



## **ARBITRATION OF WORKPLACE DISPUTES: AN IDEA WHOSE TIME HAS COME**

### **A. Background**

From a legal standpoint, the emergence of alternate dispute agreements in the workplace has been one of the most exciting H.R. and employment law developments in the last decade. ADR has now become a household word that more and more employers are adding to their workplace lexicons. Clearly, employers of all sizes and descriptions are struggling to find alternatives to the potential high costs of litigation; and many have chosen the ADR approach as their answer. This paper is designed to help familiarize you with both the legal and practical issues associated with ADR and help you decide whether it is right for you and your organization.

1666 K Street, N.W., Suite 1200, Washington, D.C. 20006  
Tel: 202-833-9200 Fax: 202-293-4939

This analysis of the appropriateness of ADR in the workplace for 2002 and beyond will examine the various types of ADR agreements and review the pros and cons of adopting an ADR policy in the employment context. It will begin by examining some of the legal issues dealing with the enforceability and exclusivity of these agreements.

### **B. Back to the Basics- What is Workplace ADR and How Does it Work?**

Workplace ADR arises out of contractual agreements whereby prospective and/or current employees agree to resolve specified workplace-related disputes, (including disputes arising from the termination of employment) by arbitration, mediation or other non-judicial methods for resolving disputes, rather than litigation. For the most part, the courts have held that employers are free to make such agreements a condition of employment for applicants and current employees, provided such agreements meet certain standards of fairness and due process.

It should be noted that these types of agreements are not without their detractors. In fact, the EEOC, plaintiff trial lawyers and civil rights groups have mobilized in opposing ADR agreements, thus making ADR not only one of the most important developments of the last 10 years, but also one of the most controversial. This struggle between proponents and detractors of ADR has led to a long and hotly contested series of court battles as to the legality and enforceability of these agreements. Although all the issues surrounding ADR have not as yet been resolved, it appears, at this juncture at least, that proponents of ADR in the workplace have been the clear winners, provided they do not overplay their hand.

### **C. Recent Supreme Court Decisions Point in Different Directions as to the Advisability of Private Employers Adopting ADR Policies for Their Workplaces.**

Within the past year, the Supreme Court has issued two important decisions regarding the scope of ADR agreements and their enforceability in the workplace.

## **1. Supreme Court's Decision in Circuit City**

In October, 2001, the Supreme Court in *Circuit City Stores v. Adams*, 121 S. Ct. 1302 (2001), in keeping with its pro-arbitration preferences, as expressed in decisions dating back to the early 1960's, upheld the enforceability under the Federal Arbitration Act (FAA) of employment agreements requiring arbitration of workplace disputes as a substitute for employment litigation. This decision upheld the majority of Circuit Courts of Appeals who had previously ruled on this issue. In essence, the Court held that both the public policy favoring arbitration, as well as the language of the FAA itself, required a narrow construction of the statute's exclusion of employment contracts. In reaching this conclusion, the Court held that the statute's exclusion of excepting from the scope of the law, "contracts of employment of seaman, railroad employees, or any other class of worker engaged in foreign or interstate commerce," excluded from the Act's coverage only those employees who were actually engaged in the transportation of goods in interstate commerce from arbitrating employment disputes. Thus, the Court concluded that all other employment contracts were covered under the statute and therefore enforceable under its provisions.

Although the Court's vote was a close one (5 to 4), this decision was an enormous victory for pro-arbitration proponents. Employers were given a green light to require their employees to sign ADR agreement as a condition of employment, provided such agreement meet minimum standards of fairness and due process. These standards will be discussed in greater lengths below.

## **2. Supreme Court's Decision in Waffle House**

Proponents of workplace ADR did not have much time to savor their victory, however, before the Supreme Court issued another major decision involving ADR agreements. This case involved the EEOC's authority to seek relief on behalf of individuals who had previously signed enforceable ADR agreements. On January 15, 2002, the Supreme Court in a 6-3 decision ruled that an arbitration agreement made by a South Carolina restaurant employee and his employer did not prevent the EEOC from pursuing – on the employee's behalf - victim-specific judicial relief based on an Americans with Disabilities Act claim. (*EEOC v. Waffle House, Inc.*). (534 U.S. 279, 122 S. Ct. 754 (2002))

Writing for the majority, Justice John Paul Stevens stated that despite the preference for arbitration inherent in the Federal Arbitration Act, once a charge is filed with the EEOC, the Commission "is in command of the process" and it is not bound by private arbitration agreements to which it was not a party. The ruling reversed a decision by the U.S. Court of Appeals for the Fourth Circuit.

In reaching its decision that the EEOC was entitled to seek victim specific relief, i.e. reinstatement, backpay, injunctive relief and punitive damages, the Court left open the question of whether a private settlement by the parties or a prior arbitration award would affect the scope of the EEOC's claim or the relief requested.

Naturally, the Waffle House decision received quite different receptions from proponents and detractors of ADR. Quite expectedly and understandably, the EEOC was thrilled with the decision. EEOC Chair, Carl M. Dominquez, stated that the decision "reaffirms the significance of EEOC's public enforcement role" and observed that the EEOC, as the agency responsible for enforcing antidiscrimination laws, "is not constrained in any way by a private arbitration agreement to which EEOC is not a party."

ADR proponents on the other hand, not surprisingly, sought to downplay the decision, observing that it would have little impact because of the infrequency of EEOC initiated litigation. Because of budgetary and staff limitations, the EEOC seldom becomes involved in litigation except in major cases involving charges of systemic discrimination, or cases involving major employers or novel issues. New York University Professor Samuel Estreicher observed that the decision allows the EEOC to continue "creating nuisance" when arbitration agreements exist, without providing significant relief for most people who bring charges. Continuing, Professor Estreicher noted that, "The decision injects an element of legal uncertainty for employers using arbitration agreements and could prevent arbitrators from reaching decisions because of concerns EEOC may become involved."

Although, as Professor Estreicher notes, the Waffle House decision does inject an element of uncertainty as to the finality of any arbitration proceeding under an ADR agreement or settlements reached as a result thereof, for the most part, ADR agreement still remains a viable option for most employees. The prospect of avoiding protracted litigation with its attendant expense, anxiety and the uncertainty caused by the prospect of runaway juries, still, in the author's opinion, makes ADR agreements an attractive alternative to litigation, even if the possibility exists that the EEOC may initiate litigation seeking "victim specific" relief.

The above assessment is further bolstered by the small number of EEOC initiated lawsuits, which is due to this Commission's limited litigation budget – a situation unlikely to change under the Bush administration. For example, during FY 2000, the EEOC filed a total of only 327 lawsuits, obviously a very small percentage of the charges filed with them. As this figure indicates, only in unusual cases involving novel issues, or in large class action matters will the EEOC initiate litigation, thus leaving the arbitration agreements, where they exist, as the controlling method for resolving most workplace claims covered by ADR. Furthermore, in addition to the prospect of jury awards, punitive damages, and delay, ADR agreements also reduce leverage in the hands of plaintiff attorneys, when they find out that their clients must arbitrate their claims instead of being able to force employers to underwrite the heavy expenses associated with litigation. All these considerations make ADR an attractive alternative to litigation. In short, while the Waffle House decision is rightly viewed as a step backwards by employers, it appears to be a tiny step backwards, and should not deter employers from adopting such agreements in the future.

### **3. Ninth Circuit's Decision in Circuit City (Part II)**

“The latest major decision regarding the enforceability of ADR agreements is the Ninth Circuit's decision in *Circuit City Stores, Inc. v. Adams* (9th Cir., No. 98-15992, 2/4/02), on remand from the Supreme Court's decision discussed above, holding that a contract of adhesion offered on a take-it-or-leave-it basis is unconscionable under California law.

Although it was overruled in its position that the FAA does not apply to employment contracts generally, the Ninth Circuit once again refused to enforce Circuit City's ADR agreement, this time on the basis that it was a contract of adhesion, offered on a take-it-or-leave-it basis between parties of highly unequal bargaining power, thereby making it unconscionable under California law.

In considering the procedural unconscionability of agreement, the Ninth Circuit focused on the disequilibrium of bargaining power between the parties, the non-negotiability of its terms, and the

extent to which the contract clearly disclosed what rights the employee was relinquishing. The Ninth Circuit ultimately concluded that the company's pre-employment dispute resolution agreement "function[ed] as a thumb on Circuit City's side of the scale" and found the agreement both procedurally and substantively unconscionable under California law. Additionally, the Court noted that while all employment-related claims "of an *Associate*" were subject to arbitration, the employer's claims were not bound by the same requirements. The court also observed that the relief available under the agreement limited injunctive relief and other types of statutory relief – as compared to the relief available to a plaintiff in a civil suit for the same causes of action. Finally, the agreement also required the employee to split the arbitrator's fees with Circuit City. This fee allocation scheme alone, the court stated, rendered the arbitration agreement unenforceable. (A Petition for Certiorari in this latest Ninth Circuit Circuit City decision was filed April 3, 2002, case 01-1460.)

The contract of adhesion defense has been frequently raised by plaintiffs in other jurisdictions and, as was the case with the Ninth Circuit's position on the applicability of the FAA, has been rejected by the great majority of courts that have ruled on the issue. Nonetheless, this case does underscore the necessity of reviewing the law in your jurisdiction prior to drafting and adopting these agreements.

#### **D. Recent Decisions Regarding Enforceability of Mandatory ADR Agreements**

Since the Supreme Court's decisions in Circuit City I & Waffle House, other courts, in addition to the Ninth Circuit, have addressed the enforceability of mandatory arbitration agreements between employers and employees.

In a very recent decision, *EEOC v. Luce, Forward, Hamilton & Seripps*, 9th Cir., No. 00-57222 (September 3, 2002) the Ninth Circuit Court of Appeals has finally joined the great majority of the other federal courts of appeals, upholding the enforceability of mandatory arbitration of Title VII discrimination claims. Reversing its earlier decision in Duffield v. Robertson Stephens & Co., 144 F.2d 1182 (1998) the Court upholds employers' right to require employees to arbitrate title VII claims as a condition of employment. In so doing, the circuit court removed an injunction previously obtained by the Equal Employment Opportunity Commission which had enjoined the San Diego law firm of Luce, Forward Hamilton & Seripps from requiring its employees to sign such mandatory arbitration agreements. In reaching its decision, the Court concluded that the Supreme Court's decision in *Circuit City*, although not repudiating *Duffield* by name, nonetheless, by its "language and reasoning decimated *Duffield's* conclusion that Congress intended to preclude compulsory arbitration of title VII claims." This is an important decision in that the Ninth Circuit was one of the last federal appellate holdouts in opposing the green light for mandatory arbitration agreements in the workplace. Now, all circuits have approved such agreements, with greater or lesser restrictions.

The Supreme Court of Texas also recently addressed the enforceability of mandatory arbitration agreements. In In re Halliburton Co., 2001 WL 1873035 (Tex. 2002), an employer sent a notice of its new dispute resolution program to an at-will employee informing the employee that continuing employment would constitute acceptance of the program. The employee was later demoted and filed suit against the company. The Texas court concluded that the agreement was enforceable. Specifically, the Court found that the *employer's* promise to submit all employment disputes to arbitration constituted adequate consideration. The arbitration program was not *dependent* on the

continuing employment. Instead, the program was *accepted* by the employee's continuing employment.

The employee also challenged, *inter alia*, the arbitration provision as procedurally unconscionable because there was (1) a gross disparity in bargaining power between the parties and (2) the employee had no opportunity to negotiate. The court concluded that under Texas law an employer has a general right to discharge an at-will employee. Therefore, it cannot be unconscionable, without more, merely to premise continued employment on acceptance of new or additional employment terms.

In Martindale v. Sandrik, Inc., 800 A 2d. 872 (N.J. 2002), one of the most recent judicial pronouncements on the subject of the enforceability of ADR agreements, the Supreme Court of New Jersey upheld that the plaintiff was legally bound by the arbitration agreement contained in her employment application, finding its language clear and unambiguous and broad enough to encompass the plaintiff's statutory causes of action and the contractual commitments support by sufficient legal consideration. In reaching this result, the majority of the Court rejected the minority's contention that the agreement in question constituted a contract of adhesion, and concluded that, furthermore, even if it could be characterized as such, the agreement subject matter and the public interests affected lead to the conclusion that it should not be invalidated on that basis.

#### **E. Divergent Legal Divisions Giving Way to Guidelines for Employers.**

Although various courts have sent mixed signals regarding the enforceability of mandatory ADR agreements, the courts are slowly beginning to establish criteria which, if followed, will insure the legality and enforceability of these provisions. Indeed, the majority of reviewing courts have enforced these agreements, while imposing various requirements in the process. These requirements may vary from jurisdiction to jurisdiction, so it is important to seek the advice of employment counsel to insure that the language and conditions set forth in your ADR agreement meet the judicial requirements in your locality. Some of the most frequently imposed restrictions are set forth below.

#### **F. Minimal Standards Required for Judicial Enforcement**

The law of workplace ADR is an evolving process. All of the issues have not finally been resolved. However, at this writing, the following are the principal areas that courts have examined in determining whether the ADR agreements being challenged meet the minimal standards of fairness and due process.

As a general rule, courts enforcing mandatory arbitration agreements have required that such agreements:

1. Be in writing and clearly set forth the terms of the agreement.

A recent New Jersey case illustrates this point. The plaintiff, a physician formerly associated with an obstetrics and gynecology practice, claimed that he was unlawfully discharged from the practice because he was a

male. Before joining the practice, the plaintiff signed a written employment agreement which stated that "any controversy arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration." Plaintiff filed suit in the New Jersey Superior Court under the New Jersey Law Against Discrimination (LAD). The court upheld the plaintiff's right to sue in court in spite of his written agreement to arbitrate, finding that the plaintiff had not clearly and unambiguously waived his rights under the LAD.

In reaching its conclusion the Court stated, "The Court will not assume that employees intend to waive those rights unless their agreements so provide in unambiguous terms." The Court further stated that a waiver of rights provision "should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. It should also reflect the employee's general understanding of the type of claims included in the waiver, e.g., work place discrimination claims." *Garfinkel v. Morristown Obstetrics and Gynecology Associates*, 2001 WL 649859 (June 13, 2001).

2. Provide the arbitrator with the authority to award the employees the same relief that would have been available had they gone to court to pursue their claims under various federal, state or local laws (including backpay, compensatory and punitive damages, injunctive relief, reinstatement, attorney fees, expert witness fees, etc.).
3. Provide for a fair procedure for the selection of a fair and impartial arbitrator. Arbitrator should be given authority to fashion any remedy s/he feels appropriate (to award "all the types of relief that would otherwise be available"). *Cole v. Burns Int'l Security Services*, 105 F. 3d. 1465 (D.C. Cir. 1997).
4. Provide for procedural fairness allowing for some pre-hearing discovery rights. One safe course would be to authorize "adequate discovery" or as appropriate in the circumstances" as determined by the arbitrator. Revised Uniform Arbitration Act ([www.law.upenn.edu/bll/ulc/ul/\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ul/_frame.htm)). *Green Tree Financial Corp.- Ala. V. Randolph*, 531 U.S. 79 (2000).
5. Provide limited judicial review of an arbitrator's decision, in order to insure that the decision is in accordance with the law and that the arbitrator acted within the scope of his or her authority. Reviewing courts generally will overturn an arbitration decision only where the arbitrator has exceeded the scope of his or her authority, where fraud has occurred, or where the decision itself reveals a "manifest disregard of the law."
6. Allow the parties to have representation of their own choosing, including legal counsel.

Do not impose an undue financial burden on the employee for pursuing the specified arbitration process. In *Cole v. Burns International Security Services*, *supra*, the United States Court of Appeals for the District of Columbia held that the employer must pay the entire cost of the arbitrator's fee, because had the matter been litigated the employee would not have been required to pay any fees other than minimal court costs. Some courts have expressed similar concerns, while others have examined the employee's ability to pay in determining what would be a fair cost to impose on the employee. (See, *Green Tree Financial Corp. – Ala v. Randolph*, *supra*.)

## **G. ADVANTAGES FOR EMPLOYERS, AS WELL AS EMPLOYEES**

1. Cost Savings – Arbitration is far less costly than litigation. This is true even if the employer pays all or substantially all of the costs associated with arbitration. Attorneys' fees for litigating an employment-related lawsuit frequently run into six figures. On the other hand, legal representation at an arbitration proceeding, except in complex and unusual cases, averages between \$10,000 and \$15,000, sometimes even less. This difference is due, primarily, to the costs associated with pre-trial discovery, i.e., depositions interrogatories, and various pre-trial motions, etc., which do not accompany the arbitration process, or only on a much more limited basis.

A recent ADR survey of 20 Fortune 500 companies found that the costs of handling cases that went to arbitration were less than one-half the average costs of suits that needed to be defended before their ADR program was adopted.

These reduced expenditures of time and money likewise may make it easier for employees to obtain legal representation to pursue their claims, since the commitment of a plaintiff's attorney's time and resources will not be nearly as substantial as if the employee's claims were to be litigated.

2. Takes away plaintiff lawyers leverage in negotiations, since the cost of defending these claims in arbitration are much less than if they were litigated and the prospect of a runaway financial award is greatly diminished at the hands of an arbitrator as opposed to a jury.
3. Avoids the uncertainty associated with jury trials. Many if not most, of today's employment-related lawsuits qualify for trial by jury. Due to the "sympathy factor", most employers are hesitant to have their cases go before a jury. The substantial jury verdicts awarded to employees and ex-employees provide a sound basis for this reluctance. Because of the potential size of the jury awards, many employers would prefer to settle these claims out of court, rather than take their chances before a jury.
4. Provides for a quicker resolution of disputes. Once an arbitrator is selected, a hearing can be quickly scheduled and a decision rendered shortly thereafter. In many cases, a decision can be rendered in three to six months after the parties select the arbitrator to hear the dispute. This compares to a year or more (often much more) to bring these matters to trial. Thus, employees can have their claims resolved expeditiously, enabling them to put such cases behind them and get on with their careers, without the aggravations associated with prolonged litigation.

5. Avoids the publicity and media attention that frequently accompanies litigation. The parties can, and frequently do, agree to keep these proceedings confidential. This benefits both the employer and the employee by keeping their "dirty linen" from being aired in public. In turn, this enables the employee to pursue other career opportunities without the threat of prospective employers being deterred from interviewing and hiring them due to the dispute with their previous employers being "aired publicly".

#### **H. DISADVANTAGES**

1. Possible increase in contested employment-related issues. By making Alternative Dispute Resolution readily available, the number of employment-related claims may increase.
2. More limited right to judicial review. Judicial proceedings and decisions at the trial level are subject to challenge on appeal. Rulings made by the trial judge on discovery issues, admissibility, motions, jury instructions, etc. are subject to appeal and can be overturned if it is determined that the judge's ruling was incorrect. In arbitration, on the other hand, review of an arbitrator's decision is usually much more circumscribed. It is often said that, on appeal, the question is not whether the arbitrator's decision was right or wrong, but whether the arbitrator had the authority to make the decision that was rendered. However, most courts have indicated that an arbitrator's legal interpretations with respect to public laws will be subject to limited judicial review, i.e. whether the award reflected a manifest disregard for the law. If it did not, the arbitrator's decision will be upheld.
3. Employees may feel that something is being taken away from them. Some employees may believe that they are forfeiting their statutory right to litigate their claims. This is true. However, this loss is counterbalanced by the positive aspects of arbitration and how the process can serve employees' best interests, i.e., the speed with which their claim can be resolved without the delay, aggravations and publicity attendant litigation.
4. Uncertainty concerning the enforceability of these agreements and the possibility of being forced to litigate this issue. Although the overwhelming number of courts that have ruled on mandatory arbitration agreements have upheld their enforceability, there are dissenting court decisions, particularly in California and the Ninth Circuit. Questions will continue to remain until all the issues regarding workplace ADR are fully resolved or Congress passes legislation on this subject. Rep., Edward J. Markley (D-Mass.) recently proposed H.R. 983, entitled the Civil Rights Procedures Act, which seeks to amend several civil rights statutes by reversing the judicial presumption of the enforceability of arbitration clauses in employment contracts. However, it does not appear that this or other legislation of a similar vein which has been introduced will be passed anytime soon.

#### **H. CONCLUSION**

On the whole, resolving employment-related claims and other workplace disputes through the arbitration process makes good sense. Those groups opposing mandatory arbitration of employment disputes argue that the system should be voluntary, and not a required condition of employment. Why? So long as the system adopted is fair, impartial, provides for judicial review, and the employee is eligible for the same relief he or she would have been entitled to through the judicial process, no good reason exists for not resolving these workplace claims through arbitration, instead of clogging our court system with these proliferating disputes. The number of discrimination cases

filed annually in federal courts from 1990 to 1999 has increased from 8,413 to 22,412. However, the latest statistics (annual report of the Administrative Office of the United States) indicate that this trend may be reversing itself, possibly an indication that the adoption of ADR agreements by employers is having an impact on the judicial case load of employment cases, most particularly discrimination cases.

Mandatory arbitration of employment disputes has worked well in the union setting, where almost every collective bargaining agreement includes a grievance provision culminating in arbitration. This process can be equally effective in resolving disputes in the non-union setting, provided the safeguards referred to earlier are in place.

The overarching purpose of Title VII and similar statutes is to eliminate discrimination in the workplace. There is no reason to believe that employers who have mandatory arbitration agreements with their employees are more likely to discriminate than those employers who do not. Nor is there any reason to believe that, when discrimination does occur, it cannot be adequately remedied through the arbitration process. Indeed, given the relative speed of arbitration, it is more likely that any remedy imposed by an arbitrator will be more effective than one provided by the courts only after long years of litigation.

In summary, therefore, a legally sufficient ADR agreement benefits all concerned parties, i.e., employees, employers and the courts whose dockets will be unburdened as more companies adopt mandatory mediation/arbitration procedures. The only parties left complaining are plaintiff trial lawyers, civil rights groups and the EEOC. The former stand to lose the leverage that the threat of lengthy, expensive litigation gives them in settlement negotiations. The latter groups lose their right to portray themselves as exclusive vindicators of employee rights. These latter claims, however, are somewhat undercut by the fact the EEOC, under the Supreme Court's Waffle House decision, still retains the right to seek individual relief in those cases it deems appropriate and to pursue cutting edge discrimination law issues.

In short, ADR workplace agreements present a win-win situation for employees and employers alike, without depriving the EEOC of its statutory right to seek relief, create new law and protect employee interests in appropriate cases.