

RESOLVING EMPLOYMENT DISPUTES OUTSIDE COURT

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I. Introduction

In this section, we look at the current state of employment law related ADR.

II. Making Arbitration Agreements Work

- A. Despite the strong federal policy favoring the arbitration of disputes, including employment disputes, a number of courts have refused to enforce arbitration agreements where the court found that the provisions caused employees to lose essential rights or were overly burdensome.

Given these issues, there are some drafting issues employers may need to consider for their employee arbitration agreements.

1. Cost sharing.
 - a. Costs of arbitration. When an employee brings a claim based on federal protective statutes, such as Title VII, the Americans with Disabilities Act, or the Employee Retirement Income Security Act, courts have been reluctant to enforce arbitration agreements that require the employee to pay a portion of the arbitration costs regardless of the outcome. Fee-splitting provisions have been struck down in Colorado on several occasions. Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F.3d 1230 (10th Cir. 1999); Gourley v. Yellow Transportation, LLC, 178 F. Supp. 2d 1196 (Colo. 2001).
 - b. Employee's attorney fees. In addition, courts have held that arbitration agreements that require both parties to pay their own attorney fees, regardless of outcome, violate the purpose of Title VII and the ADEA. Spinetti v. Service Corp. Intern., 324 F.3d (3d Cir. 2003).
 - c. Suggestion. Employers should not include any provision requiring the employee to pay costs and fees regardless of outcome. Note that, pursuant to the new American Arbitration Act Rules, discussed further below, employers are required to pay the costs of arbitration in employment disputes.
2. Shortening the statute of limitations. The Third Circuit recently upheld a district court's refusal to enforce an arbitration agreement on the grounds of unconscionability where it permitted an employee only thirty days to commence an action, as opposed to the longer statute of limitations periods permitted pursuant to statute. Alexander v. Anthony Intern., L.P., 341 F.3d 256 (3d Cir. 2003).
3. Limiting damages. The Alexander court also found that the agreement overly restricted the plaintiff's recovery and exposed the employee to the risk of paying all the arbitration costs if he or she lost, but did not provide any opportunity for the employee to recover attorney fees if he or she prevailed. See also Gannon v.

Circuit City Stores, 262 F.3d 677 (8th Cir. 2001) (arbitration provision that purported to limit punitive damages to \$5000 was invalid).

- a. Suggestion. In drafting arbitration agreements, employers should be careful not to go too far in seeking protections, or they may lose out on the benefits that arbitration may provide.
4. Fees and costs for prevailing party. When an agreement calls for fee-shifting – that is, the prevailing party pays the other side’s attorney fees and costs – it may or may not be enforced. See Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255 (11th Cir. 2003) (mere existence of fee-shifting provision in arbitration agreement did not automatically render the agreement unenforceable). A party seeking to avoid arbitration must make a showing that enforcement of the agreement would preclude him or her from effectively vindicating federal statutory rights. Much depends on the claim and whether the plaintiff or defendant as a prevailing party would have a right to fees pursuant to statute and whether the arbitration agreement incorporates the governing statute. See, e.g., Cline v. H. E. Butt Grocery Comp., 79 F. Supp. 2d 730, 733 (S.D. Texas 1999) (refusing to find arbitration clause invalid because, given that ERISA permits the recovery of attorney fees and costs, “it is entirely possible that Plaintiff will not pay any significant fees at all”), but see Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (under Title VII, although the award of fees is discretionary, a prevailing defendant may be awarded attorney fees only upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation).
 - a. Suggestion. Arbitration agreements with fee-shifting provisions may be enforceable, depending upon the claims asserted. Excluding such provisions and relying upon the statute governing particular claims to address this issue may preserve the employer’s right to obtain fees under certain circumstances but avoid challenges to the agreement.
 5. Employer modification. An arbitration agreement may be held invalid where it gives too much power to the employer to change its terms. For example, in a recent Colorado case, Gourley v. Yellow Transportation, LLC, 178 F. Supp. 2d 1196 (Colo. 2001), the employees signed an acknowledgment form agreement to arbitrate any employment dispute. However, the form referenced the arbitration policy, which was part of the employee handbook. The court noted that various disclaimers in the handbook stated that it was not a contract and the employer reserved the right to modify all provisions of the handbook at its discretion. The court concluded that the agreement to arbitrate was not a true agreement since the employer was free to change its terms unilaterally. The Tenth Circuit also recently upheld a district court’s refusal to enforce an arbitration agreement where the agreement and employee handbook contained conflicting provisions and the employer reserved the right to amend any provision. Dumais v. American Golf Corp., 299 F.3d 1216 (10th Cir. 2002).
 - a. Suggestion. Employers should keep arbitration agreements out of employee handbooks and any other documents which disclaim any intention of forming a contract. Instead, make the arbitration agreement a separate document which is intended to be a contract.
 6. Severability clause. Even where an arbitration agreement contains invalid provisions, some courts may sever the objectionable portion in order to enforce the intended function of the agreements. See, e.g., Hadnot v. Bay, Ltd., 344

F.3d 474 (5th Cir. 2003); Fuller v. Pep Boys- Manny, Moe & Jack of Delaware, Inc., 88 F. Supp. 2d 1158 (D. Colo. 2000) (severing unenforceable fee agreement from otherwise valid arbitration clause in Title VII case).

- a. Suggestion. Adding a severability clause to the arbitration agreement will make it easier for courts to sever any provision it deems unenforceable.
7. Informed consent. No matter how well drafted, an arbitration agreement will not be enforced if the employees have not been sufficiently informed of its provisions. For example, in a recent case, the employer had mailed copies of its dispute resolution procedure, but could not produce any records or verification that the plan was sent or that employees received it. Owen v. MBPXL Corp., 173 F. Supp. 2d 905 (N.D. Iowa. 2001). The court determined that, under these circumstances, the employer had not entered into a valid arbitration agreement with its employees. In another case, Kummetz v. Tech Mold, Inc., 152 F.3d 1153 (9th Cir. 1153), the employee signed an acknowledgement form stating that he had read the employee handbook, but the form did not mention or imply that the handbook contained an arbitration provision. In addition, the handbook stated that employees could obtain a copy of the dispute resolution policy from the accounting office, which the plaintiff never did. Considering these facts, the court determined that the employee did not knowingly agree to the arbitration clause. See also Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937 (S.D. Texas 2001) (court refused to enforce arbitration agreements where employees did not speak English and the agreements were not translated for them before they signed).
- a. Suggestion. Employers should have employees sign acknowledgements or separate agreements containing the entirety of the arbitration policy.

III. Changes in the American Arbitration Association Rules Regarding Employment Claims

- A. Many employers choose to integrate or reference the American Arbitration Association's rules in their arbitration agreement. However, effective November 1, 2002, the AAA has modified a number of its rules relating to employment disputes.
- B. Significant changes.
 1. Pursuant to the new rules, most of the administrative expenses of arbitration are borne by the employer, unless the parties agree otherwise. For disputes arising out of employer-promulgated plans, the employee's cost is generally limited to a \$125 filing fee. The employer pays several administrative fees, which range from \$200 to \$10,000, depending on the amount of the claim. The employer is also responsible for all expenses of the arbitration, including required travel and other expenses of the arbitrator, as well as witness or other costs relating to proof produced at the direction of the arbitrator. The employer is also required to pay the arbitrator's compensation. Under these rules, the arbitrator's compensation and the administrative fees are not subject to reallocation by the arbitrator unless the arbitrator determines that a claim or counterclaim was filed for purposes of harassment or is patently frivolous. The employer also pays an daily administrative fee of \$300 a day for each day of a hearing before a single arbitrator or \$500 a day for a hearing before a multi-arbitrator panel. Similar fees are required for disputes arising out of individually negotiated employment agreements and contracts.

2. An employer who intends to incorporate the AAA rules or refer to the AAA dispute resolution procedures must do the following at least thirty days prior to the effective date of the program:
 - a. Notify the Association of its intent to do so; and
 - b. Provide the Association with a copy of the employment dispute resolution plan.
3. The AAA rules permit the arbitrator to order discovery by way of deposition, interrogatory, document production, or otherwise.

IV. To Arbitrate or Not to Arbitrate?

At the same time that the courts have strongly endorsed arbitration as a manner of resolving employment disputes, albeit with the qualifications discussed above, employers are beginning to wonder if they really want arbitration. In this section, we will consider some of the reasons why those employers are rethinking their inclination to arbitrate.

- A. Traditionally perceived advantages of arbitration. In no particular order, employers long perceived that arbitration held certain clear advantages for them.
 1. Confidentiality. Employers believed that arbitration offered the advantage of confidentiality. However, although the proceedings themselves are not public, an arbitration award can be filed with the court.
 2. Little or no discovery. Although the AAA rules allowed for the possibility of discovery, in many instances, the parties exchanged little more than witness lists and exhibits.
 3. Cost. Because there is little discovery, arbitration was generally perceived to be much cheaper than regular litigation.
 4. Sophisticated decision maker. Because arbitrations were conducted by one or more “experts” in a particular area, the decision maker was usually more sophisticated and knowledgeable than a jury.
 5. Moderate damage award. Although there are exceptions to this rule, it was generally agreed that the sophisticated decision maker was less likely to enter an exorbitant damages award.
 6. No rules of evidence. Because the rules of evidence do not apply, potentially helpful testimony which well might be excluded by a trial court is admitted.
- B. Traditionally perceived disadvantages.
 1. Limited appeal rights. The grounds for appealing an arbitrator’s decision are quite limited and, therefore, an employer can be “stuck” with a bad decision.
 2. Splitting the baby. Arbitrators have long been criticized for having a tendency to “split the baby” instead of issuing an award to the defendant.

3. No rules of evidence. Testimony which would otherwise be excluded by a trial court is frequently admitted by an arbitrator.
- C. Reasons to consider going to court. In addition to the traditional disadvantages of arbitration, evolving circumstances have created some additional arguments for considering going to court instead of drafting and enforcing an arbitration agreement.
1. Expansion of discovery. Even before the adoption of the modified AAA rules permitting an arbitrator to order discovery, there was an increasing tendency to allow discovery in an arbitration context, perhaps as a method of buttressing an argument that arbitration clearly could be fair to an employee. Among other things, expanding discovery means that employees, who otherwise would not have access to most management witnesses, can now take their depositions before the hearing. Similarly, written discovery is far more burdensome, costly, and disadvantageous to employers because they almost always have more documents and more factual information than the employee.
 2. Increasing costs. The cost of arbitration has recently increased so that there is no real difference in the cost of litigating in court versus arbitrating a matter. As discussed above, the expansion of discovery has greatly increased costs. In addition, there is a trend towards additional pretrial and post trial briefing. Finally, the employer has to pay the cost of the arbitration, including the arbitrator's fees. Obviously, in regular litigation, the employer is not required to pay the judge's salary.
 3. Minimal summary judgment possibilities. In court, the defense frequently prevails in whole or in part on summary judgment. However, arbitrators are very unwilling to enter a summary judgment. Besides losing an opportunity to win, the defendant also loses a pressure point in the pretrial process which can lead to settlement before significant costs are incurred.
 4. Lack of decisiveness on pretrial issues. In addition to their reluctance to grant summary judgment, arbitrators may have a tendency to be more permissive or to "split the baby" on pretrial issues like discovery disputes.

V. Some Alternatives to Arbitration

- A. EEOC agreements. The United States Equal Employment Opportunity Commission has entered into a "National Universal Agreement to Mediate" with about 20 large employers. In addition to these national mediation agreements, EEOC district offices have entered into almost 300 mediation agreements with employers at the local and regional levels.
1. Terms. Under the terms of these agreements, all eligible charges of discrimination filed with the EEOC naming a party to the agreement as the employer or respondent are referred to the EEOC's mediation unit. The company usually designates a corporate representative to handle any inquiries from the EEOC and other logistical matters related to potential charges in order to expedite a prompt scheduling of the matter for mediation.
 2. Perceived benefits. The EEOC is attempting to sell these universal mediation agreements to employers because, according to the EEOC, these arrangements have at least the following benefits.

- a. By having an agreement in place, the initial step of contacting an employer to see if it is interested in mediating a particular charge is expedited or eliminated.
 - b. The agreements establish points of contact for the employer and the EEOC, which expedites the flow of information between the EEOC and the company.
 - c. Similarly, the established contact persons expedite the scheduling of the mediation session.
 - d. According to the EEOC, the likelihood of successful mediation is increased because the existence of the agreement demonstrates the employer's willingness to mediate eligible cases.
 - e. A universal mediation agreement usually allows both the EEOC and the employer to opt out of mediation on a case-by-case basis if either party believes that the claim should not be subject to mediation.
- B. Private mediation. Many companies now require a private mediation before the employee can proceed to arbitration, an administrative proceeding, or litigation.
- 1. Potential advantages. There are number of potential advantages to an agreement to mediate disputes. For example:
 - a. A resolution to an issue could be reached quickly.
 - b. The parties themselves control the process, participate actively, and, hopefully, may reach an agreement which they perceive as their own agreement rather than one directed by a governmental representative.
 - c. If mediation leads to a quick resolution, costs are low. The parties may elect to participate in the mediation without attorneys, but it is advisable to use an attorney to draft any agreement.
 - d. Because mediation attempts to resolve disputes before arbitration or litigation is initiated, there may be greater likelihood of keeping the dispute confidential.
 - e. Even if the dispute is not resolved by the mediation, both parties can learn the strengths and weaknesses of their case as perceived by both the other side and the relatively objective mediator.
 - f. Frequently, an employee simply wants a chance to be heard by some impartial authority figure, such as the mediator. Similarly, it allows the employee to express directly to the employer's decision maker his or her grievances.
 - 2. Potential disadvantages. Of course, mediation does not work every time. Here are some reasons why it does not.
 - a. The employer may be worried about setting a precedent which could encourage additional lawsuits.

- b. Requiring mediation before arbitration, an administrative filing, or litigation may be too early because the basic facts may not have been discovered and because emotions are still running high.
 - c. Similarly the employee may not be realistic about the value of his or her claim until the litigation process has proceeded for some time.
 - d. Face-to-face discussions could increase animosity.
- C. Agreements to waive a jury. Some employers are now asking employees to waive the right to a jury instead of signing an arbitration agreement. By doing so, the employers hope to gain one of the advantages of arbitration – without being subjected to some of the disadvantages of an arbitration such as losing the right to a full review of the judge’s decision. However, it is far from clear that such agreements will be enforced by the courts.
- D. Peer review. Some companies use a peer review process in which company personnel enforce standards relating to, for example, production, work rules, and performance. Usually, however, peer review policies limit the panel’s authority to issues involving company policies. Statutory claims are rarely included.
 - 1. Perceived advantages.
 - a. Advocates of peer review contend that it improves supervisory decision making and compliance with personnel policies because it tends to make all personnel more aware of company policies and their proper application.
 - b. The peer review process allows employees to participate directly in work place decisions and can lead to the establishment of mutual trust.
 - c. Because all of the individuals involved work for the company, sessions can be scheduled relatively easily and disputes can be resolved quickly.
 - d. Some advocates of the peer review process claim that it is an advantage to have people who know and care about the company and its employees, rather than outsiders, involved in the process.
 - 2. Perceived disadvantages. The major disadvantage of a peer review process is that events most likely to lead to litigation, such as an employment termination or a promotion or demotion decision, are probably not going to be handled by the peer review process. Therefore, the ability of the peer review process to avoid litigation is not terribly great.
- E. Ombudsman. According to surveys, appointing an ombudsman is the most often used form of ADR. A corporate ombudsman is an individual appointed to investigate internal complaints, report findings, and facilitate equitable settlements. This approach has many of the same advantages and disadvantages of the peer review process.
- F. Non union grievance procedure. Some companies which are not unionized employ a multi-step plan for resolving grievances. Generally, each step involves face-to-face negotiations between an employee and his or her representative and a successively higher level of the company’s management.

1. Typical procedure. Typically, a grievance procedure provides for an informal discussion of the complaint as an initial step. Usually, an employee's immediate supervisor is involved in this initial stage. If the employee believes that discussion with his or her supervisor would be inappropriate, he or she typically may proceed to the next level.
 2. At the second or third levels, the company representative usually has had no involvement in the complaint or dispute and, therefore, is at least somewhat neutral. At the second step, an investigation is frequently conducted so that the manager can consider the facts. He or she might also review the facts in the dispute with a human resources representative.
 3. Finally, the second level decision could be appealed to a management committee which frequently includes a human resources representative, the head of the particular operating division or unit, and another senior management representative. This committee may well review both the investigative materials and any written submissions by the employee.
- G. Potential disadvantages. There are a number of potential disadvantages to a mandatory grievance procedure. First, the employees may not perceive this process to be fair or impartial because it is dominated by management representatives. Second, particular companies may decide that certain types of complaints will not be subjected to the grievance procedure and, therefore, the ability to prevent litigation may be limited. Third, to be effective, a grievance procedure probably should be mandatory. However, creating a mandatory procedure eliminates management flexibility and creates the possibility of contract claims being asserted by employees who contend that the procedure was short-circuited or not conducted in good faith.