated parties, courts have generally allowed the parties to agree to shorten the limitations period to bring a claim.[29] However, many of the courts citing the commercial cases in employment disputes are failing to appreciate the specific context and the inherent imbalance of bargaining power between employer and employee.[30] While it may be that the government should have a limited role in policing terms in corporate and commercial deals, the employment relationship requires a heightened sensitivity to the possibility of overreaching.

Moreover, there is a confluence of competing policies at play. The policies supporting the underlying causes of action, as well as the policies concerning statutory limitations periods, are competing with notions of party autonomy.[31] The outcomes of the cases, and how the courts balance the competing interests, is a direct result of how the courts frame the issue. For the courts that prioritize freedom of contract, they essentially frame the question as whether the *parties* can supplant the legislative judgment about when claims become stale with their own judgment. For the courts that recognize that notions of autonomy and consent are strained in the employment context, they essentially frame the question as whether the *employer* can supplant the legislative judgment about when claims become stale by imposing a shorter limitations period on an employee. In other words, whether a court continues the fiction of mutual assent to the specific term or, instead, recognizes that the SOL Clause is imposed on the employee, often determines whether the court will enforce the clause.

This Article begins by describing the current landscape of how SOL Clauses have been treated by state legislatures and by courts. After this discussion of largely irreconcilable outcomes, the Article discusses the benefits and drawbacks of each of the approaches and relates those approaches to well-worn discussions of rules and standards in law design. Finally, the Article argues that SOL Clauses should not be enforced based

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28. *Id.*

29. *See, e.g.*, John J. Kassner & Co. v. City of New York, 415 N.Y.S.2d, 785, 789 (1979) (engineering company brings breach of contract claims against City of New York).

30. *See infra* Section I.E.

31. And, where the shortened limitations periods are contained within an arbitration agreement, there is an added policy concern about arbitration (and maintaining consistency with the precedent enforcing and encouraging private resolution of disputes).

on public policy. It does so by referencing recent scholarship that looks to the third-party harm that a contract or clause may cause. The Article argues that this lens justifies invalidating SOL Clauses, clauses which may have the effect of erecting procedural barriers that prevent employees from holding employers accountable on the merits, and might allow employers to continue repeated bad behavior without deterrence or redress. This is especially problematic given that SOL Clauses are presented to employees in standard form contracts, by which employers are re-writing the rules of the workplace. Employers are using these agreements to potentially override legislative judgments about the appropriate limitations period for an employee to pursue a claim.

I. THE CURRENT LANDSCAPE

There are four states that, as a matter of statute, prohibit or otherwise limit the enforceability of SOL Clauses.[32] There is a growing consensus that a clause shortening the limitations period to bring a Fair Labor Standards Act (FLSA) claim is not enforceable because it undermines the remedies provided by the statute.[33] The same is true of the shortening of the

32. *See infra* Section I.A.

33. *See, e.g.*, Boaz v. FedEx Customer Info. Servs., Inc., 725 F.3d 603, 607 (6th Cir. 2013) (shortened limitations period invalid as to FLSA claims); Crespo v. Kapnisis, No. 21-cv-6963 (BMC), 2022 WL 2916033, at *5 (E.D.N.Y. July 25, 2022) (shortening limitations for FLSA to one year violates the FLSA); Jefferis v. Hallrich Inc., No. 1:18-cv-687, 2019 WL 3462590, at *6 (S.D. Ohio July 31, 2019) (concluding reduction of FLSA limitations period is not enforceable); Castellanos v. Raymours Furniture Co., 291 F. Supp. 3d 294, 301 (E.D.N.Y. 2018) (holding arbitration provisions shortening the limitations period to bring FLSA claims are unenforceable); Hackler v. R.T. Moore Co., No. 2:17-cv-262-FtM-29MRM, 2017 WL 6535856, at *4 (M.D. Fla. Dec. 21, 2017) (shortening of limitations period to bring FLSA claim unenforceable); Mazurkiewicz v. Clayton Homes, Inc., 971 F. Supp. 2d 682, 691 (S.D. Tex. 2013) (holding contractual limitations period unenforceable as to FLSA claim); Chasteen v. Rock Fin., No. 07-cv-10558, 2012 WL 8705090, at *5 (E.D. Mich. Jan. 31, 2012) (contractual limitation provision contravenes FLSA); Pruiett v. W. End Rests., LLC, No. 3:11-00747, 2011 WL 5520969, at *5 (M.D. Tenn. Nov. 14, 2011) (determining employees' substantive right to full compensation under the FLSA made contractual limitations provision unenforceable as to FLSA); McLaughlin v. Advanced Comms., Inc., No. CV 09-2311 (SJF)(ETB), 2010 WL 11626961, at *5 (E.D.N.Y. Mar. 25, 2010) (enforcing the six-month statute of limitations will effectively deprive employee of right to pursue FLSA claims); Jones v. Deja Vu, Inc., 419 F. Supp. 2d 1146, 1149 (N.D. Cal. 2005) (ruling the provision shortening the statute of limitations to six months is unconscionable, at least as it applies to employee's claims under the FLSA); Wineman v. Durkee Lakes Hunting & Fishing Club, Inc., 352 F. Supp. 2d 815, 821 (E.D. Mich. 2005) (shortened limitations period as to FLSA claims not enforceable); Bailey v. Ameriquest Mortg. Co., No. CIV. 01-545(JRTFLN), 2002 WL 100391, at *5 (D. Minn. Jan. 23, 2002) (declaring contract shortening FLSA limitations period to one year undermined remedies provided by FLSA and was therefore unenforceable), *rev'd*, 346 F.3d 821 (8th Cir. 2003).

time to bring a claim under the Family Medical Leave Act (FMLA).[34] There is, however, a difference of opinion where the underlying claims are pursuant to Title VII.[35]

Beyond those circumstances, the courts have reached differing conclusions about whether to enforce SOL Clauses. At least two state Supreme Courts (New Jersey and Kansas) have held that an SOL Clause undermines the policy supporting the employee's underlying claim and, as such, is against public policy.[36] In larger number, other courts have refused to enforce the clause as "unreasonable," often under the guise of a substantive unconscionability analysis.[37] At the same time, other courts

34. *See, e.g.*, Clymer v. Jetro Cash & Carry Enters., 334 F. Supp. 3d 683, 693–94 (E.D. Pa. 2018) (shortening limitations period not enforceable with respect to FMLA claims); Madry v. Gibraltor Nat'l Corp., No. 10-13886, 2011 WL 1565807, at *4 (E.D. Mich. Apr. 25, 2011) (stating that given strong public interest in providing employees their full panoply of rights under the FMLA, shortened limitations period is contrary to public policy); Grosso v. Fed. Express Corp., 467 F. Supp. 2d 449, 456 (E.D. Pa. 2006) (holding a six-month limitations clause in employment contract is enforceable with regard to FMLA claim); Lewis v. Harper Hosp., 241 F. Supp. 2d 769, 772–73 (E.D. Mich. 2002) (shortening limitations period not valid with respect to FMLA claims).

35. *See, e.g.*, Harris v. FedEx Corp., No. 4:21-CV-01651, 2022 WL 4003876, at *2 (S.D. Tex. Aug. 31, 2022) ("The contractual six-month period of limitation within which 'any' suit might be filed against defendant, cuts against public policy and sidesteps a federal administrative process designed to meet and defeat longstanding policies of bias and discrimination in the workplace."); *Clymer*, 334 F. Supp. 3d at 694 (shortening limitations period enforceable with respect to Title VII claims); Logan v. MGM Grand Detroit Casino, 939 F.3d 824, 839 (6th Cir. 2019) (holding a contractual provision that purports to shorten the limitation period for bringing suit under Title VII is unenforceable); *Boaz*, 725 F.3d at 606 (shortening limitations period valid as to Title VII claims); Ravenscraft v. BNP Media, Inc., No. 09 C 6617, 2010 WL 1541455, at *5 (N.D. Ill. Apr. 15, 2010) (enforcing six-month contractual limit with respect to Title VII claim); O'Phelan v. Fed. Express Corp., No. 03 C 00014, 2005 WL 2387647, at *5 (N.D. Ill. Sep. 27, 2005) (holding a six month limitation on claims effectively prevents employee from having any mechanism for redress under Title VII due to administrative requirements); *Lewis*, 241 F. Supp. 2d at 772 (shortening limitations period not valid with respect to Title VII claims).

36. *See* Rodriguez v. Raymours Furniture Co., 138 A.3d 528, 530, 542 (N.J. 2016) (holding provision shortening statute of limitations unconscionable and against public policy); Pfeifer v. Fed. Express Corp., 304 P.3d 1226, 1234 (Kan. 2013) (deciding contractual limitation period shortening time to bring retaliatory discharge claim is void as against public policy).

37. *See, e.g.*, Zaborowski v. MHN Gov't Servs., Inc., 601 F. App'x 461, 463 (9th Cir. 2014) (finding contract's sixth-month limitations period is substantively unconscionable); Davis v. O'Melveny & Myers, 485 F.3d 1066, 1077–78 (9th Cir. 2007) (holding one-year limitations period is substantively unconscionable when it forces an employee to arbitrate employment-related statutory claims); Stang v. Paycor, Inc., 582 F. Supp. 3d 563, 567 (S.D. Ohio 2022) (concluding the provision shortening statute of limitations for claims brought under Ohio wage and hour law was unreasonable and violated public policy); Durruthy v. Charter Comms., LLC, No. 20-CV-1374-W-MSB, 2020 WL 6871048, at *7 (S.D. Cal. Nov. 23, 2020) (stating the provision shortening time to bring employment discrimination claim is substantively unconscionable); Hermosillo v. Davey Tree Surgery Co., No. 18-CV-00393, 2018 WL 3417507, at *13 (N.D. Cal. July 13, 2018) (holding six-month stat-

have held that the clauses are inherently reasonable and enforceable.[38] The result is a current patchwork of often irreconcilable outcomes, which are more fully explained in this Part.

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ute of limitations is substantively unconscionable); Jackson v. S.A.W. Ent. Ltd., 629 F. Supp. 2d 1018, 1029 (N.D. Cal. 2009) (shortened statute of limitations unconscionable); MacDonald v. Olympic Sec. Servs., Inc., No. CV-07-1639-ST, 2008 WL 11513143, at *2–3 (D. Or. May 6, 2008) (finding one-year statute of limitations for all employment related claims is unconscionable); De Leon v. Pinnacle Prop. Mgmt. Servs., LLC, 287 Cal. Rptr. 3d 402, 410–11 (Ct. App. 2021) (shortening limitations periods for statutory wage and hour claims was unconscionable); Ali v. Daylight Transp., LLC., 273 Cal. Rptr. 3d 544, 557 (Ct. App. 2020) (holding arbitration provision shortening the statute of limitations to bring wage claim is substantively unconscionable); Baxter v. Genworth N. Am. Corp., 224 Cal. Rptr. 3d 556, 571–72 (Ct. App. 2017) (shortened limitations period not reasonable); Martinez v. Master Prot. Corp., 12 Cal. Rptr. 3d 663, 672 (Ct. App. 2004) (shortening limitations period provided was unconscionable and insufficient to protect its employees' right to vindicate their statutory rights); *Pfeifer*, 304 P.3d at 1234 (concluding that contractual limitations period shortening time to bring retaliatory discharge claim is void as against public policy).

38. *See, e.g.*, Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1044 (9th Cir. 2001) (holding six-month contractual limitation provision is reasonable and not substantively unconscionable under California law); Taylor v. W. & S. Life Ins. Co., 966 F.2d 1188, 1193 (7th Cir. 1992) (finding six-month limitations clause reasonable and not contrary to public policy); Myers v. W. & S. Life Ins. Co., 849 F.2d 259, 262 (6th Cir. 1988) (noting nothing inherently unreasonable about clause shortening limitations period to six months); Keller v. About, Inc., No. 21-CV-228 (JMF), 2021 WL 1783522, at *3 (S.D.N.Y. May 5, 2021) (six-month contractual limitations period enforceable); Morgan v. Fed. Express Corp., 114 F. Supp. 3d 434, 444 (S.D. Tex. 2015) (six-month contractual limitations period reasonable); Dunn v. Gordon Food Servs., Inc., 780 F. Supp. 2d 570, 576 (W.D. Ky. 2011) (one-year contractual limitations period reasonable); Oswald v. BAE Indus., Inc., 483 F. App'x. 30, 33–34 (6th Cir. 2012) (six-month contractual limitations period reasonable); Badgett v. Fed. Express Corp., 378 F. Supp. 2d 613, 623 (M.D.N.C. 2005) (concluding clause shortening limitations period to six-months reasonable); Wright v. DaimlerChrysler Corp., 220 F. Supp. 2d 832, 839 (E.D. Mich. 2002) (finding clause shortening limitations period to six-months reasonable); Pearson Dental Supplies, Inc. v. Superior Ct., 82 Cal. Rptr. 3d 154, 164–65 (Ct. App. 2008) (one-year contractual limitations period reasonable), *rev'd*, 229 P.3d 83 (Cal. 2010); Rayford v. Am. House Roseville I, LLC, No. 355232, 2021 WL 5984155, at *4 (Mich. Ct. App. Dec. 16, 2021) (ruling employment agreement shortening limitations period to 180 days was neither inherently unreasonable, nor so gross as to shock the conscious); Sams v. Common Ground, No. 329600, 2017 WL 430233, at *4 (Mich. Ct. App. Jan. 31, 2017) (one-year limitations period not unconscionable); Posselius v. Springer Publ'g Co., No. 306318, 2014 WL 1514633, at *3 (Mich. Ct. App. Apr. 17, 2014) (six-month contractual limitations period enforced); Hicks v. EPI Printers, Inc., 702 N.W.2d 883, 890 (Mich. Ct. App. 2005) (one-year period of limitations for plaintiff's sexual harassment claim is reasonable); Clark v. DaimlerChrysler Corp., 706 N.W.2d 471, 474 (Mich. Ct. App. 2005) (holding six-month limitations period not procedurally or substantively unconscionable); Timko v. Oakwood Custom Coating, Inc., 625 N.W.2d 101, 105 (Mich. Ct. App. 2001) (six-month limitations period reasonable); Davies v. Waterstone Cap. Mgmt., 856 N.W.2d 711, 719 (Minn. Ct. App. 2014) (finding ninety-day limitations period in arbitration agreement reasonable); Ortegas v. G4S Secure Sols. (USA) Inc., 65 N.Y.S.3d 693 (App. Div. 2017) (determining a six-month period to bring an employment claim is inherently reasonable); Hunt v. Raymour & Flanigan, 963 N.Y.S.2d 722 (App. Div. 2013) (six-month contractual limitations period en-

A. *Statutory Approaches*

South Carolina,[39] Florida,[40] and Texas[41] have statutes that generally and broadly disallow the shortening of a statute of limitations by contract, a prohibition which extends to all contracts, including the specific context of employment agreements.[42] Texas makes an exception for agreements relating to the sale of a business entity where the consideration is $500,000 or more.[43]

The origins of these statutes are a bit of a mystery. In Texas, where the first iteration of the statute was enacted in 1891, one theory is that the statute responded to a common practice of railway companies in their bills of lading with farmers transporting cattle. The railway companies used these standardized contracts to shorten the limitations period for farmers to sue the railways for damages to cattle during transport, sometimes to a period as short as forty days, and thereby foreclosing suit.[44] The statute effectively nullified this practice.

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forced); Fayak v. Univ. Hosps., No. 109279, 2020 WL 7062683, at *1 (Ohio Ct. App. Dec. 3, 2020) (six-month contractual limitations period reasonable).

39. S.C. CODE ANN. § 15-3-140 (2023) provides:

> 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.

40. FLA. STAT. § 95.03 (2023) provides:

> 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.

41. TEX. CIV. PRAC. & REM. CODE ANN. § 16.070 (West 2023) provides:

> (a) 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.
>
> (b) This section does not apply to a stipulation, contract, or agreement relating to the sale or purchase of a business entity if a party to the stipulation, contract, or agreement pays or receives or is obligated to pay or entitled to receive consideration under the stipulation, contract, or agreement having an aggregate value of not less than $500,000.

42. *See, e.g.*, Scott v. Guardsmark Sec., 874 F. Supp. 117, 121 (D.S.C. 1995) (holding time limitation in an employment agreement void by South Carolina statute).

43. CIV. PRAC. & REM. § 16.070(b).

44. There are a number of cases where the limitations period in the bill of lading foreclosed farmers from pursuing claims against the railroads. *See, e.g.*, Armstrong v. Galveston, H. & S.A. Ry. Co., 46 S.W. 33, 34 (Tex. 1898) (holding provision in bill of lading requiring suit to be brought within forty days); Gulf, C. & S.F. Ry. Co. v. Eddins, 26 S.W. 161, 163 (Tex. Civ. App. 1894) (finding provision in shipping contract requiring suit to be brought within forty days); St. Louis S.W. Ry. Co. v. Williams, 32 S.W. 225, 225 (Tex. Civ. App. 1895) (holding provision in ship-

In 2019, the Kentucky legislature enacted a statute that specifically addresses SOL Clauses. The statute allows an employer to require an employee or applicant for employment, as a condition of employment, to execute an agreement that "reasonably reduce[s] the period of limitations for filing a claim against the employer."[45] The provision, however, precludes a reduction of the period of limitations by more than 50%.[46] So, in effect, in employment contracts, the statute unambiguously prohibits enforcement of a clause shortening the statute of limitations if the reduction exceeds 50% of the applicable limitations period. For clauses that reduce the statute of limitations by less than 50%, the shortened limitations period must be reasonable.

The impetus for enacting the statute was the decision in *Northern Kentucky Area Development District v. Snyder*,[47] where the Supreme Court of Kentucky held that Kentucky statutory law did not allow an employer to condition employment on an employee signing an arbitration agreement.[48] By statute, the legislature overrode this holding, and expressly allowed an employer to "require an employee or person seeking employment to execute an agreement for arbitration, mediation, or other form of alternative dispute resolution as a condition or precondition of employment."[49] The statute additionally addressed the shortening of the limitations period by more than 50% and also provided that violation of the preclusion would not operate to invalidate the entire agreement, just the shortened limitations period.[50]

B. *Judicial Approach—Public Policy Analysis*

In the absence of a statutory pronouncement, courts have looked to common law contract defenses. Recall Mr. Rodriguez's story from the introduction to this Article. Mr. Rodriguez's application for employment with Raymour & Flanagan shortened the limitations period to bring a

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ping contract requiring suit to be brought within forty days conflicted with statute enacted on March 4, 1891); S. Kan. Ry. Co. of Tex. v. J.W. Burgess Co., 90 S.W. 189, 193 (Tex. Civ. App.) (concluding shipping contract provision that no action should be maintainable that was filed more than six months after accrual of cause of action), *reh'g denied*, 90 S.W. 189, 193 (Tex. Civ. App. 1905); St. Louis, I.M. & S. Ry. Co. v. Hambrick, 97 S.W. 1072, 1073 (Tex. Civ. App. 1906) (holding provision in contract of shipment that no suit to recover thereunder should be sustainable unless commenced within six months after the accrual of the cause of action). Special thanks to Touro librarian Michael Tatonetti for his diligent efforts in helping try to piece this story together.

45. KY. REV. STAT. ANN. § 336.700(3)(c) (West 2023).

46. *Id.*

47. 570 S.W.3d 531 (Ky. 2018).

48. § 336.700(3)(c); *see also* Jay Inman, *Kentucky Enacts New Arbitration Law*, LITTLER (Mar. 27, 2019), https://www.littler.com/publication-press/publication/kentucky-enacts-new-arbitration-law [https://perma.cc/W8K2-C2VZ].

49. § 336.700(3)(a).

50. *Id.* § 336.700(3)(c).

claim to six months.[51] When he attempted to assert claims for discrimination and retaliation after the six months had elapsed, Raymour & Flanagan argued that the claims were time barred.[52] In a 2016 decision, the New Jersey Supreme Court declined to enforce the clause.[53] In *Rodriguez v. Raymours Furniture Co.*,[54] the court held, as a matter of first impression, that the private agreement frustrated the public imperative of New Jersey's laws against employment discrimination by shortening the limitations period for private claims.[55] The court held that the clause was both unconscionable and against public policy.[56]

Similarly, in a case where an employee alleged retaliation against Federal Express (FedEx) based on her receipt of workers compensation benefits, FedEx pointed to her employment contract, which shortened the limitations period to six months.[57] In a 2013 decision, the Kansas Supreme Court recognized that the FedEx six-month limitation provision had been challenged in a number of cases, yielding a split of authority concerning its enforceability.[58] The court sided with those cases that invalidated the clause, holding that the shortening of the limitations period was against public policy because the underlying statute was intended to protect injured workers.[59] The Kansas Supreme Court further opined that the statute of limitations, which is enacted by the legislature, was itself a statement of public policy that could not be undermined by private

51. Rodriguez v. Raymours Furniture Co., 138 A.3d 528, 531 (N.J. 2016).

52. *Id.* at 532.

53. *Id.* at 530.

54. 138 A.3d 530 (N.J. 2016).

55. *Id.* at 530.

56. *Id.* at 540, 541.

57. Pfeifer v. Fed. Express Corp., 304 P.3d 1226, 1226 (Kan. 2013).

58. *Id.* at 1229–30 ("Fair Labor Standards Act can be abridged by contractual limitations; 6-month limitation reasonable."(citing Boaz v. Fed. Express Corp., 742 F. Supp. 2d 925, 932–33 (W.D. Tenn. 2010); Ray v. FedEx Corp. Servs., Inc., 668 F. Supp. 2d 1063, 1067–68 (W.D. Tenn. 2009) ("[S]tatutes of limitations are procedural, and nothing in the Older Workers Benefit Protection Act applies to preclude procedural contractual modifications to the limitations period."); Grosso v. Fed. Express Corp., 467 F. Supp. 2d 449, 455–57 (E.D. Pa. 2006) ("6-month contractual agreement unreasonable and unenforceable with regard to FMLA retaliation claims."); Badgett v. Fed. Express Corp., 378 F. Supp. 2d 613, 622–26 (M.D.N.C. 2005) ("[R]etaliation for exercising FMLA rights claim barred under contractually shortened limitations period of 6 months."); Reynolds v. Fed. Express Corp., No. 09–2692–STA–cgc, 2012 WL 1107834, at *12 (W.D. Tenn. Mar. 31, 2012) ("[A]greement 'smacks of oppression,' but because plaintiff failed to establish it was an adhesion contract, court held it was not one and that its limitations period was reasonable."); Plitsas v. Fed. Express, Inc., No. 07–5439, 2010 WL 1644056, at *3–6 (D.N.J. Apr. 22, 2010) ("Family and Medical Leave Act . . . regulations prevent employers from interfering with employees' rights; contractual limitation is restraint on access to employees' rights."); Allen v. Fed. Express Corp., No. 1:09 cv 17, 2009 WL 3234699, at *4–5 (M.D.N.C. Sept. 30, 2009) ("6-month contractual modification to the limitations period did not violate state or federal law and was reasonable."))).

59. *Pfeifer*, 304 P.3d at 1228.

agreement.[60] FedEx had urged the court to prioritize freedom of contract, but the court, instead, recognized principles that carried greater weight in this context—namely, considerations of the impact these agreements would have on the deterrent effects of banning retaliation against employees who exercise their statutory rights to workers compensation.[61]

Courts looking to common law defenses have assessed whether to enforce the SOL Clauses in light of the policies that support the underlying causes of action that the employee seeks to assert. For example, in *Boaz v. Federal Express Corp.*,[62] the Sixth Circuit held that the six-month limitations provision was not enforceable because it would deprive the employee of his statutory rights pursuant to the FLSA, and FLSA rights may not be waived.[63] FedEx pointed to cases where courts had allowed the statute of limitations to be shortened for Title VII claims.[64] The Sixth Circuit distinguished the Title VII cases because, unlike the FLSA, employees may waive Title VII claims.[65] It also noted that an employer that pays less than minimum wage under the FLSA gains a competitive advantage that discrimination under Title VII does not provide.[66]

In sum, the enforceability of the SOL Clause is often driven by the underlying cause of action the employee seeks to pursue. Indeed, some courts have invalidated an SOL Clause as to certain claims and enforced it as to others.[67]

C. *Judicial Approach—Reasonableness Analysis*

Some courts that have refused to enforce SOL Clauses have also recognized that the freedom of contract must yield, at least to some degree, in the employment context. These courts have applied a reasonableness standard to determine enforceability.

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60. *Id.* at 1233.

61. *Id.* at 1230; *see also* David E. Pierce, *Freedom of Contract and the Kansas Supreme Court*, 86 J. KAN. BAR ASS'N 36, 40 (2017).

62. 725 F.3d 603 (6th Cir. 2013).

63. *See id.* at 606–07 (holding that a shortened limitations provision in an employment agreement operated as an impermissible waiver of claims under FLSA and the Equal Pay Act); *see also* Castellanos v. Raymours Furniture Co., 291 F. Supp. 3d 294, 300 (E.D.N.Y. 2018) ("[F]ederal courts have routinely concluded that arbitration provisions shortening the limitations period to bring FLSA claims are unenforceable.").

64. *Boaz*, 725 F.3d at 606–07.

65. *Id.*

66. *Id.*

67. *See* Clymer v. Jetro Cash & Carry Enters., 334 F. Supp. 3d 683, 693–94 (E.D. Pa. 2018) (holding shortened limitations period not enforceable with respect to FLSA or FMLA claims; enforceable with respect to Title VII claims); Zisumbo v. Convergys Corp., No. 1:14-cv-134-RJS, 2017 WL 5634120, at *1 (D. Utah Nov. 22, 2017) (finding six-month contractual shortening of limitations period enforceable as to ERISA claims, but not FMLA claims); Njang v. Whitestone Grp., Inc., 187 F. Supp. 3d 172, 177–78 (D.D.C. 2016) (concluding shortened limitations period enforceable as to Section 1981 claims but not Title VII claims).

You will recall Ms. Hamilton's story.[68] She sought to sue Norton, her employer, for retaliation, wrongful termination, and race discrimination.[69] Norton argued that Ms. Hamilton's claims were time-barred because the statute of limitations had been shortened by contract to six months.[70] In 2020, a Kentucky appellate court refused to enforce the clause shortening the statute of limitations on the ground that the six-month period in the clause was unreasonably short.[71]

Likewise, in *Ellis v. United States Security Associates*,[72] a California appellate court held that a six-month limitations provision in an employment application was not reasonable and, therefore, not enforceable.[73] The employee sought to bring claims for gender discrimination and sexual harassment.[74] In determining whether the provision was reasonable, the court noted that most of the reported decisions "upholding shortened periods involve straightforward commercial contracts."[75]

In *Ellis*, the court assessed the enforceability of the shortened limitations provision based on a reasonableness standard.[76] It explained that such a provision is reasonable if "it gives sufficient time for the effective pursuit of the judicial remedy."[77] The court provided:

> A contractual period of limitation is reasonable if the plaintiff has a sufficient opportunity to investigate and file an action, the time is not so short as to work a practical abrogation of the right of action, and the action is not barred before the loss or damage can be ascertained. On the other hand, a contractual limitation provision that requires the plaintiff to bring an action before any loss can be ascertained is per se unreasonable.[78]

In *Ellis*, the court held that the provision shortening the limitations period to six months "seriously truncates" the time for the employee to vindicate her statutory rights under the anti-discrimination statute.[79] This was espe-

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68. Hamilton v. Norton Healthcare, Inc., 2019-CA-0885-MR, 2020 WL 5742828, at *1 (Ky. Ct. App. Sept. 25, 2020).

69. *Id.*

70. *Id.*

71. *Id.* at *2.

72. 169 Cal. Rptr. 3d 752 (Ct. App. 2014).

73. *Id.* at 760.

74. *Id.* at 754.

75. *Id.* at 758 (quoting Moreno v. Sanchez, 131 Cal. Rptr. 2d 684, 684 (Ct. App. 2003)).

76. *See id.* at 756–58.

77. *Id.* at 757 (quoting 3 WITKIN, CALIFORNIA PROCEDURE § 469 (5th ed. 2008)).

78. *Id.* at 758 (citing 51 AM. JUR. 2D *Limitation of Actions* § 81 (2011)).

79. *Id.* at 759.

cially the case because the California statute, like many anti-discrimination statutes, required that the employee first file an administrative claim and receive a right to sue letter before commencing the action in court.[80]

The California statute required that the administrative complaint be filed within one year of the alleged unlawful action, and if the agency did not pursue the action, it must have issued a right to sue letter within a year of the filing.[81] The employee then has one year from the date of the right to sue letter to file a civil action. A contractually shortened six-month period was not sufficient for this process to run its course and, therefore, was unreasonable.[82] *Ellis* leaves open the possibility of enforcement of "reasonable" SOL Clauses, which will depend, in part, on the nature of the underlying claim and whether it involves an administrative process.

Conversely, an intermediate appellate court in Ohio recently held that a six-month limitation period in an employment application was reasonable and enforceable.[83] In that case, the employee sought to raise gender discrimination and harassment claims six months after the alleged incidents.[84] The court enforced the provision and dismissed her claims, holding that Ohio courts have allowed shortened contractual limitations periods to commence employment discrimination claims.[85] Collecting cases, the court also noted that other jurisdictions have held that "a six-month limitations period within an employment application is not unreasonable or against public policy under state law."[86]

There is, therefore, an inconsistency between the holdings in the California and Kentucky cases and the Ohio case.

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80. *Id.*

81. *Id.*

82. *See id.* In *Rodriguez*, in refusing to enforce the shortened limitations period, the New Jersey Supreme Court also took into account the administrative complaint process for discrimination claims. Rodriguez v. Raymours Furniture Co., 138 A.3d 528, 537 (N.J. 2016).

83. Fayak v. Univ. Hosps., No.109279, 2020 WL 7062683, at *5 (Ohio Ct. App. Dec. 3, 2020) (enforcing employer's shortening of statute of limitations for employee to commence sexual harassment claim), *appeal denied*, 166 N.E.3d 1247 (Ohio 2021).

84. *Id.* at *1.

85. *Id.* at *5.

86. *Id.* (citing Evans v. Canal St. Brewing Co. L.L.C., No. 18-cv-12631, 2019 WL 1491969, at *5–6 (E.D. Mich. Apr. 4, 2019) ("Michigan law"); Walker v. TA Operating L.L.C., No. 4:14-cv-4055, 2016 WL 1457922 (W.D. Ark. Apr. 13, 2016) ("Arkansas law"); Thurman v. DaimlerChrysler Inc., 397 F.3d 352, 357–59 (6th Cir. 2004) ("Michigan law"); Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1044–45 (9th Cir. 2001) ("California law"); Taylor v. W. & S. Life Ins. Co., 966 F.2d 1188, 1206 (7th Cir. 1992) ("Illinois law"); Morgan v. Fed. Express Corp., 114 F. Supp. 3d 434, 444 (S.D. Tex. 2015) ("Texas law"); Vega v. Fed. Express Corp., No. 09 CIV 07637, 2011 WL 4494751 (S.D.N.Y. Sept. 29, 2011) ("New York law"); Badgett v. Fed. Express Corp., 378 F. Supp. 2d 613, 623 (M.D.N.C. 2005) ("North Carolina law")).

D. *Judicial Approach—"Unconscionability" + Reasonableness*

Other courts have mentioned unconscionability in analyzing the enforceability of SOL Clauses. Some have provided a more thorough discussion of procedural and substantive unconscionability.[87] Others have named unconscionability without much analysis,[88] or have motioned towards unconscionability by referencing in passing "adhesion" and the "reasonableness" of the provision.[89]

For example, in *Hunt v. Raymour & Flanigan*,[90] an intermediate appellate court in New York upheld the same six-month limitation provision that the New Jersey Supreme Court invalidated in *Rodriguez*.[91] In *Hunt*, the employee sought to pursue discrimination and retaliation claims under the New York anti-discrimination statute.[92] The New York court stated that the employee had contractually agreed to the shortened limitations period, which was permitted in New York.[93] The New York court did not mention unconscionability, but did state that, "[a]bsent proof that the contract is one of adhesion or the product of overreaching, or that [the] altered period is unreasonably short, the abbreviated period of limitation will be enforced."[94]

The unconscionability analysis ordinarily fails because courts are reluctant to find that the agreement is procedurally unconscionable, often holding that, despite the adhesive nature of the agreement and the relative imbalance of bargaining power, the employee presented no evidence that they lacked meaningful choice in accepting employment.[95] Moreover, the courts cite to the cases upholding shortened limitations periods from the commercial context to establish that the provision is not substantively unconscionable.[96] Much of the substantive unconscionability analysis seems, in essence, to assess the reasonableness of the shortened limitations period. In that regard, it looks like a reasonableness analysis simply named as an unconscionability analysis, with a presumption that the shortened limitations period is reasonable.[97]

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87. *See, e.g.*, Clymer v. Jetro Cash & Carry Enters., 334 F. Supp. 3d 683, 690–91 (E.D. Pa. 2018); *Soltani*, 258 F.3d at 1042.

88. Curtis v. Marino, 157 N.Y.S.3d 721 (App. Div. 2022); Ortegas v. G4S Secure Sols. Inc., 65 N.Y.S.3d 693 (App. Div. 2017).

89. *See, e.g.*, Hunt v. Raymour & Flanigan, 963 N.Y.S.2d 722 (App. Div. 2013).

90. 936 N.Y.S.2d 722 (App. Div. 2013).

91. *Id.* at 723.

92. *Id.*

93. *Id.* at 724.

94. *Id.* (second alteration in original) (quoting Jamaica Hosp. Med. Ctr. v. Carrier Corp., 772 N.Y.S.2d 592, 593 (App. Div. 2004)).

95. *See, e.g.*, Clark v. DaimlerChrysler Corp., 706 N.W.2d 471, 474–75 (Mich. Ct. App. 2005).

96. *See, e.g.*, *Hunt*, 963 N.Y.S.2d at 724.

97. *See, e.g.*, *Clark*, 706 N.W.2d at 474.

The Michigan case of *Clark v. DaimlerChrysler Corp.*[98] is fairly typical of how the courts have addressed unconscionability in these cases. In *Clark*, a Michigan Appellate court held that the provision shortening the limitations period to six months was not unconscionable.[99] For procedural unconscionability, the court held that the employee "did not present any evidence that he had no realistic alternative to employment with defendant."[100] The court reasoned that "while [the employee's] bargaining power may have been unequal to that of [the employer], we cannot say that [the employee] lacked any meaningful choice but to accept employment under the terms dictated by [the employer]."[101] For substantive unconscionability, the court held that "the six-month period of limitations is neither inherently unreasonable, nor so extreme that it shocks the conscience."[102]

E. *The Role of Context and the Nature of the Employment Relationship*

The courts that have assessed SOL Clauses have not always taken the employment context into account. In *Hunt*, in assessing the reasonableness of the provision, the New York court did not acknowledge that the precedent it cited involved sophisticated parties in commercial disputes, not an employee seeking to interpose a discrimination claim.[103] Other courts have cited to *Hunt* in upholding shortened limitations provisions, also failing to recognize or distinguish the employment and commercial contexts, or the nature of the underlying claims.[104] Indeed, in *Ortegas v. G4S Secure Solutions (USA) Inc.*,[105] another New York intermediate appellate court stated that the employee could not "establish substantive unconscionability, as New York courts have held that a six-month period to bring an employment claim is inherently reasonable."[106] Similarly, in *Johnson v. DaimlerChrysler Corp.*,[107] without distinguishing the employment context

98. 706 N.W.2d 471 (Mich. Ct. App. 2005).

99. *Id.* at 474.

100. *Id.* at 475.

101. *Id.*

102. *Id.* (citation omitted).

103. Hunt v. Raymour & Flanigan, 963 N.Y.S.2d 722, 724 (App. Div. 2013) (citing Jamaica Hosp. Med. Ctr. v. Carrier Corp., 772 N.Y.S.2d 592 (App. Div. 2004) (breach of contract claims by large hospital against utility provider); John J. Kassner & Co. v. City of New York, 415 N.Y.S.2d, 785, 789 (1979) (engineering company brings breach of contract claims against City of New York)).

104. *See* Keller v. About, Inc., No. 21-CV-228 (JMF), 2021 WL 1783522, at *3 (S.D.N.Y. May 5, 2021); Ortegas v. G4S Secure Sols. (USA) Inc., 65 N.Y.S.3d 693 (App. Div. 2017).

105. 65 N.Y.S.3d 693 (App. Div. 2017).

106. *Id.*

107. No. C.A. 02-69 GMS, 2003 WL 1089394 (D. Del. Mar. 6, 2003).

from the corporate or commercial context, the district court of Delaware relied on "well-settled" precedent allowing parties to contractually limit the time for filing a complaint.[108]

By contrast, in *Herweyer v. Clark Highway Services, Inc.*,[109] the Michigan Supreme Court distinguished the employment contract from other private contracts.[110] There, an employee sought to bring claims alleging breach of contract, age discrimination, disability discrimination, and retaliatory discharge for filing a worker's compensation claim.[111] The employment contract reduced the statute of limitations to bring an employment-related claim to six months after termination.[112] The court held that the provision was unreasonable, leaving the only issue the effect of a savings clause in the contract. The employer argued that the savings clause allowed the court to supply a limitations period; the employee argued that, with the provision invalidated, the applicable limitations period was supplied by statute.[113] In holding that the applicable limitations period was supplied by statute, the court acknowledged the disparate bargaining power inherent in the employment relationship. The court wrote:

> An employer and employee often do not deal at arm[']s length when negotiating contract terms. An employee in the position of plaintiff has only two options: (1) sign the employment contract as drafted by the employer or (2) lose the job. Therefore, unlike . . . where two businesses negotiate[ ] the contract's terms essentially on equal footing, here plaintiff had little or no negotiating leverage. Where one party has less bargaining power than another, the contract agreed upon might be, but is not necessarily, one of adhesion, and at the least deserves close judicial scrutiny.[114]

This precedent in *Herweyer* was later overruled by the Michigan Supreme Court in *Rory v. Continental Insurance Co.*,[115] a case in the insurance context. *Rory* held that, so long as a provision was unambiguous, even if

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108. *Id.* at *3; *see also* Melissa DiVincenzo, *Repose vs. Freedom—Delaware's Prohibition on Extending the Statute of Limitations by Contract: What Practitioners Should Know*, 12 DEL. L. REV. 29, 39 (2010) (discussing reasonableness standard as relatively easy to satisfy when assessing enforceability of clause reducing limitations period).

109. 564 N.W.2d 857 (Mich. 1997), *overruled by* Rory v. Cont'l Ins. Co., 703 N.W.2d 23 (Mich. 2005) (holding that unambiguous provisions in adhesion contract must be enforced according to its terms).

110. *Id.* at 858; *see also* Joel C. Tuoriniemi & Roger W. Reinsch, *Return to Camelot: A Statutory Model for a Judicial Examination of Employment Agreements with Shortened Period of Limitations*, 35 OHIO N.U. L. REV. 751 (2009) (discussing enforceability of shortened limitations periods in employment contracts in Michigan and Sixth Circuit).

111. *Herweyer*, 564 N.W.2d at 858.

112. *Id.*

113. *Id.* at 857.

114. *Id.* at 860.

115. 703 N.W.2d 23 (Mich. 2005).

contained in an adhesion contract, it should be enforced as written.[116] *Rory* was later applied to employment contracts and, in *Clark*, a majority of an intermediate appellate court held that a provision shortening the statute of limitations to six months was enforceable and prevented an employee from bringing age discrimination claims against the employer.[117] In a dissent, Judge Janet Neff reminded the court of the imbalance inherent in the employment relationship, and wrote that the employer "took advantage of [the employee's] situation 'to drive him to an unfair bargain.'"[118] In sum, even within one jurisdiction, the courts have not been consistent in acknowledging that the employment relationship is distinguishable from dealings in the commercial or corporate contexts.

F. *The Benefits and Drawbacks of the Various Approaches: Rules Versus Standards*

The benefit of a statutory approach is clear guidance on when an SOL Clause will be enforceable. The outcomes are predictable. In Florida and South Carolina, it is unquestionable that the statute of limitations simply cannot be shortened by contract, regardless of context. In Texas, the same is true unless the contract involves the sale of a business for $500,000 or more. In Kentucky, it is clear that, for employees, a limitations period reduction over 50% will not be enforced. In that respect, the line drawing is precise. However, the statute still does reference a standard of reasonableness where the SOL Clause reduces the limitations period by less than 50%. For that reason, the Kentucky statute provides less exact line drawing and, with that, less certainty concerning the enforceability of those provisions.

The public policy approach prioritizes the goals and protections of both the statutes of limitation and the underlying cause of action the employee seeks to pursue. The allure of this approach is that it provides clear guidance in the jurisdictions where the courts have pronounced that an SOL Clause is against public policy. For example, there is now a growing consensus that the statute of limitations for FLSA claims cannot be shortened and, with that, clarity that the clause will not be enforced. Where there are consistent decisions, it lends to predictability and certainty in outcomes. It is only a case-by-case approach to the extent that the courts have weighed private autonomy against the policy of each underlying claim, which, as various underlying causes of action get raised, will require the courts to determine whether the policy and protections of that underlying cause of action should be prioritized over party autonomy. To the extent this work is being done by the courts (rather than legislatures), it

116. *Id.* at 26.

117. Clark v. DaimlerChrysler Corp., 706 N.W.2d 471, 474–75 (Mich. Ct. App. 2005).

118. *Id.* at 480 (Neff, P.J., dissenting) (quoting Gillam v. Mich. Mortg.-Inv. Corp., 194 N.W. 981, 982 (Mich. 1923)).

also largely leaves open questions about whether an SOL Clause should be enforced when an employee seeks to raise non-statutory claims (for example, a claim for breach of contract).

The unconscionability and reasonableness approaches have the benefit of assessing each provision with sensitivity to the particulars—for example, the nature of the underlying claims the employee seeks to pursue, how the provision was presented to the employee (in an application or arbitration provision or employment agreement), the length of the shortened limitations period, and whether there are administrative prerequisites to filing a complaint in court. This case-by-case approach allows the courts to balance private autonomy with the protections necessitated by any given case—both in how the parties reached the bargain and the bargain that was reached. The drawback, of course, is the lack of guidance and, with that, loss of predictability about whether a particular provision will be enforced. There are irreconcilable outcomes among the cases, sometimes in assessing the enforceability of the very same clause, which undermines predictability and certainty.

The benefits and drawbacks of the various approaches mirror the well-worn debate about rules versus standards in law design.[119] It is much simpler to enforce a rule that unambiguously invalidates an SOL Clause as a matter of public policy.[120] It also simplifies contract drafting if it is known that the provision will not be enforced. By contrast, a standard of reasonableness is vague and, as with the current landscape, susceptible to producing irreconcilable results. A benefit of a reasonableness standard, however, is that it provides judges with discretion to consider the individual circumstances of each employment contract, which may lead to some instances where, in fairness, an SOL Clauses should be enforced.[121] Ultimately, this article argues for a rules-driven approach that simply invalidates SOL Clauses as against public policy.

There is a strong analogy to the current approaches to enforcement of non-compete clauses. A few states, including California, follow a rules-driven approach that, by statute, prohibits non-competes in employment contracts.[122] Other states adhere to a standard by assessing whether the

119. Tomer S. Stein, *Rules v. Standards in Private Ordering*, 70 BUFF. L. REV. 1835, 1844 (2022) ("The choice between rules and standards is an essential part of elementary legal education and is present—expressly or implicitly—in virtually any discussion of law design."); Alan Schwartz & Robert E. Scott, *The Common Law of Contract and The Default Rule Project*, 102 VA. L. REV. 1523, 1539–46 (2016) (discussing rules versus standards tension in contract law).

120. Stein, *supra* note 119, at 1848 (discussing enforcement of rules versus standards).

121. *Id.* at 1847–49 (discussing benefits and drawbacks of exercise of discretion in enforcing standard).

122. *See, e.g.*, CAL. BUS. & PROF. CODE § 16600 (West 2023) (prohibiting any "contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind"). *See generally* Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV.

restriction on employee mobility is reasonable.[123] When compared to a reasonableness standard, the blanket prohibition is simply easier to apply, and the outcomes are predictable.[124] The analogy to non-compete agreements instructs that the benefits of a rules-driven approach to SOL Clauses would outweigh the disadvantages.

II. SOL CLAUSES AS AGAINST PUBLIC POLICY

Absent statutory pronouncements like those in Florida, South Carolina, and Texas, the courts should hold that SOL Clauses are void as against public policy. Even the handful of cases that have found SOL Clauses against public policy have not undertaken an extensive analysis of the use of public policy as a defense to the enforceability of a contract provision. This Part sets out to explore public policy as a ground to void a contract or clause and apply that doctrine to SOL Clauses. The gist of the normative argument is that context matters. While freedom of contract is a value, it should not be prioritized over fairness, especially in the employment context, where there is an inherent imbalance of bargaining power, the SOL Clause is grossly one-sided in favor of the employer, and the harms may reverberate to third parties.

A. *Public Policy as a Contract Defense*

Writing in 1824 in a frequently referenced passage, Judge Burroughs opined that rendering a contract unenforceable as against public policy is a "very unruly horse, and when once you get astride it you never know where it will carry you."[125] He continued, that public policy "is never ar-

672, 677 (2008) (discussing states that prohibit enforcement of non-compete agreements).

123. *See* Pivateau, *supra* note 122, at 677–78 (discussing states that assessing enforceability of non-compete agreements by reasonableness standard); *see also* Robert W. Gomulkiewicz, *Leaky Covenants-Not-to-Compete as the Legal Infrastructure for Innovation*, 49 U.C. DAVIS L. REV. 251, 261–65 (2015) (discussing the two different approaches of modern American law to non-compete clauses).

124. *See, e.g.*, David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U.L. REV. 165, 217 (2019) ("One of the advantages of a public policy rule for hush contracts is that it is highly salient and easy to understand: courts would broadcast that particular classes of contract offend public policy. Unlike the 'reasonableness' tests that mark formation doctrines, or the multi-factor materiality standard that guides breach rules, simple public policy standards might be easier for arbitrators to apply, and thus more likely to be actually taken up in practice. This is the general pattern we see in the analogous situation in California, where arbitrators are obligated to rule against non-competes.").

125. Richardson v. Mellish [1824] 130 Eng. Rep. 294, 303 (Burrough, J.); David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U.L. REV. 563, 566 (2012); *see also* Jeffrey Steven Gordon, *Silence for Sale*, 71 ALA. L. REV. 1109, 1160 (2020); Chunlin Leonard, *Illegal Agreements and the Lesser Evil Principle*, 64 CATH. U.L. REV. 833, 845 n.83 (2015); Anthony J. Casey & Anthony Niblett, *The Limits of Public Contract Law*, 85 L. & CONTEMP. PROBS. 51, 69 (2022); Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public*

gued at all but when other points fail."[126] While it may be true that public policy is often a defense of last resort, David Friedman has observed that the doctrine of public policy is actually not all that unruly, especially where the contract contravenes a statute or regulation.[127] In those cases, Friedman found that courts invalidated contracts at a 59% rate.[128] He observed, however, that the success rate is only 31% where the contract is challenged by generally appealing to public policy.[129]

In the absence of a specific statute or regulation, public policy is often overlooked as a viable defense, or criticized as lacking in content. In discussing non-disclosure agreements (NDAs), Jeffrey Gordon has observed that "[m]odern courts are wary of the public policy exception to NDA enforceability because public policy strongly favors freedom of contract."[130] However, to the extent contract law is a general body of law, it has to balance competing values,[131] which should be given different weight depending on the context. Public policy as a ground to invalidate a contract provision is a counterweight to the potential for overreaching in a system of law that otherwise adheres to "the utmost liberty of contracting."[132] In this connection, David Hoffman and Erik Lampmann argue that, by acting as a safety valve, the public policy doctrine plays an important role in legitimizing contract law.[133]

B. *Public Policy as a Balancing of Competing Interests*

In assessing whether to invalidate a contract clause as against public policy, the Restatement (Second) of Contracts section 178 provides a multi-factor, context-driven balancing of interests. The analysis requires a balancing of the interests in enforcement versus non-enforcement, much like preparing a chart of "pros and cons." The Restatement provides that a "promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."[134] In the absence of a legislative pronouncement, in assessing the balance of interests, the Restatement identifies the most common factors for consideration.

Policy Doctrine in the Enforcement of Private Legal Arrangements, 94 NEB. L. REV. 685, 693 (2016); Hoffman & Lampmann, *supra* note 124, at 189.

126. *Richardson*, 130 Eng. Rep. at 303.

127. Friedman, *supra* note 125, at 566.

128. *Id.* at 581 tbl.1.

129. *Id.*

130. Gordon, *supra* note 125, at 1167.

131. Meredith R. Miller, *Party Sophistication and Value Pluralism in Contract*, 29 TOURO L. REV. 659, 660 (2013).

132. Gordon, *supra* note 125, at 1167 (quoting Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356 (1931)).

133. Hoffman & Lampmann, *supra* note 124, at 204, 210–11.

134. RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. L. INST. 1981).

To weigh the interest in the enforcement of a term, the Restatement identifies the following factors:

(a) the parties' justified expectations,
(b) any forfeiture that would result if enforcement were denied, and
(c) any special public interest in the enforcement of the particular term.[135]

Conversely, to weigh a public policy against enforcement of a term, the Restatement points to the following factors:

(a) the strength of that policy as manifested by legislation or judicial decisions,
(b) the likelihood that a refusal to enforce the term will further that policy,
(c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
(d) the directness of the connection between the misconduct and the term.[136]

It has been observed that this multi-factored approach of the Restatement "does not provide that authority in practice nor does it appear to reflect the manner in which today's courts handle cases."[137] This is certainly true of the cases addressing SOL Clauses, none of which reference the Restatement. Reviewing the cases that do reference Restatement section 178, a rare few involved employment agreements.[138]

Nevertheless, the analysis whether to enforce SOL Clauses does require a balance of competing interests—freedom of contract, the policy reflected by the statute of limitations, and the policy reflected by the underlying substantive cause of action. There are also concerns about preventing overreaching by employers and arriving at fair results, which need to be balanced against achieving consistency and predictability in the law.

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135. *Id.* § 178(2).

136. *Id.* § 178(3).

137. Friedman, *supra* note 125, at 576.

138. Our research yielded only four such cases. *See* State v. Pub. Safety Emps. Ass'n, 323 P.3d 670 (Alaska 2014) (holding collective bargaining agreement addressing discipline of state trooper for misconduct did not violate public policy); Kleewood, Inc. v. Hart Design & Mfg., Inc., 727 N.W.2d 87 (Wis. Ct. App. 2006) (concluding recruiting fee agreement not void as against public policy); City of Wilkes-Barre v. City of Wilkes-Barre Police Benevolent Ass'n, 814 A.2d 285 (Pa. Commw. Ct. 2002) (finding requirements of officers' retirement plan not void as against public policy); Virgin Islands Diving Schs./Supplies, Inc. v. Dixon, 20 V.I. 54 (V.I. 1983) (holding non-compete and non-disclosure agreement void as against public policy).

1. *Freedom of Contract*

The overarching rationale to enforce an SOL Clause as written is the parties' "freedom of contract." Indeed, with any thorny public policy issue in contract law, broadly conceived, the difficulty is in balancing the value of private autonomy against that of societal fairness.[139] Those cases that have enforced SOL Clauses have, over all else, prioritized freedom of contract.[140] Of course, those cases have premised enforcement on the notion that the courts should "respect[ ] the freedom of individuals freely to arrange their affairs via contract."[141] This is framed as an interest in the "utmost liberty of contracting."[142]

What the prioritization of private autonomy ignores here is the context of the employment relationship. The SOL Clause is not "bargained-for" in any real sense. Indeed, in many of the cases, an SOL Clause is imposed on the employee in a job application *before that employee has even been offered the job*. If the applicant were to object to the provision, the applicant likely would not receive an offer from the employer.[143] Moreover, even where the clause is presented later in the hiring process—say, in a packet of HR paperwork, in an arbitration clause appurtenant to an offer letter, or in an employee handbook—there is rarely any room for bargaining (or consent) in a meaningful sense.[144]

2. *Statute of Limitations—Policy upon Policy*

In balancing the various interests, with SOL Clauses, there is really *policy upon policy*. There is the policy of the underlying substantive claim that the employee seeks to assert, then there is also the policy expressed by the statutorily enacted limitations period.

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139. Hoffman & Lampmann, *supra* note 124, at 189 ("The problem is hard: how to balance the needs of autonomy with those of distribution, or, more concretely, how to decide when the state will not recognize freely-chosen bargains.").

140. *See* Badgett v. Fed. Express Corp., 378 F. Supp. 2d 613, 622 (M.D.N.C. 2005) (enforcing a shortened limitations period because "it reflects the importance of the parties' freedom of contract absent clear policy to the contrary"); *accord* Morgan v. Fed. Express Corp., 114 F. Supp. 3d 434, 442 (S.D. Tex. 2015).

141. Clark v. DaimlerChrysler Corp., 706 N.W.2d 471, 476 (Mich. Ct. App. 2011) (Neff, P.J., dissenting) (quoting Rory v. Cont'l Ins. Co., 703 N.W.2d 23, 30 (Mich. 2005)).

142. *Id.* (quoting *Rory*, 703 N.W.2d at 30 (majority opinion)).

143. *Id.* at 479.

144. *See, e.g.*, Schreiber v. K-Sea Transp. Corp., 814 N.Y.S.2d 124, 130 (App. Div. 2006) (individual employees "lack the knowledge and bargaining power to negotiate as equals"); *see also* Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 963 ("Employment relationships are perhaps the paradigmatic example of inequality of bargaining power in contract law."); Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 194 (2005) (noting that the courts' earliest rhetorical uses of the concept of bargaining power are found in late nineteenth century cases addressing labor disputes).

With SOL Clauses, one reason that has been provided for prioritizing freedom of contract is that SOL Clauses are consistent with the underlying rationale of statutes of limitation, which is intended "to encourage promptness in bringing actions so as to avoid a loss of evidence from the death or disappearance of witnesses, destruction of documents, or failure of memory."[145] One court explained, "because statutes of limitations do not open a window to suit, but instead close a door, there is nothing in the policy or language of statutes of limitations 'which inhibits parties from stipulating to a shorter period within which to assert their respective claims.'"[146]

However, as the Supreme Court of the United States has recognized in an employment discrimination case, the length of the period allowed for pursuing a claim "inevitably reflects a value judgment."[147] The legislature is making a judgment "concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."[148]

Moreover, while the accepted purposes of statutes of limitation are often stated as promoting repose for defendants and preventing unexpected litigation of "stale" claims,[149] it may be a bit more complicated and nuanced. Tyler T. Ochoa and Judge Andrew J. Wistrich have provided a detailed collection and thoughtful consideration of the policies favoring and disfavoring limitations periods. In favor of limitations periods, they discuss promoting repose, minimizing the deterioration of evidence, placing defendants and plaintiffs on equal footing, promoting diligence, encouraging the prompt enforcement of substantive law, avoiding retrospective application of contemporary standards, and reducing the volume of litigation.[150]

Ochoa and Judge Wistrich note, however, that there are policy goals that disfavor limitations of actions. A principal reason to disfavor limitation of actions is that there is strong policy in favor of disposing of litigation on the merits rather than on procedural grounds.[151] They write that there are "several reasons for valuing the adjudication of claims, whether valid or invalid, on their merits."[152] They explain that, first, "the fundamental reason for having a legal system is to resolve disputes on their merits under the substantive law."[153] Second, they note that valuing

145. *Badgett*, 378 F. Supp. 2d at 622.

146. *Id.* (quoting Ord. of United Com. Travelers of Am. v. Wolfe, 331 U.S. 586, 608 n.20 (1947)).

147. Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 463 (1975).

148. *Id.* at 463–64.

149. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 456–57 (1997).

150. *See generally id.* at 460–500.

151. *Id.* at 500–01.

152. *Id.* at 501.

153. *Id.*

resolution of claims on the merits "comports with fundamental notions of fairness and due process of law."[154] Third, they argue that "allowing all litigants their 'day in court' promotes the dignitary value of the legal process."[155] Ochoa and Judge Wistrich observe:

> It is frustrating and demeaning not to be allowed to be heard when a person believes that he or she possesses a valid complaint. Creating such feelings of frustration and powerlessness causes disaffection with the legal system, and possibly with the political system as well.[156]

Ochoa and Judge Wistrich also argue that "another policy disfavoring limitation of actions is the desire to vindicate meritorious claims."[157] They discuss the loss of a valid claim as a violation of our sense of justice.[158]

While the policies favoring limitations periods apply with equal force whether the timeframe is set legislatively or by private ordering, the same is not true of the policies disfavoring limitations periods. The policies disfavoring limitations periods apply with even stronger force when set by contract, especially in the employment context, where the term is not bargained for in any real sense but, rather, imposed by the employer. Allowing employees to pursue their claims on the merits in court promotes the "dignitary value" of the justice system. It only compounds frustration and perceived unfairness of the legal system if the employee is foreclosed from pursuing claims based on rules *written by the employer*.

The question, then, becomes whether the statutory judgment call about the length of the limitations period—necessarily "arbitrary"[159] to some degree—may be supplanted by private agreement. The courts that prioritize freedom of contract essentially frame the question as whether the *parties* can supplant the legislative judgment about when claims become stale with their own judgment.[160] The courts that recognize that notions of autonomy and consent are strained in the employment context essentially frame the question as whether *the employer* can supplant the leg-

154. *Id.*

155. *Id.*

156. *Id.* at 501–02.

157. *Id.* at 505.

158. *Id.*

159. *Id.* (quoting Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945)); *see also* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 463–64 (1975) (describing statute limitations as arbitrary but also a legislative judgment call).

160. It is important to distinguish tolling agreements, which are routinely used and enforced in the employment context. A tolling agreement suspends the statute of limitations for a period agreed upon by the parties, effectively elongating the time to bring a claim. Because these agreements *preserve* rather than *prevent* the employee from pursuing claims, they are readily distinguishable from SOL Clauses. Moreover, a tolling agreement is ordinarily negotiated between the parties once a dispute has arisen—thus, the employee is aware of the claim they seek to assert and the timeframe provided by the relevant statute of limitations. In addition, at this stage, the employee is much more likely to be represented by counsel.

islative judgment about when claims become stale by imposing a shorter limitations period on an employee. This framing of the issue often dictates the outcome. Indeed, in *Pfeifer*, the Kansas Supreme Court declined to uphold the same shortened limitations period in FedEx's employment contract that was enforced in other cases. In doing so, the court reasoned:

> Statutes of limitations are creatures of the legislature and themselves an expression of public policy on the rights to litigate. They find their justification in necessity and convenience and serve the practical purpose of sparing courts from litigating stale claims and people from being put to the defense of claims after memories fade and witnesses disappear. But as creatures of the legislature, statutes of limitations also reflect legislative determinations that necessarily balance these various interests. FedEx asks the court to inject its own public policy views into this give-and-take under a freedom-to-contract rationale when our legislature has provided [two] years to bring a cause of action that protects the exercise of statutory rights under the Workers Compensation Act. We decline to do that.[161]

3. *Policy Reflected by Underlying Claims*

There can be no doubt that shortening the time for an employee to bring a claim impedes enforcement of the right the employee seeks to assert and the public policy underlying it. This is why, in the FLSA context, courts have generally reached a consensus that the time to bring a claim cannot be shortened.[162] That analysis is strengthened by the fact that the FLSA expressly states that its provisions cannot be waived and the shortened limitations period effectively functions as a waiver.[163] Courts have often followed this logic when the underlying claim is pursuant to a state wage statute.[164]

Conversely, courts have not reached consensus where the underlying claims are federal or state discrimination claims.[165] Those courts that have not enforced the shortened limitations period have stressed that the strong public interest in eliminating practices of discrimination are con-

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161. Pfeifer v. Fed. Express Corp., 304 P.3d 1226, 1233–34 (Kan. 2013) (citation omitted).

162. *See supra* note 34 and accompanying text.

163. *See, e.g.*, Boaz v. FedEx Customer Info. Servs., Inc., 725 F.3d 603, 605–06 (6th Cir. 2013) (quoting Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–10 (1945)); Castellanos v. Raymours Furniture Co., 291 F. Supp. 3d 294, 301 (E.D.N.Y. 2018).

164. *See, e.g.*, Stang v. Paycor, Inc., 582 F. Supp. 3d 563, 566–68 (S.D. Ohio 2022).

165. *See supra* note 36 and accompanying text.

travened by the shortening of the limitations period.[166] Other courts have presumed that the SOL Clause is reasonable, even if the underlying claim sounds in discrimination.[167]

Whatever the underlying substantive claim, there can be no doubt that a shortened limitations period erects barriers for employees to be heard on the merits and to hold their employers accountable. Indeed, when this author began to notice the trend over a decade ago, she wrote that "a shortened statute of limitations does surreptitiously, in effect, serve to weaken the remedial and deterrent functions of underlying substantive laws."[168] Further, where it is uncertain whether the court will enforce the SOL Clause, there is also an *in terrorem* effect, which strongly discourages employees from pursuing their claim.[169]

C. *Assessing Third-Party Harm*

In an article about NDAs that suppress information about sexual harassment allegations (which they call "hush contracts"), Hoffman and Lampmann observe that public policy doctrine prioritizes social welfare over private choice.[170] They restate it as a defense explicitly concerned with minimizing third-party harm.[171] With SOL Clauses, third-party harm is a very real potential effect of preventing employees from pursuing their claims. For example, employees who have claims that relate to fair wages, discrimination or workplace safety are, by raising their claims, improving workplace conditions for all employees.

Without naming it as such, courts have applied this third-party harm framework to invalidate SOL Clauses where the underlying claim is one of discrimination or retaliation. For example, in *Rodriguez*, the New Jersey Supreme Court recognized the "public purpose" of the civil rights statute that the employee sought to enforce.[172] In so doing, the court prioritized

166. Rodriguez v. Raymours Furniture Co., 138 A.3d 528, 538–40 (N.J. 2016); Ellis v. U.S. Sec. Assocs., 169 Cal. Rptr. 3d 752, 755–57 (Ct. App. 2014) (explaining anti-discrimination laws cannot be undermined by shortening of statute of limitations because laws inure to benefit of public at large, not just any one employer and employee).

167. *See, e.g.*, Hunt v. Raymour & Flanigan, 963 N.Y.S.2d 722, 724 (App. Div. 2013).

168. Miller, *supra* note 3, at 399.

169. *See* Pivateau, *supra* note 122, at 690–91(discussing *in terrorem* effect of ambiguous non-compete clauses); Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 682 (1960) (writing about non-compete clauses: "[f]or every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors").

170. Hoffman & Lampmann, *supra* note 124, at 170, 199; *see also*, Aditi Bagchi, *Other People's Contracts*, 32 YALE J. ON REG. 211, 229–32 (2015) (proposing interpretive rule that resolves ambiguity to avoid harm to third-parties to contract).

171. Hoffman & Lampmann, *supra* note 124, at 170, 199.

172. Rodriguez v. Raymours Furniture Co., 138 A.3d 528, 541 (N.J. 2016).

the public interest in preventing and eradicating discrimination over notions of freedom of contract, writing that it "ha[d] the public interest to consider" and the civil rights statute "exists for the good of all the inhabitants of New Jersey."[173] Which is to say, the court appears to take into account discrimination, and barriers to challenging it, as a public harm that extends beyond the contracting parties. First, all citizens have an interest in eliminating workplace discrimination. Second, employees who challenge discriminatory practices may protect other employees from a repeat of the alleged misconduct. This analysis recognizes the social harm of enforcing an SOL Clause that erects a barrier for an employee to seek redress.

Moreover, it is not foreign to employment law jurisprudence to acknowledge third party harms that may extend beyond the individual relationship between the employer and employee. The entire premise of the public policy exception to the presumption of at-will employment is the concern for harm to third parties.[174]

In determining whether to enforce SOL Clauses, courts have discussed the nature of the underlying claims the employee seeks to pursue and the purposes of those claims. This should be irrelevant. The employee is alleging a harm and seeks redress and the SOL Clause threatens to erect a technical barrier to having the employee's claims heard on the merits. While it is, perhaps, easier to identify the public harms and social interest in enforcing the FLSA or federal or state anti-discrimination statutes, the same can be argued where the employee seeks to pursue common law claims. Even with tort or contractual claims, an employee's effort to pursue those claims may prevent further workplace misbehavior that might be repeated to victimize other employees.

And there may be third-party harms that extend beyond other employees. For example, Ms. Hamilton, a newborn nurse, claimed that she was terminated after she reported a few botched circumcisions that left newborns with deformities.[175] If Ms. Hamilton was prevented from challenging her termination, it could serve in future instances to insulate the hospital from exposure if it did not exercise due care in serving patients. It would send a message to employees that discourages them from raising these important issues that impact patient safety, lest they be terminated without recourse.

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173. *See id.* at 538.

174. *See, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373, 380 (Cal. 1988) (collecting decisions that protect the public by recognizing a tort action for wrongful discharges in violation of public policy); *see also* Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) (arguing that American employment law should restrict abusive exercise of employer power for a socially unjustified purpose).

175. Hamilton v. Norton Healthcare, Inc., No. 2019-CA-0885-MR, 2020 WL 5742828, at *1 (Ky. Ct. App. Sept. 25, 2020).

At the end of the day, because the SOL Clause is in a standard form contract used with all employees, it has the effect of imposing barriers on employees who seek to hold their employers accountable and, in so doing, excusing the employer's bad behavior. In this sense, it should not matter whether the underlying claim is statutory—it is likely premised on alleged bad behavior that could be repeatedly inflicted on any number of employees. Redress and accountability in one case can change the employer's policies in a way that protects and benefits all employees.

D. *Public Policy Versus Unconscionability*

As we have seen, the unconscionability analysis performed by the courts that have addressed SOL Clauses has often been fairly rote. Where the courts have discussed both procedural and substantive unconscionability, they often conclude that, even though the employee is presented with a contract of adhesion, and even though there is an imbalance of bargaining power, the employee had the choice whether to proceed with the job. For this reason, procedural unconscionability is a steep hurdle for employees challenging SOL Clauses. For substantive unconscionability, the courts have the great weight of precedent holding that SOL Clauses are not inherently unreasonable.

Rather than unconscionability, public policy provides a sound doctrinal basis to invalidate SOL Clauses. Public policy doctrine focuses on the effect of SOL Clauses beyond just the individual employee and employer who are parties to the contract at issue.

Jacob Hale Russell has noted that public policy is "frequently indistinguishable in analysis from unconscionability" and "[c]ourts often discuss both interchangeably and in the same analysis."[176] Indeed, the New Jersey Supreme Court in *Rodriguez* did not make much effort to explain the contours between the two doctrines in holding that the SOL Clause was both unconscionable and against public policy.[177] Russell observes that the difference between public policy and unconscionability "has long been murky."[178] "However, most cases voiding clauses on grounds of public policy focus on terms that, no matter how they are used, would be

176. Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 982 (2019).

177. Indeed, *Rodriguez* quotes another case that mentions public policy as part of the substantive unconscionability analysis, essentially conflating the two doctrines. *See Rodriguez*, 138 A.3d at 542 ("Those factors focus on procedural and substantive aspects of the contract 'to determine whether the contract is so oppressive, or inconsistent with the vindication of public policy, that it would be unconscionable to permit its enforcement.'" (quoting Delta Funding Corp. v. Harris, 912 A.2d 104, 111 (N.J. 2006))).

178. Russell, *supra* note 176, at 1018. For a thorough discussion of unconscionability, see Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723, 755–64 (2021).

void."[179] Russell describes this as a context neutral analysis—that is to say, the term is "automatically void as to all" contracts without examination of its use "in a particular contractual context."[180]

Public policy is certainly more context neutral than unconscionability. A determination that a contract or clause is against public policy is less of a case-by-case analysis than unconscionability. The public policy doctrine bypasses questions about bargaining parity,[181] and is not sensitive to the individual parties to the specific contract. Procedural unconscionability investigates the parties' relative bargaining positions, but public policy simply says that, in substance, nobody can make this deal. That said, context does matter to the public policy analysis because the law might, for example, state that non-compete agreements are enforceable in business sale contracts, but are unenforceable in employment contracts.[182] In other words, the contract type may matter to the public policy analysis, but these specific parties' relative positions to each other do not.

Applying that framework to SOL Clauses, the argument here is that agreements shortening the limitations period should be unenforceable as against public policy in employment contracts. It may be that, even though three states completely disallow it by statute,[183] the courts should otherwise continue to allow parties in commercial or corporate contracts to agree to shorten the limitations period within reason. By holding that SOL Clauses are void as against public policy, there is consistency and predictability in employment contracts, and recognition that the harms of these provisions, which may allow the employer to evade accountability, may also very well extend beyond an individual employee.

E. *Other Approaches to Addressing SOL Clauses*

There are certainly alternative approaches to simply voiding SOL Clauses that may reflect more of an attempt to compromise between the competing policy interests.

For example, the Kentucky statute does not allow for more than a 50% reduction of the limitations period.[184] Kentucky allows reductions of less than 50% so long as they are reasonable. This approach, therefore, still leaves room for uncertainty when the SOL Clause reduces the limitations by less than half. Moreover, to the extent it provides a bright line rule in certain cases, there is no principled explanation for why the em-

179. Russell, *supra* note 176, at 1018.

180. *Id.*

181. Hoffman & Lampmann, *supra* note 124, at 201 ("Unlike unconscionability, public policy does not require courts to make explicit findings about the party's bargaining deficits before ruling for her claims.").

182. *See* CAL. BUS. & PROF. CODE §16600 (West 2023) (non-competes in employment contracts not enforceable); CAL. BUS. & PROF. CODE §16601 (West 2023) (non-competes in business sales are enforceable).

183. *See supra* notes 39–42 and accompanying text.

184. *See supra* notes 45–50 and accompanying text.

ployer may not reduce the limitations period by more than half, but may limit it by less. Even if the legislatively enacted limitations period is, at least to some degree, arbitrary, the 50% threshold is equally arbitrary.

Another statutory approach is proposed by Joel Tuoriniemi and Roger Reinsch.[185] In response to the shifting sands in addressing SOL Clauses in the Michigan courts, they propose a model statute that would: (1) void SOL Clauses that reduced the limitations period for claims alleging a violation of federal or state civil rights statutes and (2) otherwise permit SOL Clauses if they are reasonable. Reasonableness would be determined based on the following factors:

> (a) the adequacy of the consideration provided by the employer to the employee in exchange for the agreement or covenant;
> (b) whether the amount of time set forth in the agreement or covenant provides the employee sufficient opportunity to investigate and bring such claims;
> (c) whether the amount of time is so short as to work a practical abrogation of the right to bring such claims; and
> (d) whether, before the loss or damage can be ascertained, the claim is barred through expiration of the time set forth in the agreement or covenant.[186]

Their proposed statute would allow a court to "blue pencil" (i.e., reform) an SOL Clause once that court determines the clause is unreasonable as written.[187]

There is no doubt that Tuoriniemi and Reinsch propose a statute that would improve the current state of the law by resolving the split in cases concerning whether to enforce SOL Clauses where the employee's underlying claim is based on a federal and/or state civil rights statute. However, they only propose a bright line as to SOL Clauses that limit the time to bring "civil rights" claims. This would mean, for example, limitations on the right to bring claims related to workplace safety would not be in the category of automatically invalidated.

Moreover, by assessing all other SOL Clauses (i.e., those not related to underlying civil rights statutes) based on a multi-factored reasonableness standard, the proposed statutory model continues to suffer from the vagueness seen in the current decisional law, which has provided unpredictable and irreconcilable results. In addition, allowing judges to re-write unreasonable SOL Clauses has all of the problems that have been identified with allowing judges to re-write unreasonable non-compete clauses. Namely, there is no disincentive from (and arguably an incentive for) the

185. Tuoriniemi & Reinsch, *supra* note 110.

186. *Id.* at 798.

187. *Id.*

employer to overreach in drafting the SOL Clause, knowing that the worst that happens is that the judge adjusts the shortening limitations period to one the judge deems "reasonable."[188]

There is yet another statutory approach—that taken in Florida and South Carolina.[189] As discussed, those states simply ban any shortening of a limitations period by contract, regardless of the context or type of contract. This is a bridge too far because no contract—even a commercial deal among sophisticated parties—may agree to a shortened limitations period. Texas appears to address this concern by prohibiting enforcement of all clauses that reduce the limitations period unless they involve the sale of a business for $500,000 or more. The Texas statute better balances competing interests by allowing the parties in what is a presumptively sophisticated deal to opt for a provision reducing the limitations period.

These statutes that take broader aim at all contracts, not just employment contracts, may be unwarranted. There are concerns that are specific to the employment relationship that warrant a bright line rule prohibiting SOL Clauses; however, it may better balance party autonomy to preserve the possibility of shortening the limitations period in other contexts.

In sum, these statutory and proposed statutory approaches are valiant attempts to find compromise among competing interests, and they have features that are an improvement on the current state of the decisional law, but they also retain features that are less than ideal.

A statutory approach that bans SOL Clauses entirely is certainly the brightest line that can be drawn and the one that brings the swiftest clarity to the law. That said, this would require legislative action and likely faces political infeasibility both at the federal and state levels. Therefore, based on the reasons set forth in this Article, the next best approach is for the courts to hold that SOL Clauses are void as against public policy.

The net effect is that an SOL Clause should be invalidated and severed from the larger agreement. This result preserves whatever is enforceable about the larger bargain but eliminates the offensive clause. The courts should not "blue pencil" SOL Clauses by supplying their own substitute judgment concerning what is a "reasonable" limitations period. Rather, the SOL Clause should be supplanted by the limitations period provided by law.

CONCLUSION

SOL Clauses should not be enforced. The avenue to reach this result is the public policy doctrine. While public policy requires a weighing of competing interests, in the employment context, "freedom of contract"

188. *See generally* Pivateau, *supra* note 122, at 689–94 (discussing problems with "blue pencil doctrine," including that it "exacerbates the problem by providing further uncertainty").

189. *See supra* notes 39–40 and accompanying text.

should not be the guiding star. Party autonomy is a strained concept in a relationship with an inherent imbalance of bargaining power and where the agreements are most frequently standardized forms drafted by the employer.

Rather than assess SOL Clauses for reasonableness or by a standard of unconscionability, a public policy pronouncement voiding SOL Clauses lends the most certainty and predictability to the law. It brings clarity to a murky area where there are a number of irreconcilable decisions. SOL Clauses have the potential to override legislatively enacted periods of limitation, and thereby erect technical barriers that prevent employees' claims from being heard on the merits. There are a number of reasons to value a hearing of claims, whether valid or invalid, on their merits. Allowing employees their "'day in court' promotes the dignitary value of the legal process."[190] The perceived unfairness of not being heard on the merits is compounded by the fact that the SOL Clause represents a technical procedural rule written not by the legislature but, rather, *by the employer*.

If an employee's claim is dismissed based on a procedural technicality imposed by the employer, it may inflict harm beyond the individual employee that seeks redress. The dismissal (or failure to ever raise the claim in the first place because of the SOL Clause) may allow an employer to evade accountability for misconduct that might be repeated to victimize other employees. This potential harm to other employees justifies a pronouncement that SOL Clauses are against public policy.

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190. *See* Ochoa & Wistrich, *supra* note 149, at 501.