

DESIGNING A LEGALLY DEFENSIBLE ALTERNATIVE DISPUTE RESOLUTION (ADR) AGREEMENT

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ABSTRACT

Alternative Dispute Resolution (ADR) procedures are viewed by employers and the courts as expedient and cost-effective devices for adjudicating employee complaints. With these professed benefits, ADRs have grown significantly among employers in both the public and private sectors. Unfortunately, recent court decisions have held that to be legally enforceable, ADRs must meet certain standards of law and judicial fairness. Included here are various procedural guarantees including rights of disclosure, employee representation, and fairness of relief. This article provides a comprehensive analysis of the judicial requirements for effective ADR administration. Seven points are provided to ensure a legally defensible ADR agreement.

The use of alternative dispute resolution (ADR) agreements has become popular for resolving employment rights disputes. Legislative preference for ADRs and arbitration is increasingly enforced by various federal, state, and circuit court decisions. Interestingly, the courts and substantive law actually prefer settlement of such disagreements through arbitration rather than through litigation. As the most frequently used method of ADR, arbitration is viewed by employers as a less expensive and a more effective method of resolving employment-related cases. Additionally, practitioners often assert that arbitrators are less likely to be persuaded by emotional appeals than jurors when finalizing employment claims.

LEGAL BACKGROUND

Legislation and judicial support for resolving employment claims through ADR policies and arbitration is now largely established. The Federal Arbitration Act (FAA) exhibits a strong federal preference for finalizing employee disputes through final and binding arbitration. Section 2 of the FAA declares that written arbitration agreements are “valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract” [1]. Additionally, thirty-five states have adopted variations of the Uniform Arbitration Act (UAA), which has provisions similar to the FAA [2]. Arbitration agreements may be enforceable under state law, even if not enforceable under the FAA.

In a significant court case decided in 1991, the U.S. Supreme Court in *Gilmer v. Interstate Johnson Lane Corp.* held that employee complaints based on age discrimination can be resolved through private arbitration [3]. Since *Gilmer*, statutory employment claims involving race discrimination [4], sexual harassment [5], and sexual discrimination [6] have been held arbitrable, provided a binding and enforceable ADR agreement exists between the parties. Importantly, the 1991 Civil Rights Act makes it clear that Title VII discrimination claims are appropriate for arbitration:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including . . . arbitration, is encouraged to resolve disputes arising under the Act or provisions of Federal law amended by this title [7].

Despite the legal standing and professed benefits of ADRs, significant court decisions have attempted to limit the use of arbitration, particularly agreements that are employer mandated and, unfortunately, deny employees complete statutory rights, remedies, or violate certain due process safeguards. Although ADR procedures are increasingly adopted by employers, their acceptance, enforceability, and validity may ultimately rest on a legally designed and well-administered ADR program. Fortunately, recent court cases have delineated the acceptable boundaries of ADR agreements. Based on important legal decisions, this article discusses seven points for employers to consider when designing a legally defensible ADR procedure. Included here are procedural concerns regarding the fairness of ADR agreements, full and open disclosure, discovery, selection of neutral adjudicators, and the relief and parameters of arbitral awards. Many of the points discussed below have originated from employee challenges opposing legislation or court decisions favorable to the arbitration of employment claims.

POINT 1— MANDATORY OR VOLUNTARY PROCEDURE

Employers may adopt mandatory arbitration agreements for the resolution of all employee/management disputes. Therefore, unilaterally imposed arbitration provisions placed in company handbooks or human resources (HR) policies are valid. For example, in *Long v. Burlington Northern Railroad*, an arbitration procedure implemented twenty-nine years after the employee's initial employment, was held valid, creating a binding contract between the parties [8]. In 1994, the Ninth Circuit Court in *Nghiem v. NEC Electronics, Inc.* ruled that a mandatory ADR provision in the employer's arbitration agreement sufficed for enforcement purposes under the FAA [9]. To be shielded from attack, however, mandated arbitration procedures should be in writing. The procedure must be clearly written and should adequately describe what the employee is giving up (i.e., the employee's right to sue in court) and what is gained from the agreement to arbitrate employment disputes. For example, the speedy resolve of an employment claim.

For enforcement purposes, it is not necessary to have an employee sign an ADR policy. The Equal Employment Opportunity Commission (EEOC), while strongly supporting voluntary ADR agreements, opposes requiring employees to sign a mandated arbitration provision. In *EEOC v. River Oaks Imaging and Diagnostic*, the court held that requiring an employee to sign an agreement to arbitrate Title VII claims is itself a violation of those laws in that the policy prohibits access to the EEOC [10]. Without an employee's written consent, an implied agreement will be established if the employer prominently publishes the arbitration procedure and the employee continues his/her employment with full notice of the agreement. However, to facilitate enforcement—should a challenge arise—employers are encouraged to obtain an employee receipt acknowledging the policy. Furthermore, employers must not retaliate against employees for refusing to sign an ADR policy. Retaliation will invoke a violation of Title VII or the National Labor Relations Act [11].

If an ADR process is fair to both parties, and not drafted to solely benefit the employer, it should be held enforceable. Only when a mandatory ADR procedure is "unduly oppressive" or "highly unconscionable" will the courts refuse to enforce the arbitration agreement. As an example, when employers deny employees representation rights at hearings or severely limit reasonable remedies or awards, their arbitration policy will be subject to challenge. For completeness, the ADR should include a statement of the procedure's advantages to both parties to give employees an opportunity to appreciate the policy's intended value. Additionally, the arbitration policy, and any outcomes obtainable under its procedures, should be held binding on both parties.

**POINT 2—
PROVIDE FULL AND OPEN DISCLOSURE**

For an employer-implemented ADR agreement to be enforceable, there must be full and open publication of its existence. Employees must be informed of an agreement to arbitrate employment disputes at the time of their employment or upon implementation of a new ADR policy. Employees should also be given a copy of the policy that outlines the conditions and procedures of arbitration. In a significant court case decided in 1994 by the Ninth Circuit, the court stated in *Prudential Insurance Co. of America v. Lai Viernes*:

Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies, and procedural protections prescribed in Title VII and related state statutes [12, at 1305].

Therefore, to be held enforceable, arbitration agreements must be properly disseminated, clear, and explicit in their conditions. Because employees are forfeiting important procedural and substantive rights, they must be informed that they are waiving the right to trial by jury, appellate review, and full discovery. Employees should understand they are entering into the agreement voluntarily. However, generally a policy will not be invalid where an employee has simply failed to read it [13].

**POINT 3—
GRANT PROCEDURAL FAIRNESS**

A perplexing problem in ADR administration is the issue of discovery. One of the proposed advantages of arbitration is the limits placed on discovery with arguments opposing rather than supporting large numbers of depositions, interrogatories, and exhaustive document productions. Denial or “reduced” discovery is seen by plaintiffs, particularly in discrimination cases, as hampering attainment of needed evidence and perpetuation of the misdeed itself. The problem becomes one of balancing the employee’s right to present a full and complete case against the employer’s right to a speedy and inexpensive resolution of the employment dispute.

Employment laws provide little guidance for discovery in ADR procedures. Absent definite legislative or judicial guidelines, arbitration agreements should allow for document production, information requests, depositions, and subpoenas obtained in a simple, informal, and expeditious manner. While employees should have access to information reasonably relevant to the adjustment of their claims, a provision for limited discovery is desirable. The ADR should place definite limits on the time within which discovery may be completed. For example, time limits

of two to three hours could be placed on the taking of depositions or the interviewing of witnesses [14]. Figure 1 gives the American Arbitration Association's California Employment Disputes Resolution Rules for providing due process in discovery proceedings.

To ensure a productive hearing, the ADR agreement also should address hearing procedures, the presentation and examination of witnesses and documentary evidence, transcripts, and post-hearing arguments and briefs.

POINT 4— IDENTIFY DISPUTES SUBJECT TO ARBITRATION

The ADR procedure must specify how extensive the scope of the arbitration provision will be. Because the arbitration agreement is a contract, and, like any other contract, the parties agree to arbitrate only disputes falling within the coverage of their agreement. The procedure can be drafted to govern all employment disputes, or employers may desire to limit coverage to significant claims such as suspensions or terminations. If the parties intend to arbitrate statutory disputes, that intent should be explicitly stated in the agreement. Arbitration agreements can prohibit an employee from pursuing a discrimination claim in court, but they cannot block an employee from filing a charge of discrimination

- Parties shall list all witnesses to be called, a short summary of their testimony, and each document to be offered into evidence within thirty days of invoking the ADR procedure.
- Discovery shall be limited to that which is relevant and nonprivileged and for which each party has a substantial, demonstrable need.
- Upon request, either party shall be entitled to receive copies of relevant documents.
- The employee shall be entitled to a copy of his/her personnel records.
- The parties shall be entitled to take two depositions each.
- The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator deems necessary to facilitate full and fair exploration of the issue in dispute.

Figure 1. Discovery rules for arbitration.

with the Equal Employment Opportunity Commission (EEOC), nor can they prohibit the EEOC from investigating the charge and going to court in the employee's behalf.

ADR clauses stating that "all employment disputes shall be subject to arbitration" should be avoided. If certain types of disputes are to be specifically excluded, these exclusions should be clearly outlined. For example, employers may wish to expressly forbid arbitration regarding matters of compensation, work standards, or performance appraisal. The inclusion of grievable items should be carefully considered. Importantly, when the wording of an ADR policy is ambiguous, if challenged by employees the ambiguity will likely be construed against the employer. In *First Options of Chicago, Inc. v. Kaplan*, the Supreme Court held that courts, rather than arbitrators, should decide whether specific issues are arbitrable [15].

POINT 5— PROVIDE ADMINISTRATIVE SAFEGUARDS

A legally defensible ADR agreement must specify procedural safeguards to employees. Employers may find their ADR policy viewed as unfair, unconscionable, or contrary to law when administrative guarantees are absent. Several procedural requirements are particularly noteworthy.

Selection of the Arbitrator

A prerequisite to enforceability of an arbitration agreement is the selection of a neutral adjudicator through some means of mutual selection. The courts have clearly stated that the selection of arbitrators must meet a standard of neutrality (e.g., arbitrator should not be prejudged as biased or improperly appointed). For example, an *employer*-appointed single arbitrator or arbitral panel has failed to meet the neutrality requirement [16]. Where panels are used, these bodies must be structured to reflect an equal number of employee or management representatives [17]. Furthermore, panel representatives or single arbitrators should be chosen by both parties [18]. Adjudicators need not be outsiders but they must be competent and impartial. For cases involving employment discrimination claims, it is advisable to select arbitrators who are familiar with substantive law.

In a 1995 case particularly meaningful to the American Arbitration Association (AAA) and those selecting from its labor panel, a Texas court ruled that there was nothing manifestly biased about the AAA roster of arbitrators. In *Olson v. American Arbitration Association, Inc.*, the plaintiff claimed that the AAA procedures, which she was forced to use by virtue of her employment contract, were biased because the panel was "unfairly stacked with lawyers who primarily represent employers," that the AAA received substantial contributions from employers [19, at 560], and because the panel was composed of a majority of

white males. In rejecting the plaintiff's arguments, the court held the plaintiff's assertion that the panel was biased was based on speculation regarding stereotypical characteristics of selected individuals [19].

Arbitration Costs

The ADR policy should outline who must pay the costs incurred with arbitration. Costs can include arbitrator fees, document reproduction, administrative fees, and transcript charges (if one is used). A transcript provides the best evidence that the employee had a fair opportunity to present oral or written evidence supporting his/her claims. To avoid legal challenges that the agreement is unenforceable because of high costs to the employee, employers may want to absorb all or substantial costs of the arbitration. Attorney's fees, however, should be borne by the individual parties. There is no need for the employer to subsidize the employee's complaint against the organization. Since attorney's fees are usually available to the prevailing party in discrimination lawsuits, it may be beneficial to grant these fees when statutory issues are arbitrated.

Employee Representation

The arbitration procedure should make clear that both parties are entitled to legal counsel or other responsible representation. This guarantee will establish a climate of fairness and due process while permitting a court to grant weight to this issue of procedural justice [20].

Submission Agreement

Under a procedurally sound ADR agreement, the parties to arbitration should be required to enter into a submission agreement specifying the issues in dispute, the issue of law and fact to be decided, and the remedy sought. Submission agreements, by their very nature, will force the parties to focus on the salient aspects of their dispute. The submission agreement may include any standard by which the arbitrator will decide the claim—for example, a just cause standard in termination cases.

Hearing Protocol

To be held legally enforceable, any mandatory ADR procedure must provide the fundamental hearing safeguards of fairness and due process. The agreement should grant to employees sufficient advance notice of the time and location of the hearing. Employees must be allowed adequate time to prepare their defense and to rebutt the organization's evidence. During the hearing itself, witnesses should be subject to cross-examination and the claimant granted the right to testify in his/her own behalf. Essentially, both parties must be granted full and equal opportunity to present facts and arguments. Finally, the arbitrator's

decision should be rendered in writing and include both findings of fact and the arbitrator's rationale for resolving the dispute. To bring a speedy resolve to the complaint, the ADR procedure should require the arbitrator to return the decision within a specified time period. It is not uncommon to require arbitrators to render their decisions within thirty days after close of the hearing or receipt of post-hearing briefs if submitted.

POINT 6— PROVIDE APPROPRIATE RELIEF

One of the compelling advantages of arbitration is that arbitrators generally grant to successful claimants only actual economic damages incurred by the employee. To maximize enforcement of the ADR agreement, therefore, employers must be careful not to reduce, or eliminate altogether, potential recoverable damages. Conversely, the more the arbitral remedy matches prevailing arbitral and legal standards, the more enforceable the ADR agreement will become.

In discrimination claims, the arbitration policy should provide that employees/plaintiffs be allowed the relief provided by law. For example, the arbitrator may direct payment consistent with the Civil Rights Act of 1991. In one case, *Kinnebrew v. Gulf Insurance Co.*, the court noted, "Plaintiff does not forego 'substantive rights' when compelled to arbitrate under a more limited remedial scheme" [21, at 140]. In *Graham Oil Co. v. Arco Products*, another important case influencing ADR procedures, the court held that while arbitration agreements are enforceable, statutory mandated rights cannot be forfeited by ADR agreements [22]. The use of an ADR procedure is intended to supplement, not supplant, the remedies provided by federal or state law. This guideline is applicable even where the arbitration agreement provides for punitive damages. In cases of employment tort, the arbitrator should be allowed to award punitive damages if proven by clear and convincing evidence. The Federal Arbitration Act allows for the agreement to be enforced according to its terms regardless of any opposing state law barring punitive damages through arbitration. The American Arbitration Association recommends arbitrators be allowed to grant any remedy or relief the neutral deems just and equitable, including, but not limited to, any relief available had the employment dispute been resolved in court [23]. Arbitration policies that provide for these remedies clearly face fewer challenges to their enforceability.

POINT 7— TAILOR YOUR ADR POLICY

Arbitration procedures should be flexible and designed to meet the needs of a particular employment relationship. In most large organizations, a multistep

process finalized through arbitration is most effective. If the safeguards discussed above exist, employers are generally free to structure their arbitration agreement as they see fit. Just as the issues subject to arbitration may be defined, so too may ADR agreements specify the rules under which the arbitration will be conducted.

CONCLUSION

The courts continue to champion the use of ADR procedures and arbitration to resolve employment disputes. But employers cannot deny employees their statutorily guaranteed rights, nor can employers coerce, threaten, or mislead employees through poorly drafted ADR agreements. Employers wishing to implement an ADR program should be aware they may limit the costs of litigating employment claims, but they may not limit their statutory or common law liability. Steps must be taken to ensure that a clear, definite ADR agreement that outlines the subjects appropriate for arbitration is distributed among all covered employees. Moreover, employers should advise employees fully of any rights they relinquish when entering into a binding ADR agreement. Applying the seven points discussed above will help to ensure the enforceability of the employer's ADR policy and help insulate the ADR agreement from unwanted employee challenges.

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