"The Future of Workplace Arbitration"

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I. A View Long Held: One Attorney's Perspective

> For me, arbitration is a forum unlike any other. Above all else, its intimacy singles it out. It is a civilized form of "trial by ordeal," generally witnessed only by the immediate players. It is relatively free of procedural and other barriers, yet, at the same time, it is rooted in a disciplined structure that allows for the civility and dignity most of us cherish. Where necessary and desirable, it can be expeditious. It not only permits, but cries out for, creativity. For those of us who thrive on passion and intensity, it is an ideal vehicle through which to pour out our souls in a proceeding generally of limited duration, with a prompt result in the offing. How satisfying!

Michael I. Bernstein, "Preparing for Arbitration: A Management Lawyer's View"; in *How ADR Works,* ABA Section of Labor and Employment Law, edited by Norman Brand, 677-694 (The Bureau of National Affairs, Inc. 2002).

II. Surveys Say...

A. **1988** – Dale Allen, Jr. and Daniel F. Jennings, "Sounding Out the Nation's Arbitrators: An NSA Survey," *Labor Law Journal* (July 1988): 423-431 (nationwide sampling survey of labor arbitrators, based upon 296 questionnaire responses), yielded, *inter alia,* the following observations, opinions and projections:

1. **Retirements:** A large percentage of labor arbitrators will likely be retiring from practice over the next decade (*id.* at 430).

2. **Average Number of Days Billed:** Nearly half of those responding indicated estimated "three days" as the number of days billed for a typical or average case including the hearing, travel, and study time; "[o]bviously, there could be considerable variance in the number of days charged depending on the complexity of a given case" (*id.* at 425).

3. **Private Sector/Public Sector:** While the greatest gains in union growth occurred in the public sector "in [then] recent years," the

NAA neutrals responding indicated they hear over twice as many private sector disputes; on the other hand, 25% of survey participants indicated that 50% or more of their hearings were in the public sector (*id.* at 425-26).

4. **Projections/Union Membership:** Of those responding to the question as to the level of anticipated union membership in the next 25 years, 29% believed it would remain at about the then current levels 25 years into the future; 25% believed union membership would grow by over 25% in those 25 years; 19% believed union membership would grow between 5 and 25% in that 25-year period; only 7% envisioned a loss of union membership during those next 25 years (id. at 429).

5. **Degree of Legalism:** 43% indicated that arbitration should strive to increase the degree of legalism in arbitration procedure; the majority, 51%, favored less legalism; 6% believed the current level of legalism in arbitration procedure was "about right" (*id.* at 429).

6. **Arbitration Usage:** Notwithstanding that 43% foresaw a growth in union membership, 37% of those responding to the question believed the arbitration caseload would be about the same in the next ten years; 28% believed the arbitration caseload would increase in that period; and 27% believed the arbitration caseload usage would drop in that period (*id.* at 429-30).

7. **Post-hearing briefs:** 63% of arbitrators responding recommended elimination of such briefs as a means of reducing cost of arbitration, although 45% believed them to be of significant value both in analyzing the record and drafting the opinion (*id.* at 427).

8. **Discrimination Case Experience:** While discrimination frequently is included as a supporting argument in a large percentage of cases involving minority employees, in response to a question as to the approximate number of cases heard in the last three years, where discrimination was the *"primary"* issue, only 10% had heard at least one racial discrimination dispute; 90% had not heard any cases involving race or handicap; nearly 25% had heard one or more religious discrimination disputes; approximately 50% had presided over at least one age and six sex discrimination cases; 43% had decided 10 or more age discrimination disputes (*id.* at 426).

9. **Conflicting Medical Opinions, *e.g.*, Medical Clearance to Return to Work:** 45% would tend to uphold the physician's report indicating the most intensive in-depth examination and analysis; nearly 25% would favor a specialist over a non-specialist; 27%

would accord heaviest weight to the physician having the most intimate knowledge of the job to be performed (*id.* at 429).

B. **1997-2013** – Tom Stipanowich, "What Does the Fortune 1,000 Survey on Mediation, Arbitration and Conflict Management Portend...?," March 2013, http://www.mediate.com/articles/StipanowichTbl20130315.cfm, predicated upon 2011 survey of corporate counsel developed by researchers at Cornell University's Scheinman Institute on Conflict Resolution, the Strauss Institute for Dispute Resolution at Pepperdine University School of Law, and the International Institute for Conflict Prevention & Resolution:

1. **Concerns, Objectives and Approaches:** Although the approaches of large corporations to managing conflict vary widely, their strategies typically boil down to how best to control cost and risk in dispute resolution processes and outcomes. As the U.S. experienced what some have called a "quiet revolution" in dispute resolution in the 1980s, corporate counsel were in the forefront of efforts to avoid the expense and risk of hardball litigation. They began using settlement-oriented approaches like mini-trial, and, more significantly, negotiation with the help of mediators. They banded together to form the Center for Public Resources (now CPF), which actively promoted corporate and law firm pledges to seek out-of-court solutions before resorting to litigation.

2. **Limitations of Arbitration?** Around the same time, corporate counsel also participated in efforts to address what they perceived to be the limitations or inadequacies of binding arbitration as a substitute for litigation. Although forms of arbitration had been a mainstay of business dispute resolution throughout much of the latter half of the Twentieth Century, arbitration was thrust into an even more prominent role as a substitute for public trial thanks to a series of U.S. Supreme Court decisions strongly promoting the enforcement of arbitration agreements.

3. **1997 Cornell Survey of Fortune 1,000 Corporate Counsel:**

   a. Responses of more than 300 counsel "present[] a very different, decidedly mixed picture"; "assert that their companies are less likely to employ hardball litigation as a primary strategy, and instead broadly embrace mediation as a tool for resolution of all kinds of disputes now and in the future"; also becoming more proactive in managing conflict in the early stages of litigation and employing third parties to evaluate and assess different dimensions of a legal dispute. More than two-thirds of responding counsel said their company employ[s] some form of 'early case assessment' – an approach that in companies like DuPont is a formalized

and systematic method of analyzing all aspects of a dispute in the early stages in order to plot the appropriate course of its resolution."

b. At the same time, there exists a more cynical view of alternative dispute resolution ("often subject to manipulation that prolongs or frustrates the dispute resolution process"), and "[b]inding arbitration usage has dropped for most kinds of disputes (including ... employment ...); "corporate counsel are now evenly divided on the question of their company's future use of arbitration."

c. Many corporate counsel concerned "about the inability to overturn arbitration awards that do not comport with applicable law or proven fact," while many other corporate attorneys continue to regard binding arbitration as a "choice-based process that affords countervailing advantages such as options for enhanced confidentiality, speed and efficiency, expertise ... and even, potentially, private appeal to another tier or arbitration!"

d. On the one hand, "arbitration will undoubtedly remain the preferred mechanism for adjudication of international business disputes.... On "the other hand, it is reasonable to expect that over time international businesses will increasingly probe the opportunities to enhance their control and active management of conflict, including intervention strategies that help to promote greater cross-cultural and cross-border communication and which reduce the need for arbitration hearings. Such developments are likely to be stimulated to the extent that businesses perceive international arbitration is becoming more costly and less efficient – a perception that has factored significantly in recent years on the American scene."

III. Ebbs And Flows

A. Without here attempting to exhaust the ebbs and flows in what one might characterize as the "love/hate/ambivalent" relationship our courts, agencies, parties and advocates have held for arbitration over the years, consider, by way of example, the following observations:

1. William A. Carmel and Patrick Westerkampft, "The Arbitration of EEO Claims: A Decade After Gardner-Denver," *New York State Bar Journal* (January 1988): 26-34, 65, reprinted from *Employee Relations Journal*, Vol. 12, No. 1 (Summer 1986), (quoting from *Alexander v. Gardner-Denver Co.,* the very "'informality of arbitral

procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution [also] makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts'" (*id.* at 30). The authors offered, however:

> Although the use of arbitration in the resolution of EEO claims has been very limited, the legal climate may not be as unfavorable to arbitration as was believed in the years immediately following *Gardner-Denver*.... Parties, by heeding the Court's suggestions, have within their grasp the opportunity to perfect existing grievance systems to accommodate EEO claims, or to submit existing disputes to arbitration as voluntary, knowing settlements of statutory entitlements. *Id.* at 65.

2. Patricia Thomas Bittel, "Arbitration: Is This Where We Were Headed?," *Labor Law Journal*, (CCH, 2002): 122-32, reprinted from *The Journal of Alternative Dispute Resolution in Employment,* vol. 3, no. 1 (CCH, Spring 2001):

   - examining, *inter* alia, the experience under the War Labor Board created in 1942 and endorsed by the War Labor Disputes Act of 1943,[1] inclusive of mediation, voluntary arbitration, compulsory arbitration and interest arbitration to facilitate resolution of wartime production issues (*id.* at 122-23);

   - the Federal Arbitration Act (FAA) of 1925[2] "not only placed arbitration appellants on an equal footing with other contracts, it established a federal policy favoring arbitration" (*id.* at 125);

   - the *Steelworkers Trilogy* of 1960[3] "put the full force of the federal courts behind labor arbitration" (*id.* at 124);

   - the 1983 decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,*[4] "federal policy favors arbitration of employment disputes where they have agreed to submit such disputes to binding arbitration" (*id.* at 125);

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[1] 50 U.S.C. §§ 1501-1511 (1943).
[2] 9 U.S.C. §§ 1-14.
[3] 363 U.S. 564; 363 U.S. 574; 363 U.S. 593
[4] 460 U.S. 1

- the public policy exception addressed, in 1987, in *United Paperworkers v. Misco,*[5] "ushered in the era of legalism" (*id.*);

- the "landmark" decision in *Gilmer v. Interstate/Johnson Lane Corp.*[6] "changed the landscape by endorsing a system of binding arbitration of statutory employment rights" and "increas[ing] the general perception that the judiciary would favorably view compulsory arbitration systems" (*id.*);

- Congress' enactment of the Civil Rights Act of 1991[7] -- "[w]here 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 Acts or provisions of Federal law amended by this title" – considered by "[m]ost courts facing the issue [to have] established Congressional intent to encourage arbitration of claims under the laws being amended, including Title VII, the ADA and the ADEA" (*id.*);

- *the convening, in 1995, of a Task Force of the American Bar Association, the National Academy of Arbitrators, the American Arbitration Association, the Society of Professionals in Dispute Resolution, the Federal Mediation & Conciliation Service, the National Employment Lawyers Association, and the American Civil Liberties Union, to address "fundamental issues of fairness for the arbitration process," yielding "basic guidelines for a fair arbitration procedure" in the form of the "Due Process Protocol," such as:*

  * Any agreement should be informed, voluntary, and not conditioned on initial or continued employment.

  * Employers should have the right to insist on an agreement to mediate and/or arbitrate statutory disputes as a condition of initial or continued employment.

  * Employees should not be permitted to waive their right to judicial relief for statutory claims arising out of the employment relationship for any reason.

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[5] 484 U.S. 29.
[6] 500 U.S. 20 (1991).
[7] Pub. L. No. 102-166 § 118, 105 Stat. 1071, 1081 (1991).

* Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but the decision to mediate and/or arbitrate cases should not be made until after the dispute arises (*id.* at 126);[8]

- The Revised Uniform Arbitration Act ("RUAA"),[9] as approved by the National Conference of Commissions on Uniform State Laws on August 3, 2000, ("opens the door for courts to revisit a number of procedural issues in [*inter alia*] the areas of discovery..."; "arbitrator is given authority to issue subpoenas and permit such discovery as is appropriate, including depositions," which "could result in the expansion of deposition practice in jurisdictions that do not use it widely for arbitration"; "arbitrator may award punitive damages and other exemplary relief, attorney fees, and 'such remedies as the arbitrator considers just and appropriate'" – without subject to the constraints placed upon the judiciary, an approach of particular concern to its opponents (*id.* at 128-29);

- *EEOC v. Waffle House, Inc.,*[10] "Although [the decision] recognizes that the EEOC's mandate to uphold the public interest supersedes the employee's agreement to arbitrate, the case in no way backtracked from the enforceability of such agreements between parties, as recognized in prior cases" (*id.* at 131).

- "We do not know," *inter alia*:

  * "how far an arbitrator can restrain discovery in the drive toward efficiency before basic fairness has been denied";

  * [with certain exceptions], "how arbitrator costs should be allocated";

  * "whether an arbitrator is bound by the statutes of limitations applicable in courts";

  * "whether courts will or should look the other way when an arbitrator mangles the law." *Id.*

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[8] The text of Due Process Protocol may be reviewed at the website of the National Academy of Arbitrators, www.nmaarb.org.

[9] *The Revised Uniform Arbitration Act,* http://www.uniformlaws.org/shared/docs/uniform/arbitration/arbitration_final_00.pdf (accessed Nov. 11, 2013).

[10] 534 U.S. 279 (2002).

3. Philip A. Miscimarra and John R. Richards, "The Ghost of Arbitration Past, Present, and Yet To Come: Insights About the Arbitration Fairness Act, A Management Perspective," National Academy of Arbitrators (2009), http://www.morganlewis/pubs /GhostsofArbitration_20may09.pdf:

- *Alexander v. Gardner-Denver Co.* -- "For many years, the Supreme Court's most important pronouncement on the resolution of legal claims in arbitration" (*id.* at 57); "[f]or a time, the *Gardner-Denver* decision was regarded as a suggestion that the Supreme Court was generally hostile to the notion that an employee's statutory rights could be conclusively resolved in arbitration. The arbitration in *Gardner-Denver,* however, was conducted under the labor agreement, involving a contractual dispute, and the existence of a prior arbitration award was raised as a defense in the employee's subsequent Title VII action. Therefore, the *Gardner-Denver* case did *not* involve the application of the FAA, a factor subsequently relied upon by the Supreme Court when it determined in *Gilmer* that the FAA could be invoked to enforce the arbitration of statutory disputes" (*id.* at 58; citations omitted).

- *14 Penn Plaza LLC v. Pyett,*[11] "The Court majority ... stated that *Gardner-Denver* and its progeny were inapplicable, and the Court explained that they 'do not control the outcome where, as is the case here, the collective bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims' and 'those decisions instead involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims'" (*id.* at 67; internal citations omitted); in answer to why the " 'broad dicta' in *Gardner-Denver* and similar cases that appeared to be 'highly critical of using arbitration to vindicate statutory antidiscrimination rights,'" the "Court majority in *Pyett* offered three responses":

  * "the Supreme Court stated that *Gardner-Denver* 'erroneously assumed' that arbitration involved the waiver of statutory rights"; "the decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right

[11] 556 U.S. 247 (2009).

to seek relief from a court in the first instance" (*id.;* internal citations omitted);

* "the Supreme Court in *Pyett* indicated that it had 'corrected' a mistaken suggestion in *Gardner-Denver* that certain informal features of arbitration made it "a comparatively inappropriate forum for the final resolution of [employment] rights'" (*id.;* internal citation omitted);

* as to the concern expressed in *Gardner-Denver* that a union might subordinate an individual employee's interests to the collective interests of all bargaining unit employees, according to the Court, such fear did not warrant introducing a qualification to the ADEA that was not evident in the statute itself or, for that matter, justify a collateral attack on the National Labor Relations Act (*id.;* internal citations omitted).

4. Mark N. Reinharz and Terence M. O'Neil, "Jury Waivers: An Alternative to Arbitration," *Nassau Lawyer,* Vol. 52, No. 2 (Oct. 2002): In *Circuit City v. Adams,* 532 U.S. 105 (2001), the "Court made it easier for employers to resolve workplace disputes through the use of arbitration procedures rather than the courts," but "many lower courts have not given employers carte blanche in this area," as evidenced in the Ninth Circuit's decision on remand from the Supreme Court in *Circuit City* itself:

> The Court of Appeals unanimously ruled that the arbitration agreement at issue was unenforceable because it was too one-sided. The agreement at issue in *Circuit City* was held to be procedurally unconscionable because it was a contract of adhesion: "a standard-form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely." It was also found to be substantively unconscionable because the agreement: (1) required employees to arbitrate all "employment-related legal disputes, controversies or claims" against the employer but did not require the employer to arbitrate its claims against employees; (2) required employees to split the arbitrator's fee with the employer; (3) imposed a strict one year statute of limitations on the arbitration of claims; and (4) limited the relief available to employees to injunctive relief, up to one year of

back pay and up to two years of front pay, compensatory damages, and punitive damages in an amount up to the greater of the amount of back pay or front pay awarded or $5,000. Because the unconscionable provisions could not be severed, the entire arbitration agreement was unenforceable.

IV. Given The Foregoing, What Assumptions To Make?

A. Predictability difficult.

B. Arbitration, with all its desirable traits, never was a "one-size-fits-all" solution, any more than mediation is appropriate or desirable in every case.

C. To the extent arbitration a desirable and legally viable alternative, still the need to address such issues and concerns as:

1. Relinquishing the right of appeal except in limited circumstances – or is that necessarily the case? Are there alternatives? *See, e.g.,* "New Optional Appellate Arbitration Rules From The AAA And ICDR Provide Further Arbitration Flexibility" (November 1, 2013), http://go.adr.org/AppellateRules.

2. The increased costs, scheduling difficulties and other delays and protracted hearings often encountered in arbitration.

3. Fees.

4. Pre-dispute mandatory arbitration.

5. Mutuality.

6. A declining pool of qualified and experienced arbitrators?

7. Unionization: ↑↓↔?

8. Discovery and related alternatives: None? More? Less? How much? Unique circumstances? *See, e.g.,* FINRA Rules 13506-13514 (2013); a demand for a bill of particulars ???? [a war story].

9. The import of e-discovery? Better in litigation? Better in arbitration?

10. Other legalisms and increased formalities and resemblance to litigation? Transcripts? Briefs? Motions?

11. Unpredictability, including, where applicable, as compounded by the uncertainty and shifting positions of the NLRB as to the interaction between the National labor Relations Act and the desirability of arbitration as an appropriate forum.

12. The import of an internal grievance or complaint procedure: in union context; in non-union context. *See*, *e.g.*, Michael I. Bernstein, "What's in a Name: The Discovery in Grievance Handling," in, *Handbook of Health Care Human Resources Management*, Second Edition, edited by N. Metzger, 483-484. Aspen Publishers, 1990 (attached).

13. Post-grievance, pre-arbitration, built-in settlement conference and other approaches to "early case assessment."

14. A summary judgment approach to arbitration (where appropriate).

15. Remedies.

16. Statutes of limitation and other time bars.

V. Other Creative Approaches?

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What's in a Name: The Discovery in Grievance Handling

Senator Chic Hecht (R-Nevada) reportedly once said he opposed a nuclear waste "*suppository*" in his home state.[1] It is unclear whether Senate administrative aides relied to any extent on this remark when they designated Senator Hecht the Senate's least effective member. It is clear, however, that the senator's malapropism couldn't hurt him when the aides sought out their most likely candidate.

Malapropisms, by definition, are humorous and, witness Mr. Berra, generally harmless. That, unfortunately, isn't necessarily the case with faulty packaging. How a thought, idea, or program is presented, labeled, or classified may well be determinative. The implications can be profound.

Query, for example, whether the term *grievance procedure* is an apt one. Some years ago, I asked a group of managers what the term *grievance procedure* brought to mind. As they responded, I wrote their comments on a chalkboard: "due process," "discipline," "complaints," "day in court," "safety valve," "fair hearing." They cited, as well, the procedure as an indicator of problems, the need for management to be concerned with both real and imaginary issues, and the importance of expeditious processing, predictability, and uniformity in the resolution of problems.

All of these comments, of course, were accurate, and each captured vital and essential aspects of any grievance procedure, whether in a union or union-free setting. Yet none of the managers even thought of the grievance procedure as a vehicle for discovery—a critical vehicle, I might add, given the likelihood that a grievance eventually may resurface in any number of different fora. Indeed, if I were to cite one of management's most common errors, it would be this failure to recognize the best discovery vehicle management has at its command.

How many times have we witnessed a grievance in or en route to arbitration, administrative processing, or litigation where management has learned surprisingly little during the grievance stages about the grievant's case? What *precisely* is the grievant's position? If there are witnesses, who are they, what is it they are prepared to say, and has such been fully investigated? If the grievant was elsewhere, what do we know about his/her alibi and the extent to which it can be substantiated? If there is documentation, will there be any surprises, and have we been apprised of all the documentation on which the grievant relies? If the grievant's position is predicated on a pattern or practice, or a supervisor's representation, do we know the individuals, specific situations, or facts he/she has in mind? To what extent has the grievant been *pinned down* to a fixed position, or details, so that subsequent attempts to alter that position, or its details, can be highlighted?

Why is it too often we first hear the answers to these questions only when in arbitration, administrative hearing, or litigation? Why, when preparing for such, must we merely *speculate* on precisely what the grievant's position will be? Not in every case, but in most, there is no reason whatsoever for management to find itself in such a position. But it does happen—and too frequently.

After much thought I have come to believe the answer in large part lies with the packaging. Here is where the labeling leads us down the wrong path. Call it a *grievance procedure*, and immediately a certain mindset develops. A *grievance* generally entails an *accusation* that management/supervision

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in some way has acted improperly. That, in turn, often produces a defensive reaction on the part of those involved in the grievance process, even if well intentioned. The initial focus, as a result, is more on justifying management's position, consciously or otherwise. The grievant is allowed to speak, and even conduct a superficial investigation if necessary, but if the grievant can't convince you that management has acted improperly, the grievance is denied.

On its face, that appears reasonable enough, especially if you consider the time limits of a grievance procedure, the busy schedules of those charged with resolving grievances, and their understandable preference to deal instead with their many other concerns and responsibilities.

But is it acceptable or desirable?

Suppose that you were taught that after a grievance is filed, the next step in the procedure is *discovery*—to borrow a term from our litigation process. Assume that nothing is changed in your existing grievance procedure other than the label "discovery," but now each manager/supervisor involved in the process is instructed that his/her express mandate, in resolving the grievance, includes learning as much as possible about the grievant's position and, where appropriate, investigating it before making a decision. More specifically, assume that each such manager/supervisor is advised to ask as many questions as necessary to flush out—*and pin down*—the grievant's position, so that if the grievance reaches arbitration, administrative hearing, or litigation, you are not surprised by the theory of the case, the contract provision(s) (if applicable) on which the grievant relies, the chronology of events, the documentation, and the witnesses.[2]

Not only is a grievance more likely to be resolved—one way or the other—if such an approach is pursued, but also if a case does proceed to arbitration, administrative hearing, or litigation and the theory or material details have changed, management will be in a better position to point such out. At the very least, management will be far more able to anticipate and prepare for the arguments and evidence advanced.

What must be emphasized is that the grievance procedure is, essentially, *management's* own internal procedure. It is not a procedure supervised or controlled by a court or administrative agency, or even (where one exists) by the union. At no other time will management have such utter control over the process and, for that matter, such relatively unfettered access to potential witnesses. Even where the grievant and/or union refuses to name or produce witnesses, that may well bear either on the credibility of the grievant's and/or witnesses' position thereafter or on the reasonableness and good faith of management's position in acting on the information then available to it. Moreover, in its pursuit of a meaningful investigation of the grievance, management's "license"—indeed, obligation—to question these individuals should go unchallenged; it is to be expected that management will seek to learn as much as possible about the grievance before rendering its decision at each step, and, accordingly, the grievant and/or union is in less of a position to resist.

Contrast this with the discovery procedure of the litigation process. There the parties already are locked into an adversarial proceeding. While discovery in litigation is designed to discourage and minimize surprises, this adversial relationship and the formality of the proceedings breed a tension and degree of resistance less likely to be present, or justified, in the internal and informal grievance stages controlled by the employer.

In short, there probably never will be an opportunity such as that afforded during the grievance procedure. It offers, as Senator Hecht might have said, a potential "suppository" of vital information.

NOTES

1. "The Election," *Time* (21 November 1988): 83.

2. You might even consider revising the grievance form, to the extent you control it, to include specific reference to the contract provisions, the chronology, the pertinent documentation, and the names and positions of any witnesses. Failing that, a checklist of such areas of inquiry might be distributed to those managers/supervisors involved in the process.

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The Future of Employment Arbitration Agreements – The Legacy of *AT&T Mobility LLC v. Concepcion*

June 9, 2011

By Betsy Johnson and Evan J. Spelfogel

Employment litigation is growing at a rate far greater than litigation in general. Twenty-five times more employment discrimination cases were filed last year than in 1970, an increase almost 100 percent greater than all other types of civil litigation combined. Case backlogs at the U.S. Equal Employment Opportunity Commission ("EEOC") and in state and federal courts and administrative agencies nationwide number in the hundreds of thousands. Class and collective wage and overtime cases are inundating the courts. These types of cases now even outnumber discrimination cases. Most of the employment-related cases pending in the courts involve jury trials with lengthy delays and unpredictable results.

Alternate dispute resolution ("ADR") presents a significant alternative to litigation of these types of cases. While an agreement to submit a dispute to voluntary arbitration after the dispute has arisen is non-controversial and of some benefit, most often parties post-dispute become less flexible, gird for battle, and are less inclined to step back from judicial confrontation. The time for the parties to agree to ADR and binding arbitration is before the dispute has arisen. Drafting and implementing an ADR policy that ensures fundamental due process, with proper checks and balances, could protect the rights of both parties on a speedy, cost-effective basis. It could also reduce the burden on our judicial system.

For those employers that might wish to consider ADR, the Supreme Court of the United States has issued a series of decisions in five major cases, providing a road map. Not only do these decisions ratify the validity of carefully drafted pre-dispute ADR policies so as to bar individual employees from suing in court, but the most recent two decisions even allow employers to draft and enforce pre-dispute ADR policies that preclude both class action lawsuits and class action arbitrations. These decisions are summarized below.

First, in 1991, the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that courts may compel employees to honor pre-dispute arbitration agreements and to arbitrate age discrimination claims. In barring Gilmer from suing in court, the Supreme Court expressly held that the unequal bargaining power as between employer and employee was irrelevant, and that the agreement to arbitrate could not be set aside unless the employee could (a) prove "fraud in the inducement," or (b) show unawareness of the existence of the arbitration language in the agreement and,

therefore, that the employee did not "knowingly or voluntarily" enter into the arbitration agreement (*Gilmer*, at 32-33).

Second, in 2001, in *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), the Supreme Court extended *Gilmer* beyond age discrimination to all forms of statutory employment discrimination. This paved the way for the vast majority of private sector employers to bind their employees and applicants for employment to mandatory pre-dispute arbitration as a condition of employment.

Third, in mid-2009, in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 556 U.S. __, 173 L. Ed. 2d 398 (2009), the Supreme Court held that employers and unions could agree in their collective bargaining agreements that statutory discrimination claims of covered employees must be submitted to binding arbitration.

Fourth, in mid-2010, the Supreme Court held in *Stolt-Nielson SA v. AnimalFeeds International Corp.*, 130 S. Ct. 1758, 559 U.S. __, 176 L. Ed. 2d 605 (2010), that, absent a party's express agreement in its arbitration undertaking, it could not be required to arbitrate on a class action basis. An agreement to arbitrate class claims could not be inferred from silence.

Finally, on April 27, 2011, the Supreme Court held in *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___ (2011), that a state law that banned class action waivers in arbitration agreements was invalid and preempted by the Federal Arbitration Act.

As a result of these five cases, the Supreme Court has set the bar in favor of employers that choose to mandate arbitration of all statutory employment discrimination and wage and overtime claims. Properly drafted arbitration agreements may not only preclude employees from initiating or participating in class actions in court (thereby avoiding employers having to deal with jury trials), but may also bar class arbitration and require separate, individual employee case-by-case determinations in arbitration.

What Employers Should Do Now

Employers should first determine whether, under their separate business models and cultures, they wish to implement arbitration agreements that bind their employees and applicants for employment to mandatory pre-dispute arbitration and, if so, whether they wish to prohibit class arbitration. There are pros and cons to mandatory arbitration. The arbitration process is generally quicker and less expensive and is conducted in a private forum. In addition, the arbitration process protects employers from "runaway" jury verdicts. On the other hand, arbitrations do not provide for some of the formal procedural safeguards found in judicial proceedings. For example, the traditional judicial rules of evidence and privilege do not necessarily apply, and there is limited judicial review and appeal of arbitration decisions. Further, there are judicial decisions and state and local rules that require employers to pay all of the fees of the arbitrators and of administering agencies, such as the American Arbitration Association or JAMS (except for the equivalent of a federal court filing fee).

Of course, as stated in *Gilmer*, arbitration is not available for statutory claims where Congress clearly expressed its antipathy to arbitration in the relevant statute. For example, the recently enacted Dodd-Frank Wall Street Reform and Consumer

Protection Act amended the Sarbanes-Oxley Act of 2002 ("SOX") to prohibit specifically the use of pre-dispute arbitration agreements for SOX claims. Further, the EEOC and the National Labor Relations Board take the position that an employee waiver of the right to file an administrative agency charge or complaint is void as against public policy and, in any event, cannot bar the agency from exercising its statutory rights. Thus, care must be taken in drafting a pre-dispute arbitration policy not only to exclude from the policy certain statutory claims, such as SOX claims, but also to carve out an employee's right to file agency charges while at the same time limiting the employee's right to share in any monetary relief that might be obtained in an agency proceeding.

Bear in mind that aside from mandating the arbitration of statutory employment-related claims, many other non-statutory forms of employment disputes may also be required to be arbitrated. These include, for example, contract and tort claims, such as wrongful discharge, assault and battery, defamation, negligent hiring and retention or supervision, and intentional infliction of emotional distress – claims that employees' attorneys typically assert with statutory claims to avoid the 1991 Civil Rights Act's $300,000 cap and to take advantage of the absence of caps on compensatory and punitive damages under state law.

Employers that decide to implement and embrace a mandatory pre-dispute arbitration program must carefully draft and implement the program. It must be bilateral – that is, it must be binding on employer as well as on employees, and the program must not over-reach. It must be fair, and it must afford due process. In short, it must merely substitute an arbitral forum for a judicial forum, while enabling employees to preserve all the rights and remedies that they would have been entitled to in a court of law.

If you have any questions about this Advisory or other mandatory pre-dispute arbitration policy issues, please contact one of the following:

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The Benefits of Mandatory Arbitration in Employment Law

by Evan J. Spelfogel[*]

Traditional litigation is a mistake! Our system is too costly, too painful, to time consuming and too inefficient. It is time for change, for a system of alternative dispute resolution in employment related matters.

Employment litigation has grown at a rate many times greater than litigation in general. Twenty-five times more employment discrimination cases were filed last year than in 1970, an increase almost 100% greater than all other types of civil litigation combined. There is currently a backlog of over 50,000 employment discrimination cases at the United States Equal Employment Opportunity Commission ("EEOC") and thousands more at state and local governmental agencies. New cases of discrimination are being filed at a rate 25% greater than last year alone. Discrimination claims under the Americans with Disabilities Act[1] and other protective workplace laws are only beginning to impact these statistics. The EEOC is under tremendous congressional pressure to reduce its budget and to cut back on investigators and support staff needed to handle the influx of new cases.

Currently, there are over 25,000 wrongful discharge and discrimination cases pending in state and federal courts nationwide. Nearly all of these cases involve jury trials with lengthy delays and unpredictable results. Studies indicate that plaintiffs win nearly 70% of these cases and that the average jury award for a wrongfully fired employee is now approximately $700,000 (with many in the millions of dollars), but that it takes three to five years before the case goes to a jury and many jury verdicts are reduced or set aside by the courts.

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[1] 42 U.S.C. §§ 12201-12213.

Class and Collective wage and overtime cases are inundating the courts. There are now even more such cases pending in the federal courts nationwide than discrimination cases.

Alternative dispute resolution presents the only proven alternative to litigation of employment and workplace cases. Voluntary arbitration, at the option of an employee after a dispute has arisen, is non-controversial and of some benefit. Unfortunately, many times after a dispute has arisen, the parties become less flexible, gird for battle, and are less inclined to step back from judicial confrontation. Employee-plaintiffs seek jury vindication; defendant-employers look to the technical rules of evidence, protracted discovery, and judicial scrutiny of technical legal arguments to win the day. The opportunity for the parties to agree to ADR and binding arbitration, available long before a dispute has arisen, has been squandered. Drafting an ADR policy that assures fundamental due process and has proper checks and balances will protect the rights of both parties on a speedy, cost-effective basis and will reduce the burden on our judicial system.

The Legal Framework

The issue of the enforceability of pre-dispute agreements to arbitrate statutory employment claims was addressed by the U.S. Supreme Court in two seminal cases: (i) *Alexander v. Gardner-Denver Co.*[2] and (ii) *Gilmer v. Interstate/Johnson Lane Corp.*[3]

In 1974, the Supreme Court held in *Alexander* that an employee could sue in federal court under Title VII for race discrimination notwithstanding an agreement to arbitrate contained in his union's collective bargaining agreement. The union, the Court said, could not waive the employee's statutory rights.

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[2] 415 U.S. 36(1974).
[3] 500 U.S. 20 (1991).

In 1991, the Supreme Court held in *Gilmer* that courts may compel employees to honor pre-dispute arbitration agreements and to arbitrate age discrimination claims. The arbitration agreement in *Gilmer* was part of an industry-wide application that persons who wished to work as brokers or registered representatives in the securities industry were required to sign ("U-4" forms). In barring Gilmer from suing the company in court for age discrimination, the Supreme Court expressly held that the unequal bargaining power as between the employer and the employee was irrelevant;[4] and the agreement to arbitrate could not be set aside unless the employee could (a) prove "fraud in the inducement," or (b) show that he was not aware of the existence of the arbitration language in the agreement and, therefore, did not "knowingly or voluntarily" enter into the arbitration agreement.[5]

During the 1990's, with the exception of the Ninth Circuit, *Gilmer* was applied by every U.S. Court of Appeals to have considered the issue, to require arbitration of all forms of statutory discrimination. Binding arbitration agreements could be contained in handbooks, manuals, and employers' personnel policies and practices. In addition, there were numerous lower federal and state court decisions across the country to the same effect, including the New York State Court of Appeals' decision in *Fletcher v. Kidder Peabody & Co.*[6]

In mid-1998, the Ninth Circuit ruled in *Duffield v. Robertson Stevens & Co.*,[7] that the 1991 amendments to the Civil Rights Act of 1964 evidenced a congressional intention to bar arbitration of statutory discrimination disputes. A district court judge in Boston agreed with the Ninth Circuit, but the First Circuit rejected the district judge's rationale criticizing the Ninth

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[4] Gilmer, 500 U.S. at 32.
[5] *Id.* at 33.
[6] 81 N.Y.2d 623, 601 N.Y.S.2d 686 (1993).
[7] 144 F.3d 1182 (9th Cir. 1998).

Circuit's *Duffield* decision.[8] In *Sens v. John Nuveen Co., Inc.*,[9] the Third Circuit rejected the *Duffield* view, stating that analysis of the legislative history of the 1991 Civil Rights Act amendments not only did not show a congressional intention to bar arbitration, but, rather, clearly indicated a congressional favoring of arbitration. A California intermediate appeals court ruled that the Ninth Circuit's *Duffield* decision applied only to federal discrimination claims within the Circuit, and not to California state law claims of discrimination.[10]

Arguably, Duffield could be distinguished on the basis that it concerned only a "captive" securities industry arbitration panel and not an extra-industry private panel such as the American Arbitration Association or JAMS/Endispute. As described below, Duffield was ultimately overruled by the Ninth Circuit in its 2003 decision in *EEOC v. Luce Forward, Hamilton & Scripps*,[11] and was superceded by a clarifying decision of the U.S. Supreme Court.

In 1998 the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE) modified their rules, effective Jan. 1, 1999, so that registered employees were no longer required to submit statutory employment discrimination claims to arbitration based solely on U-4 Agreements. However, individual securities industry companies were allowed to develop their own ADR programs, including pre-dispute mandatory arbitration agreements. An unresolved question was whether these individual member employer arbitration programs

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[8] *Rosenberg v. Merrill Lynch*, 995 F. Supp. 190 (D. Mass. 1998); *affirmed on other grounds*, 167 F.3d 361 (1st Cir. 1998).

[9] 146 F.3d 175 (3d Cir. 1998). *See, in accord Koveleskie v. SVC Capital Markets*, 199 WL 50226, (7th Cir. Feb. 4, 1999); *Cole v. Bums Int'l Soc. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Paladino v. Avnet Computer Techs., Inc.* 134 F.3d 1054, 1062 (11th Cir. 1998); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir. 1996); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308, 312 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 340 (5th Cir. 1991).

[10] *24 Hour Fitness, Inc. v. Superior Court of Sonoma Cty.*, 66 Cal. App. 4th 1199 (1998).

[11] 345 F.3d 742 (9th Cir. 2003).

required both statutory and nonstatutory related disputes to be submitted to a single private arbitration tribunal so that the parties would not be faced with bifurcation of such issues.

While the overwhelming majority of courts to have considered the issue during the ten years since *Gilmer* upheld and enforced pre-dispute agreements to submit statutory employment discrimination claims to mandatory arbitration, there were a handful of "backlash" decisions across the country that were instructive and presaged the need for further Supreme Court clarification. Several courts refused to enforce "opinionless" arbitration awards.[12] The Michigan Supreme Court refused to enforce an arbitration provision in a handbook because the employee never signed anything indicating an intent to be bound, and the employer reserved to itself the right not to be bound.[13]

Even before *Duffield*, the Ninth Circuit had held in *Prudential Ins. of Am. v. Lai*[14] that an employee did not "knowingly and voluntarily" enter into an arbitration agreement where the relevant language was "buried" in a lengthy legal document, was not called to the employee's attention during the negotiations for the agreement, and was never mentioned at any time before the dispute arose months later.[15] Several courts refused to enforce arbitration clauses because they were not precise enough and did not expressly reference statutory claims.[16]

The conflict between *Duffield* in the Ninth Circuit and cases like *Rosenberg*, *Cole*, and *Seus* in the First, D.C., and Third circuits respectively, one would think, suggested early

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[12] *See, for example, Halligan v. Piper Jaffrey*, 148 F.3d 197 (2d Cir. 1998); *Montes v. Shearson Lehman Bros., Inc,*. 128 F.3d 1456 (11th Cir. 1997).
[13] *Heurtebise v. Reliable Business Computers, Inc.*, 452 Mich. 405, 550 N.W.2d 243 (1996).
[14] 42 F.3d 1299 (9th Cir. 1994).
[15] *Id.* at 1305.
[16] *See, for example, Renteria v. Prudential Ins. Co.*, 113 F.3d 1104 (9th Cir. 1997) (arbitration clause that did not list, specifically, the statutes covered could not constitute a "knowing waiver").

resolution of the split in the circuits by the U.S. Supreme Court. The Court, however, declined the opportunity when it denied certiorari in *Duffield.*[17]

Similarly, the Supreme Court avoided an opportunity to clarify the reach of *Gilmer*, the continued viability of *Alexander*, and the application of the 1991 Civil Rights Act amendments in its 1998 decision in *Wright v. Universal Maritime Service Corp.*[18] There, the Court ruled, an agreement to arbitrate found in a union collective bargaining agreement could not bar a federal court Title VII suit, absent a "clear and unmistakable" waiver. Writing for a unanimous bench, Justice Antonin Scalia stated that the Court did not have to reach the more significant questions as to whether *Alexander* had been overturned by *Gilmer* and whether a union could waive an individual member's right to go to court on a statutory Title VII claim, because the agreement at issue did not expressly reference the statute or its substantive coverage.

In the meantime, the National Labor Relations Board and the EEOC continued to oppose any mandatory arbitration policy that barred an employee from filing administrative complaints with those agencies. The Second Circuit in *EEOC v. Kidder Peabody & Co.*,[19] and a Michigan District Court in *EEOC v. Frank's Nursery & Crafts, Inc.*,[20] ruled, however, that while the EEOC might have authority to investigate discrimination charges brought by an individual employee and to seek injunctive relief with respect thereto, the EEOC may not seek individual relief, including monetary compensation of any kind, for an individual who had signed an arbitration agreement. Both courts reasoned that the Federal Arbitration Act ("FAA")[21] expressed strong congressional preference in favor of enforcing valid arbitration agreements freely entered into by contracting parties. Moreover, they noted, the Supreme Court had held that

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[17] 525 U.S. 982 (1998).
[18] 119 S. Ct. 391 (1998).
[19] 156 F.3d 298 (2d Cir. 1998). Arguably overturned by E.E.O.C. v. Waffle House, Inc., 534 U.S. 279 (2002).
[20] 966 F. Sup. 500 (E.D. Mich. 1997), Reversed, 177 F. 3d 448 (6th Cir. 1999)
[21] 9 U.S.C. Sections 1-16 (1994)

precluding individual suits based on arbitration agreements was not inconsistent with the remedial purposes underlying the ADEA. The EEOC may continue to investigate and remedy pattern, practice, and collective claims against the employer, but that as to individual employees who have signed arbitration agreements, the EEOC stands in the shoes of the affected employee.[22] On the other hand, the Ninth Circuit held *in Kraft v. Campbell Soup Co.*,[23] that agreements to arbitrate employment disputes fell within an exception in Section 1 of the FAA and, thus, could not be enforced under that statute.

The "backlash" cases referenced above, generally, taught that carefully structured arbitration programs that merely substituted an arbitral forum for a judicial forum and that carefully protected all of an employee's substantive rights and remedies, should not be objectionable.

In Circuit City Stores v. Adams,[24] a landmark 5-4 decision, the United States Supreme Court ended the debate and ruled that employers could require most employees to resolve their employment related disputes, including statutory discrimination claims, through arbitration. As a result of *Circuit City*, the vast majority of employees and employers are free to enter into binding arbitration agreement pursuant to the FAA.

Left unresolved by the Supreme Court in its decisions in Gilmer, *Wright* and *Circuit City* was the continued viability of *Alexander* and whether an employer and a union might agree in a collective bargaining agreement that employee discrimination claims (as contrasted with contract interpretation issues) would be subject to binding arbitration.

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[22] *Supra*, note 4.
[23] 161 F.3d 1199 (9th Cir. 1998).
[24] 532 U.S. 105 (2001).

In mid-2009, the Supreme Court resolved this issue in the affirmative in 14 Penn Plaza LLC v. Steven Pyett.[25] In its split decision, the Supreme Court held enforceable a provision in a collective bargaining agreement that clearly and unmistakenly required covered employees to arbitrate federal age discrimination claims.

In view of *14 Penn Plaza*, *Circuit City* and *Gilmer*, it is now clear that as a legal matter, properly and carefully crafted and administered pre-dispute mandatory arbitration policies will be upheld and will bar employees from suing in court and obtaining jury verdicts on statutory discrimination claims – provided that the policies are fair, afford due process and merely substitute an arbitral forum for a judicial forum, while preserving to employees all the rights and remedies they would have been entitled to in a court.

Drafting the Arbitration Program

In view of the current legal landscape, an employer may now draft and implement a carefully worded mandatory arbitration program that at a minimum provides for the following: (i) the neutral be an experienced labor/employment arbitrator familiar with discrimination laws; (ii) there be a fair, simple discovery method for employees to obtain information necessary to prepare for the arbitration hearing and protect their claims; (iii) the employer pay the entire arbitrator and arbitration tribunal fees (although the employee may be required to pay the equivalent of a federal court filing fee); (iv) the employee have the right to be represented by counsel; (v) the arbitrator have the same authority to award the same range of remedies available in court under applicable law; (vi) the arbitrator issue a written opinion explaining the award in detail; and (vii) the arbitrator's opinion and award be subject to review under the FAA or similar state law. Needless to say, the employee should be allowed to participate in the arbitrator selection process; time limits should be comparable to applicable statutes of limitations; there

[25] 556 U.S. ____ (2009)

should be no retaliation for an employee's using the ADR program; and there should be fundamental due process.

Clearly, the arbitration policy should be bilateral, i.e., the employer should be equally bound to arbitrate any claims it might have against the employee.[26] Moreover, references to the arbitration policy should be highlighted in bold, oversized print on job applications, in employee handbooks, and in periodic reminders and distributions to employees. Further, the policy or program should expressly list, either by statute or by description of its substantive coverage, the statutory claims that must be submitted to arbitration.

The arbitration policy should be republished at least annually (and preferably semi-annually), and should be discussed frequently at employee meetings. Employees should sign a separate page agreeing to be bound by the arbitration policy and should sign attendance sheets at discussion meetings as evidence they were aware of and knew of the policy. Finally, the program should be carefully prepared, announced, marketed, and implemented as the benefit to employees that it is, rather than suggesting any limitation on employee rights.

Other Advantages and Disadvantages of Arbitration

In recent years, many well-known employers have set up mandatory arbitration programs covering millions of employees. These include J.C. Penney, LensCrafters, Phillip Morris, Chrysler Corporation, Credit Suisse Bank, Bear Stearns, and Salomon Smith Barney. The benefits of an arbitration program are clear. A survey of employee attitudes with respect to the use of arbitration in employment disputes shows that 83% of American workers favor the use of

[26] Typically, employers exclude from arbitration their claims for injunctive relief to prevent breaches of covenants not to compete and confidentiality agreements. Typically, employee claims under state workers' compensation and unemployment compensation statutes are also excluded from arbitration. We do not see such exclusions as indicating a lack of mutuality or one-sidedness, as suggested by one court in *Gonzalez v. Hughes Aircraft Federal Credit Union*, 1999 Cal. App. Lexis 151 (Ct. App. Cal. 2nd App. Div. Feb. 23, 1999).

arbitration instead of courts to settle disputes with management.[27] Most employees surveyed felt that arbitration would make it easier for ordinary workers to obtain a speedy and fair hearing, that it would be far less costly than hiring a lawyer and going into court, and that it was a meaningful substitute under federal civil rights laws.

From management's point of view, a mandatory arbitration program speeds up the dispute resolution process, minimizes the expense of discovery, reduces internal and legal costs, ensures the preservation of confidentiality (thereby minimizing the risks of adverse publicity), and avoids the possibility of runaway jury verdicts. Disadvantages include the fact that arbitrators are not as inclined as courts to preserve the technical rules of evidence, and that the parties mutually give up their right to judicial review and appeal.

The U.S. Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth*,[28] and Farragher v. City of Boca Raton[29] provide even more incentive for an employer to initiate an ADR program. These decisions indicate that an employee's claims of sexual harassment and hostile work environment may be defeated by the employee's failure to take advantage of an available and effective employer provided grievance/arbitration program.

Moreover, aside from mandatory pre-dispute agreements to arbitrate statutory discrimination claims, many other nonstatutory forms of employment disputes may also be required to be arbitrated. These include, for example, contract and tort claims such as wrongful discharge, assault and battery, defamation, negligent hiring, retention or supervision, and intentional infliction of emotional distress. These are all claims that plaintiffs' lawyers typically

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[27] *See* PRINCETON SURVEY RESEARCH ASSOCIATES, WORKER REPRESENTATION AND PARTICIPATION SURVEY Focus GROUP REPORT (April 1994).
[28] 118 S. Ct.2257 (1998).
[29] 118 S. Ct. 2275 (1998).

join with statutory claims to avoid the 1991 Civil Rights Act's $300,000 cap on compensatory and punitive damages in certain discrimination cases.

Conclusion

In conclusion, compulsory arbitration of statutory employment disputes offers many advantages over litigation. These include speed, efficiency, informality, reduced costs, confidentiality and the potential for preserving an amicable relationship between the parties, not to mention the unclogging of court and administrative agency backlogs. Considering all of the alternatives, employers are urged to give serious consideration to promulgating pre-dispute mandatory arbitration programs. While active opposition and unanswered questions remain, the advantages of arbitration substantially outweigh any countervailing considerations.