SMITH ANDERSON

WORKPLACE ARBITRATION PROGRAMS: DEVELOPING AN ENFORCEABLE PROGRAM AND AVOIDING IMPLEMENTATION TRAPS

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WORKPLACE ARBITRATION PROGRAMS: DEVELOPING AN ENFORCEABLE PROGRAM AND AVOIDING IMPLEMENTATION TRAPS

I. GENERAL GUIDELINES

A. Companies can require employees/applicants to sign arbitration agreements, but can't use their superior power to go beyond requiring the employee/applicant to use private arbitration, rather than the courts, as a forum to resolve workplace disputes. In other words, workplace arbitration programs cannot be used to require employees/applicants to forego their substantive rights.

B. To be enforceable, arbitration agreements/programs should:

- Be clear;
- Use impartial, competent arbitrators;
- Use procedures that meet minimum fairness and due process standards (including adequate discovery, a written award and judicial review) and do not impose unreasonable costs or require payment of any arbitration fees or expenses;
- Avoid overreaching substantive provisions and allow for all relief available in court; and
- Impose a mutual obligation on the company and individual to arbitrate claims.

C. Key cases providing guidelines for proper program development:

☑ Circuit City Stores, Inc. v. Adams, 532 U.S. ____ (2001) (reminding companies that arbitration can be used to change the forum for dispute resolution but not the substantive rights)

☑ Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (general guidelines)

☑ Hooters of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (example of unenforceable program)

☑ Cole v. Burns International Security Svcs., 105 F.3d 1465 (D.C. Cir. 1997) (example of unenforceable cost provisions)

☑ Armendariz v. Foundation Health Psychcare Svcs. Inc., 24 Cal. 4th 83 (Cal. 2000) (general guidelines)

II. PROGRAM DEVELOPMENT CHECKLIST

A. Decide Who Should be Subject to the Arbitration Program

1. Arbitration agreements with transportation workers are not enforceable under the FAA. Circuit City Stores, 532 U.S. at ____.

2. With the exception of transportation workers and union employees who will be subject to arbitration set up by the collective bargaining agreement, companies are free to select which employees/applicants will be subject to arbitration.

   Common Options:

   - ❑ All employees and applicants
   - ❑ All employees
   - ❑ Certain groups of employees (*e.g.*, employees at or above a certain level or in a particular division, salaried v. hourly, etc.)
   - ❑ New hires only

3. Anticipate all likely company defendants (*e.g.*, parent, affiliates, successors, benefit plans, plan administrators and fiduciaries, officers, directors, co-employees) and expressly name them in the agreement/program.

B. Decide What Claims Should Be Covered

1. The company can limit the scope of the claims to be arbitrated; however, the arbitration program may be held invalid if the employee, but not the employer, is barred from litigating claims. See, e.g., Volt Information Services, Inc. v. Bd. of Trustees, 489 U.S. 468 (1989); Pinedo v. Premium Tobacco, Inc., No. B138076 (Cal. Ct. App. Dec. 19, 2000).

   a. Exclude claims from arbitration where a judicial or administrative remedy is appropriate (*e.g.*, workers' comp, intellectual property matters, unemployment benefit claims).

   b. Exclude claims arising under benefit plans for which there is an existing arbitration agreement.

2. The courts will invalidate the program if it is ambiguous as to claims to be arbitrated.

   a. Avoid language that might inadvertently limit the claims required to be arbitrated. *E.g.*, "…claims arising out of the employment relationship…," "… claims arising out of this Agreement…," etc.

   b. Specifically reference past and future disputes.

   c. Specifically reference statutory claims. See, Quint v. A.E. Staley Mfg. Co., 172 F.3d 1 (1st Cir. 1999).

C. Decide When in the Relationship Employees/Applicants Enter the Program

Options:

- During the application process
- At the job offer
- Beginning of employment
- After employment begins

This last option often is undertaken in connection with granting special benefits, etc. to the employee (*e.g.*, promotion, special pay increase, stock options, etc.). The reason existing employees are given such benefits is to ensure that their agreement to arbitrate is supported by consideration (*i.e.*, something of value), which is required by law to make their agreement to arbitrate legally enforceable. Although the grant of special benefits to existing employees is a common practice widely believed to be legally required, it is not. All that is legally required is that the company agree to be bound by a proper arbitration award or agree to arbitrate its own claims against the individual.

D. Decide What To Give The Employees/Applicants In Exchange for Their Agreement to Arbitrate (*i.e.*, Consideration)

Options:

- Mutual agreement by the company to arbitrate claims, see e.g., Hull v. Norcom, Inc., 750 F.2d 1547 (11th Cir. 1985) (one party's promise to arbitrate at least some class of claims has been held to be consideration for other party's promise to arbitrate)

- Some economic benefit (*e.g.*, promotion, pay increase, additional benefits, legal assistance benefit); usually offered to existing employees

- Mutual agreement by company to be bound by a proper arbitration award (company agreement to be bound to arbitrator award on employee's claims has been held to be sufficient even though company did not agree to arbitrate its claims), see, e.g., Johnson v. Circuit City Stores, Inc., 148 F.3d 373 (4th Cir. 1998). Recent case law, however, suggests that this approach might invalidate the program.

- Agreement to consider applicant for employment (applicants only)

E. Decide on the Form of the Arbitration Agreement

Arbitration agreements frequently are challenged as being unenforceable unconscionable contracts of adhesion. These challenges are governed by state law with the caveat that state law cannot be used to interfere with the FAA. Accordingly, what is unconscionable and unenforceable may differ state to state. The following guidelines are designed to be enforceable in most states.

1. Present the arbitration agreement as a separate stand alone agreement.

2. Present the arbitration agreement in a form that reflects mutuality (*i.e.*, company agrees to arbitrate too).

3. Require employees/applicants to sign the agreement. See, e.g., Bailey v. Federal Nat'l Mortgage Assoc., 209 F.3d 740 (D.C. Cir. 2000) (employee who continued to work after program issued but who did not sign not required to arbitrate).

4. Optional:

   - Add provision advising employee/applicant to consult counsel before signing the agreement.

5. Arbitration agreements written in English without a foreign language translation may be held unenforceable against employees who do not speak English. Prevot v. Phillips Petroleum Co., No. G-00-295 (S.D. Tex. Mar. 7, 2001).

6. Although some courts have enforced arbitration provisions in employee handbooks/handbook acknowledgement forms, employment applications or written job offers, this practice generally is not advisable because (i) it increases the likelihood of challenges on the basis of no knowing waiver of the judicial forum and (ii) may strengthen arguments that the company

handbook is contractually binding on the company. Compare cases enforcing handbook programs (see, e.g., Chanchani v. Salomon/Smith Barney, No. 99 Civ. 9219 (S.D.N.Y. Mar. 1, 2001); Nghiem v. NEC Elec. Inc., 25 F.3d 1437 (9th Cir. 1994) with cases invalidating handbook programs (see, e.g., Romo v. Y-3 Holdings, Inc., No. B136617 (Mar. 20, 2001).

a. Perhaps one exception is inclusion of the arbitration provision in the employment application or other documents a job candidate must sign to be considered for employment. Absent such a provision, rejected applicants will not be bound to arbitrate failure to hire claims. Even where these pre-hire provisions are used, the company should require a separate arbitration agreement for individuals who are ultimately hired.

b. The arbitration program documents can be physically located as an appendix to the handbook as long as it is clearly marked as a stand-alone document.

III. SPECIFIC PROGRAM ELEMENTS

A. How Soon Must Claims be Asserted – Statute of Limitations?

1. Although there is some judicial authority for parties to shorten the period of time in which employee claims must be brought, there is significant risk that doing so could invalidate the agreement, especially with regard to statutory claims. Compare Graham Oil Co. v. Arco Prod. Co., 43 F.3d 1244 (9th Cir. 1994) with Taylor v. Western & S. Life Ins. Co., 966 F.2d 1188 (7th Cir. 1992).

   - Six months has been held reasonable by some courts.

2. Due Process Protocol and AAA National Rules for the Resolution of Employment Disputes require the use of the applicable statute of limitations for statutory claims.

B. Arbitrator Selection Procedures

1. The arbitration agreement should provide for an unbiased, experienced arbitrator knowledgeable about the applicable laws and should specify the selection procedure. Gilmer, 500 U.S. at ___; Armendariz, 24 Cal. 4th at ___. *E.g.*, parties alternately strike from a AAA or other third party-provided list, information about arbitrator employment history along with names of party representatives in last __ matters handled by the arbitrator with further inquiries permissible, certain number of peremptory challenges and unlimited cause challenges

Note: FAA allows a court to overturn rulings of a corrupt or partial arbitrator.

2. Employer control of the list of potential arbitrators renders the agreement unenforceable. See, e.g., Hooters, 173 F.3d at ___.

3. The AAA National Rules for Resolution of Employment Disputes provide for a selection process that will be followed in AAA arbitrations unless the parties agree to a different process.

C. Discovery

1. Some limitations on discovery as a matter of right are permissible with arbitrator authority to authorize more with an appropriate showing. Gilmer, 500 U.S. at ___; Armendariz, 24 Cal. 4th at ___.

   a. AAA discovery procedure allows for discovery (document production, information requests, depositions, subpoenas) by arbitrator order. In light of recent case law, companies should allow for some minimal discovery as a matter of right.

2. Preclusion of all discovery will invalidate the arbitration program.

3. One-sided discovery (*e.g.*, employee required to specify acts complained of and provide a list of witnesses but employer does not have to give notice of defenses or witnesses) will invalidate the arbitration program. See, e.g., Hooters, 173 F3d at ___.

4. The agreement should authorize prehearing conferences with the arbitrator to resolve disputes.

D. Arbitration Costs

1. Arbitration programs that require employees to pay any or all of the arbitrator fees are increasingly being held to be unenforceable. Cole, 105 F.3d at ___; Armendariz, 24 Cal. 4th at ___. Agreement should include provision that each party will be required to pay its own other costs, such as witness fees or other amounts which they would be required to pay as a party litigating a claim in court.

   NOTE: AAA and Due Process Protocol rules for arbitrator fee splitting by the parties may be held unlawful.

2. Agreements which do not address how arbitration fees will be paid are not *per se* unenforceable; however, if the individual can show that the cost was

prohibitive, the agreement will be invalidated. Green Tree Financial Corp. – Alabama v. Randolph, 121 S.Ct. 513 (2000); cf. Bradford v. Rockwell Semiconductor Sys., Inc., 84 F.E.P. 1358 (4th Cir. 2001).

Recommended provision: Individual will be required to pay no more than he/she would have had to pay for judicial resolution of the dispute.

E. Remedies

1. Do not limit remedies to less than that allowed under applicable law (*e.g.*, do not exclude punitive damages, front pay, compensatory damages). Gilmer, 500 U.S. at ___; Graham Oil Co., 43 F.3d at ___; Armendariz, 24 Cal. 4th at ___.

   NOTE: The AAA National Rules for Resolution of Employment Disputes authorizes the arbitrator to grant any remedy or relief that he/she deems just and equitable, including any remedy that would have been available through litigation. This provision seems to allow for greater relief than that afforded by law. Accordingly, although the National Rules do not permit limitations on remedies, it nonetheless is advisable to limit remedies to the type and amount available under applicable law.

2. Attorneys' fees should be recoverable only to the extent permitted by law.

3. Authorize the arbitrator to award equitable relief.

F. Other Arbitration Procedures

1. Preserve all rights, except dispute resolution in judicial forum.

2. Do not exclude the right to make reports to administrative agencies.

3. Allow parties to be represented by counsel during the arbitration process.

4. Decide whether the arbitration program will be self-administered or administered by a third party. Requiring arbitration to be handled by a specific organization (*e.g.*, EDSI) may render the provision unenforceable. See, e.g., Geiger v. Ryan's Family Steak Houses, No. 1P99-1335-C-B/S (Mar. 21, 2001).

   NOTE: Third party administrators may require that the parties use the administrator's arbitration rules.

5. Specify the arbitration rules that will be followed (*e.g.*, company's own arbitration rules, AAA, JAMS, NYSE, etc.) as amended from time to time.

Rules should provide fairness and due process standards. At least one court has held that the company's unilateral right to amend the rules contributed to the unenforceability of the program. Hooters, 173 F.3d at ___.

6. One-sided procedures (*e.g.*, right to add claims, make motions, record the proceeding, sue in court to vacate award, cancel the agreement) render the agreement unenforceable.

7. Specify that the arbitrator has the authority to resolve any dispute relating to the interpretation, applicability or enforceability of the agreement.

8. Specify that the arbitrator has the authority to entertain a motion to dismiss and/or motion for summary judgment, to which the federal or state rules of civil procedure will apply.

9. Allow parties to obtain a written transcript of the proceedings.

10. Specify the parties' right to file a post-hearing brief.

11. Require a written opinion by the arbitrator setting forth issues, findings and conclusion on which the award is based. Gilmer, 500 U.S. at ___; Armendariz, 24 Cal. 4th at ___. Procedures making award decisions available to public are preferred.

12. Specify scope of judicial review. *E.g.*, "…on the same basis that an appellate court would review trial court decisions sitting without a jury…" FAA provision for judicial review is narrow: arbitrator corruption, fraud, bias, failure to postpone hearing/hear evidence, exceeds authority; miscalculation, award on unsubmitted issue, imperfect award unrelated to merits). Common law authority exists to apply a manifest disregard of the law standard.

13. Requiring arbitration at distant location may render the arbitration program unenforceable.

14. Severability clause may or may not save the arbitration agreement if a particular provision is unenforceable.

APPENDIX A

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Resolving Employment Disputes - A Practical Guide
Amended and Effective July 1, 2003

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INTRODUCTION

This handbook has been prepared by the American Arbitration Association to guide employers and employees in the responsible development and use of alternative dispute resolution (ADR) procedures to resolve workplace disputes.

As a more effective option to traditional litigation, an increasing number of employers and employees are using ADR to resolve disputes in the non-union workplace. A wide range of dispute prevention and resolution procedures allow employers to offer employees a fair, cost-effective and private forum to resolve workplace disputes.

Due process safeguards are critical to any employment dispute resolution program because they provide a fair and equitable forum for both employee and employer.

Role of the American Arbitration Association

The American Arbitration Association, founded in 1926, is a not-for-profit, public service organization dedicated to the resolution of disputes through mediation, arbitration, elections, and other voluntary dispute resolution procedures.

In addition, the AAA provides education and training, specialized publications, and research on all forms of dispute settlement. With 35 offices nationwide, an international office in Dublin, Ireland, and 53 cooperative agreements with arbitral institutions in 38 countries, the American Arbitration Association is the nation's largest private provider of ADR services.

The Use of ADR to Resolve Employment Disputes

Federal and state laws reflecting societal intolerance for certain workplace conduct, and court decisions interpreting and applying those statutes, have redefined responsible corporate practice and employee relations.

Increasingly, employers and employees face workplace disputes involving alleged wrongful termination, sexual harassment, or discrimination based on race, color, religion, sex, national origin, age and disability.

As courts and administrative agencies become less accessible to civil litigants, employers and their employees now see ADR as a way to promptly and effectively resolve workplace disputes. ADR procedures are becoming more common in

contracts of employment, personnel manuals and employee handbooks. As the leading provider of ADR services nationally, the American Arbitration Association is well-suited to offer guidance in developing responsible ADR programs designed to address workplace conflict.

Legal Basis of Employment ADR

Since 1990, Congress has twice re-affirmed the important role of ADR in the area of employment discrimination — in the Americans with Disabilities Act in 1990, and a year later in Section 118 of the Civil Rights Act of 1991.

The United States Supreme Court has also spoken on the importance of ADR in the employment context. The lead case is **Gilmer v. Interstate/Johnson Lane***,* 500 U.S. 20, 111 S.Ct. 1647 (1991). In **Gilmer**, the Supreme Court refused to invalidate Gilmer's agreement with the New York Stock Exchange that he would arbitrate disputes with his employer (Interstate/Johnson Lane) simply because he was obliged to sign it in order to work as a securities dealer whose trades were executed on the Exchange. Although the **Gilmer** Court found that the Age Discrimination in Employment Act did not preclude arbitration of age discrimination claims, it specifically declined to decide whether employment arbitration agreements were "contracts of employment" excluded under the Federal Arbitration Act.

The specific issue left open by **Gilmer** was decided 10 years later by the United States Supreme Court in **Circuit City Stores, Inc. v. Adams**, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001). In **Circuit City**, the Supreme Court concluded that except for transportation workers such as seamen or railroad workers, the FAA covers all contracts of employment and that the Act may be used to compel arbitration of employment-related claims. While **Circuit City** involved only state law claims, the Supreme Court had determined previously in **Gilmer** that federal age discrimination claims (and presumably other federal civil rights claims) were arbitrable under the FAA. **Circuit City** did not answer the question of whether an arbitration agreement which fails to mention, for example, what rules will govern the arbitration proceeding or how an arbitrator will be chosen, will be enforceable. At least one federal circuit court of appeals has indicated that such factors may play a role in the enforceability of arbitration agreements. See **Floss v. Ryan's Family Steak Houses, Inc.**, 211 F.3d 306 (6th Cir. 2000), *cert. denied*, 121 S.Ct. 763 (2001).

The United States Supreme Court decided two other important cases. In **Green Tree Fin. Corp.–Alabama v. Randolph**, 531 U.S. 79 (2000), *aff'd by*, **Randolph v.Green Tree Fin. Corp.–Alabama**, 244 F.3d 814 (2001), the Supreme Court held, in the context of consumer arbitration, that an arbitration agreement that does not mention arbitration costs and fees is not *per se* unenforceable in that it fails to affirmatively protect a party from potentially steep arbitration costs. A party who seeks to invalidate an arbitration agreement on the ground of prohibitive expense bears the burden of showing the likelihood of incurring such costs. To make certain all persons with employment claims are able to access the arbitration forum, the AAA's current policy is that the employer will pay all administrative filing fees above $125 (a typical court filing fee), and all compensation for the neutral. The AAA's policy contains two narrow exceptions to balance the protections—if a case is determined by the arbitrator to have been filed frivolously, or a case is filed with intent to harass.

In **Equal Employment Opportunity Comm'n v. Waffle House, Inc.**, 534 U.S. 279, 122 S.Ct. 754 (2002), the Supreme Court held that because the EEOC is not a

party to an arbitration agreement, it is not bound by its terms. The EEOC, said the Court, is the master of its own case. By federal statute, the EEOC has the authority to evaluate the strength of the public interest at stake and to determine whether public resources should be committed to the recovery of victim-specific relief, or the full panoply of remedies the statute entitles the EEOC to seek. Today, most federal and state courts support employer-imposed arbitration systems if they are fair to all participants. The notion of fairness includes accurate and timely notice, ability to retain counsel, secure adequate discovery, receive a reasoned award and maintain the right to secure the same forms of relief available to those in litigation. The AAA continues to maintain that employer-promulgated plans must follow the *Employment Due Process Protocol* to be administered by the AAA.

The Fairness Issue: The Due Process Protocol

The *Due Process Protocol* for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship was developed in 1995 by a special task force comprised of individuals representing management, labor, employment, civil rights organizations, private administrative agencies, government, and the American Arbitration Association. The *Due Process Protocol,* which was endorsed by the Association in 1995, seeks to provide fairness and equity in resolving workplace disputes. The *Due Process Protocol* encourages mediation and arbitration of statutory disputes, provided due process safeguards exist. It conveys the hope that ADR will reduce delays caused by the huge backlog of cases pending before administrative agencies and the courts. The *Due Process Protocol* "recognizes the dilemma inherent in the timing of an agreement to mediate and/or arbitrate statutory disputes" but does not take a position on whether an employer can require a predispute, binding arbitration program as a condition of employment.

The *Due Process Protocol* has been endorsed by organizations representing a broad range of constituencies. They include the American Arbitration Association, the American Bar Association Labor and Employment Section, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the Society of Professionals in Dispute Resolution. The National Employment Lawyers Association has endorsed the substantive provisions of the *Due Process Protocol.* It has been incorporated into the ADR procedures of the Massachusetts Commission Against Discrimination (MCAD) and into the *Report of the United States Secretary of Labor's Task Force on Excellence in State and Local Government.* The full text of the *Due Process Protocol* appears in the Appendix below.

AAA's Employment ADR Rules

On June 1, 1996, the Association issued its first *National Rules for the Resolution of Employment Disputes.* The rules, since revised several times, have been developed for employers and employees who wish to use a private alternative to resolve their disputes. The rules enable parties to have complaints heard by an impartial person of their joint selection, with expertise in the employment field. Both employers and individual employees benefit by having experts resolve their disputes without the costs and delay of litigation. The rules include procedures that provide due process in both the mediation and arbitration of employment disputes.

AAA's Policy on Employment ADR

The AAA's policy on employment ADR is guided by the state of existing law, as well as its obligation to act in an impartial manner. In following the law, and in the

interest of providing an appropriate forum for the resolution of employment disputes, the Association administers dispute resolution programs which meet the due process standards as outlined in its *National Rules for the Resolution of Employment Disputes* and the *Due Process Protocol.* If the Association determines that a dispute resolution program materially deviates from the minimum due process standards of the *National Rules for the Resolution of Employment Disputes* and the *Due Process Protocol,* the Association will decline to administer cases under that program. Other issues, not related to compliance with the *Due Process Protocol*, will be presented to the arbitrator for determination.

Notification

If an employer intends to utilize the dispute resolution services of the Association in an employment ADR plan, it must, at least thirty (30) days prior to the planned effective date of the program: (1) notify the Association of its intention to do so; and (2) provide the Association with a copy of the employment dispute resolution plan. If an employer does not comply with this requirement, the Association reserves the right to decline its administrative services. Copies of all plans should be sent to the American Arbitration Association, 725 S. Figueroa Street, Suite 2400, Los Angeles, CA 90017, and marked to the attention of Neil Currie, Assistant Vice President, Case Management Department.

Designing an ADR Program

The guiding principle in designing a successful employment ADR system is that it must be fair in fact and perception. The American Arbitration Association has considerable experience in administering and assisting in the design of employment ADR plans, which gives it an informed perspective on how to effectively design ADR systems, as well as the problems to avoid. Its guidance to those designing employment ADR systems is summarized below:

- The American Arbitration Association encourages employers to consider the wide range of legally available options to resolve workplace disputes outside the courtroom.
- A special emphasis is placed by the Association on encouraging the development of in-house dispute resolution procedures, such as open door policies, ombuds, peer review, and internal mediation.
- The Association recommends an external mediation component to resolve disputes not settled by the internal dispute resolution process.
- Programs which use arbitration as a final step may employ:
    - pre-dispute, voluntary final and binding arbitration;
    - pre-dispute, mandatory non-binding arbitration;
    - pre-dispute, mandatory final and binding arbitration; or
    - post-dispute, voluntary final and binding arbitration.
- The Association's experience and belief is that any ADR method used in the employment context is most effective when the parties knowingly and voluntarily agree on the process, and have confidence in the neutrality of

the mediator or arbitrator and the procedures and the institution under which their case is being administered.

The principles outlined above are examined in detail below:

- *The American Arbitration Association encourages employers to consider the wide range of legally available options to resolve workplace disputes outside the courtroom.*

  Experience has shown that systems which include a series of steps in an attempt to resolve disputes in their earliest stages are most likely to be successful. A "one-size fits all" approach does not work in the employment ADR area. A good employment ADR program will be custom-tailored to suit the needs of the employer and its employees, consistent with the current state of the law and the organization's corporate culture.

- *A special emphasis is placed by the Association on encouraging the development of in-house dispute resolution procedures, such as open door policies, ombuds, peer review, and internal mediation.*

  It is in the interest of all parties to resolve disputes as quickly as possible. Therefore, the Association encourages employers to develop in-house dispute resolution systems in an effort to resolve disputes in their early stages. This will minimize the productivity and good will lost during protracted disputes. An impressive variety of options may be selected in one of several combinations, from the menu set forth below:

Alternative Dispute Resolution Options

Open Door Policy: Employees are encouraged to meet with their immediate manager or supervisor to discuss problems arising out of the workplace environment. In some systems, the employee is free to approach anyone in the chain of command.

Ombuds: A neutral third party (either from within or outside the company) is designated to confidentially investigate and propose settlement of employment complaints brought by employees.

Peer Review: A panel of employees (or employees and managers) works together to resolve employment complaints. Peer review panel members are trained in the handling of sensitive issues.

Internal Mediation: A process for resolving disputes in which a neutral third person from within the company, trained in mediation techniques, helps the disputing parties negotiate a mutually acceptable settlement. Mediation is a non-binding process.

Fact-finding: The investigation of a complaint by an impartial third person or team. This person or team examines the complaint and the facts and issues a non-binding report. Fact-finding is particularly helpful for allegations of sexual harassment, where a fact-finding team, comprised of one male and one female neutral, investigates the allegations and presents their findings to the employer and the employee.

• *The Association recommends an external mediation component to resolve disputes not settled by the internal dispute resolution process.*

The in-house methods described above will resolve an overwhelming percentage of workplace disputes. For those matters not resolved by these methods, the Association strongly encourages employers to use external mediation. External mediation is a process in which the parties discuss their dispute with an impartial person who assists them in reaching a settlement. The mediator may suggest ways of resolving the dispute but may not impose a settlement on the parties. Mediation offers the advantage of informality, with reduced time and expense needed to resolve disputes. Perhaps the greatest benefit, aside from relatively low cost, is that mediation works — mediation has an 85% settlement rate. The AAA's *National Rules for the Resolution of Employment Disputes* has a mediation component to encourage parties to take advantage of this process.

The AAA has developed a roster of experienced mediators, knowledgeable in the employment field. It assists the parties in selecting the right mediator for their dispute, and in scheduling a meeting.

Disputes not resolved by the external mediation can be arbitrated. Arbitration is generally defined as the submission of disputes to one or more impartial persons for final and binding determination. It can be, and often is, the final step in a workplace program that includes other dispute resolution methods. There are many possibilities for designing this final step. They include:

Pre-Dispute, Final and Binding Arbitration: The parties agree in advance to use arbitration to resolve disputes and they are bound by the outcome.

> Where clear notice has been given to employees when plans containing a mandatory arbitration component are implemented, and where the plan is fair, courts have generally enforced them. However, the issue of the validity of imposed binding arbitration systems that are a condition of employment is still being litigated. Also, the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB) have legally challenged pre-dispute, mandatory final and binding arbitration agreements imposed as a condition of employment, in some circumstances.

Pre-Dispute, Non-binding Arbitration: The parties agree in advance to use arbitration to resolve disputes, but they are not bound by the outcome.

Post-Dispute, Final and Binding Arbitration: The parties have the option of deciding to arbitrate unresolved disputes after a dispute arises, and they are bound by the outcome.

Post-Dispute, Non-binding Arbitration: The parties have the option of deciding to arbitrate unresolved disputes after a dispute arises, but they are not bound by the outcome. *The Association's experience and belief is that any ADR method used in the employment context is most effective when the parties knowingly and voluntarily agree on the process, and have confidence in the neutrality of the mediator or arbitrator and the procedures and the institution under which their case is being administered.* Although the AAA administers binding arbitration programs required as a condition of

initial or continued employment, such programs must be consistent with the Association's *National Rules for the Resolution of Employment Disputes* and the *Due Process Protocol*. If the ADR plan conforms to the Rules and the Protocol, the Association will administer disputes arising from it, pending future legal developments.

Checklist for Employment Arbitration Programs

To aid drafters of employment arbitration programs, the following checklist is provided.

- Include a fair method of cost-sharing between the employer and employee, which requires the employer to pay a substantial portion of the administrative fees and the arbitrator's fees, to ensure affordable access to the system for all employees.

AAA rules require the employer to absorb all administrative fees above $125 (a typical filing fee in court), and all of the neutral's compensation. Of course, the employer can absorb all filing fees, and the additional hearing costs. If, however, an employee raises an objection and asks to assume a larger portion of the costs of arbitration, an employer is wise to do so in order to protect the process, and avoid the appearance of bias. Use a neutral ADR provider and an established, fair procedure to govern the arbitration. It is important to designate a neutral arbitral organization, such as the American Arbitration Association, to administer the external component of the program such as the mediation and/or arbitration processes, and to specify the *National Rules for the Resolution of Employment Disputes.* The American Arbitration Association as administrator acts as a buffer between the parties and the neutral, collecting and disbursing arbitrator compensation, ruling on objections pertaining to the arbitrator's continued service, and preventing *ex parte* communication between one party and the arbitrator. The plan also should follow the *Due Process Protocol.*

- Specify the qualifications and number of arbitrators.

The Association's national employment panel is comprised of a select group of employment law experts including former judges, labor and employment management and plaintiff attorneys, corporate counsel, labor arbitrators and human resource professionals. Arbitrators on this panel have significant employment law experience, particularly in dealing with issues involving statutory rights. The employment ADR program also may specify additional qualifications of the arbitrator. For example, the clause may specify that an arbitrator knowledgeable about the Employment Retirement Income Security Act of 1974 (ERISA) will resolve all pension disputes.

One arbitrator hears most employment arbitrations. However, a clause may provide that a panel of three arbitrators shall hear large, complex employment cases with claims exceeding a certain dollar amount.

There are benefits and drawbacks to either number. Appointing an arbitrator and scheduling hearings is easier with one arbitrator than with three, and compensation of the neutral is less. However, as the stakes

increase, some parties feel more comfortable having their dispute decided by a panel of three individuals.

- Specify the employees to be covered.

The program should describe which employees are included in it.

Some examples:

- All employees not covered by collective bargaining agreements
- Certain divisions, departments or work groups
- Certain categories of employees such as executives, supervisors or professionals
- Salaried employees or hourly employees
- Independent contractors
- New-hires only
- Specify the nature of the claims to be covered.

The plan should specify the nature of the claims to be covered, including express reference to employment disputes and/or specific statutory claims such as Title VII and ADEA. Some employers may want the ADR provision to be as broad as possible, while others may choose to exclude certain types of claims. The range of issues to be covered or excluded may include:

- Termination
- Benefits
- Statutory claims
- Sexual harassment
- Wages and compensation
- Performance evaluation

- Give employees clear notice of their right of representation.

The plan should provide that counsel or any person whom the employee designates at any stage of the external review process might represent the employee. Plans may also provide information about institutions that offer assistance to parties who cannot afford representation, such as bar associations, legal service associations, and civil rights organizations.

Employers also may consider providing a fair method for reimbursement of at least a portion of the employee's legal fees, especially for lower-paid employees. This has been accomplished by tying a legal assistance benefit to the employment dispute ADR program.

The ADR program should provide time frames for filing a claim that are consistent with applicable statutes of limitation. This is required by the *National Rules for the Resolution of Employment Disputes* and the *Due Process Protocol* and establishes a level of clarity regarding when claims must be filed.

- Provide for fair and adequate discovery.

The ADR program should include a fair and simple method by which the parties can obtain the necessary information to present their claim. The plan should provide that the arbitrator would decide any disputes regarding the extent of discovery.

- Allow for the same remedies and relief that would have been available to the parties had the matter been heard in court.

Under the *National Rules for the Resolution of Employment Disputes,* the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court. This authority includes the right to award compensatory and exemplary (or punitive) damages, attorneys' fees, and other remedies to the extent those remedies would be available under applicable law in court. The *National Rules for the Resolution of Employment Disputes* do not permit programs to place restrictions on available remedies.

- State clearly that it does not preclude an employee from filing a complaint with a federal, state or other governmental administrative agency.

A plan that prohibits employees from filing complaints with the EEOC, NLRB, or other agencies charged with protecting the statutory rights of employees, may be subject to successful legal challenge. Moreover, an agency is generally free to pursue a complaint from "any source" or even on its own volition. *See* **Equal Employment Opportunity Comm'n v.Waffle House, Inc.***,* 534 U.S. 279, 122 S. Ct. 754 (2002) (holding that an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief, such as back pay, reinstatement, and damages, in an enforcement action alleging that the employer violated Title 1 of the Americans with Disabilities Act of 1990 (ADA)).

- Provide adequate notice to employees prior to the plan implementation.

It is important to give employees adequate notice of the planned implementation date of the employment ADR program. This will also allow time to prepare supervisors as to their roles. The "lead time" will depend on several factors, including the nature of the plan, the number of employees

and the number of offices (or locations).

• Ensure that the employment ADR plan is written in a clear and easily understood manner.

Employment ADR plans should be easily understood by all employees. Legal jargon should be avoided or kept to a minimum.

Summary of Options

In summary, there are many options available to drafters of employment ADR systems.

1) Internal ADR Options

- open door policy
- peer review
- ombuds
- internal mediation

2) External ADR Options

- fact-finding
- external mediation
- pre-dispute, final and binding arbitration
- pre-dispute, non-binding arbitration
- post-dispute, final and binding arbitration
- post-dispute, non-binding arbitration

Examples of Employment ADR Systems

Given the many variables involved in establishing a sound, responsible employment ADR system that suits the needs of a specific employer and its employees, no one model can be presented as representing the best approach.

The Association has examples of established ADR plans it administers and will make them available to those designing employment ADR programs.

Conclusion

The employment ADR field is in a state of rapid expansion. As a result, employers will want to be circumspect in their promulgation of ADR plans. Copies of the

American Arbitration Association's *National Rules for the Resolution of Employment Disputes* and other materials, guides, and articles related to employment ADR may be obtained by contacting any AAA regional office or the Association's headquarters at:

American Arbitration Association
Customer Service Department
335 Madison Avenue
New York, NY 10017-4605
Phone: (800) 778-7879
Fax: (212) 716-5906

These materials, as well as a broad range of information about the ADR process in other substantive areas, may also be downloaded from the Association's Web site at: **www.adr.org**.

APPENDIX

I. ADR CLAUSES

Reproduced below are just a few examples of ADR clauses that can be used in connection with employment ADR plans. It is by no means an exhaustive compilation.

Mediation Clause

Parties can provide for mediation of disputes by using the following language in the appropriate document, and inserting an appropriate time period to conclude mediation:

> *If a dispute arises out of or relates to this [employment application; employment ADR program; employment contract] or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its National Rules for the Resolution of Employment Disputes, before resorting to arbitration, litigation or some other dispute resolution procedure.*

Optional Arbitration of Unresolved Future Disputes

Parties can provide for voluntary arbitration of disputes after a dispute arises by using the following language in the appropriate document:

> *Any controversy or claim arising out of or relating to this [employment application employment ADR program; employment contract] that is not resolved by the parties, shall, upon the written agreement of the parties after the dispute arises, be settled by arbitration administered by the American Arbitration Association under its National Rules for the Resolution of Employment Disputes and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Agreement to Submit an Existing Dispute to Arbitration

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its National Rules for the Resolution of Employment Disputes, the following controversy: (cite briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide and perform any award rendered by the arbitrator(s), and that judgment of the court having jurisdiction may be entered on the award.

Arbitration Clause for Future Disputes

Subject to the caveats expressed in this Guide, parties can provide for arbitration of future disputes by using the following language in the appropriate document:

Any controversy or claim arising out of or relating to this [employment application; employment ADR program; employment contract] shall be settled by arbitration administered by the American Arbitration Association under its National Rules for the Resolution of Employment Disputes and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

II. DUE PROCESS PROTOCOL

A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship

The following Protocol is offered by the undersigned individuals, members of the Task Force on Alternative Dispute Resolution in Employment, as a means of providing due process in the resolution by mediation and binding arbitration of employment disputes involving statutory rights. The signatories were designated by their respective organizations, but the Protocol reflects their personal views and should not be construed as representing the policy of the designating organizations.

Genesis

This Task Force was created by individuals from diverse organizations involved in labor and employment law to examine questions of due process arising out of the use of mediation and arbitration for resolving employment disputes. In this Protocol we confine ourselves to statutory disputes.

The members of the Task Force felt that mediation and arbitration of statutory disputes conducted under proper due process safeguards should be encouraged in order to provide expeditious, accessible, inexpensive and fair private enforcement of statutory employment disputes for the 100 million members of the workforce who might not otherwise have ready, effective access to administrative or judicial relief. They also hope that such a system will serve to reduce the delays which now arise out of the huge backlog of cases pending before administrative agencies and courts and that it will help forestall an even greater number of such cases.

A. Pre- or Post-Dispute Arbitration

The Task Force recognizes the dilemma inherent in the timing of an agreement to mediate and/or arbitrate statutory disputes.

It did not achieve consensus on this difficult issue. The views in this spectrum are set forth randomly, as follows:

- Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but any agreement to mediate and/or arbitrate disputes should be informed, voluntary, and not a condition of 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. Postponing such an agreement until a dispute actually arises, when there will likely exist a stronger predisposition to litigate, will result in very few agreements to mediate and/or arbitrate, thus negating the likelihood of effectively utilizing alternative dispute resolution and overcoming the problems of administrative and judicial delays which now plague the system.
- Employees should not be permitted to waive their right to judicial relief of statutory claims arising out of the employment relationship for any reason.
- Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but the decision to mediate and/or arbitrate individual cases should not be made until after the dispute arises.

The Task Force takes no position on the timing of agreements to mediate and/or arbitrate statutory employment disputes, though it agrees that such agreements be knowingly made. The focus of this Protocol is on standards of exemplary due process.

B. Right of Representation

1. Choice of Representative

Employees considering the use of or, in fact, utilizing mediation and/or arbitration procedures should have the right to be represented by a spokesperson of their own choosing. The mediation and arbitration procedure should so specify and should include reference to institutions which might offer assistance, such as bar associations, legal service associations, civil rights organizations, trade unions, etc.

2. Fees for Representation

The amount and method of payment for representation should be determined between the claimant and the representative. We recommend, however, a number of existing systems which provide employer reimbursement of at least a portion of the employee's attorney fees, especially for lower-paid employees. The arbitrator should have the authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law or in the interests of justice.

3. Access to Information

One of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery. Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims. The employees'

representative should also have reasonable pre-hearing and hearing access to all such information and documentation.

Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available.

We also recommend that prior to selection of an arbitrator, each side should be provided with the names, addresses and phone numbers of the representatives of the parties in that arbitrator's six most recent cases to aid them in selection.

C. Mediator and Arbitrator Qualification

1. Roster Membership

Mediators and arbitrators selected for such cases should have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment. The roster of available mediators and arbitrators should be established on a nondiscriminatory basis, diverse by gender, ethnicity, background, experience, etc., to satisfy the parties that their interests and objectives will be respected and fully considered.

Our recommendation is for selection of impartial arbitrators and mediators. We recognize the right of employers and employees to jointly select as mediator and/or arbitrator one in whom both parties have requisite trust, even though not possessing the qualifications here recommended, as most promising to bring finality and to withstand judicial scrutiny.

The existing cadre of labor and employment mediators and arbitrators, some lawyers, some not, although skilled in conducting hearings and familiar with the employment milieu, is unlikely, without special training, to consistently possess knowledge of the statutory environment in which these disputes arise and of the characteristics of the nonunion workplace.

There is a manifest need for mediators and arbitrators with expertise in statutory requirements in the employment field who may, without special training, lack experience in the employment area and in the conduct of arbitration hearings and mediation sessions. Reexamination of rostering eligibility by designating agencies, such as the American Arbitration Association, may permit the expedited inclusion in the pool of this most valuable source of expertise.

The roster of arbitrators and mediators should contain representatives with all such skills in order to meet the diverse needs of this caseload.

Regardless of their prior experience, mediators and arbitrators on the roster must be independent of bias toward either party. They should reject cases if they believe the procedure lacks requisite due process.

2. Training

The creation of a roster containing the foregoing qualifications dictates the development of a training program to educate existing and potential labor and employment mediators and arbitrators as to the statutes, including substantive, procedural and remedial issues to be confronted and to train experts in the statutes as to employer procedures governing the employment relationship as well as due

process and fairness in the conduct and control of arbitration hearings and mediation sessions.

Training in the statutory issues should be provided by the government agencies, bar associations, academic institutions, etc., administered perhaps by the designating agency, such as the AAA, at various locations throughout the country. Such training should be updated periodically and be required of all mediators and arbitrators. Training in the conduct of mediation and arbitration could be provided by a mentoring program with experienced panelists.

Successful completion of such training would be reflected in the resume or panel cards of the arbitrators supplied to the parties for their selection process.

3. Panel Selection

Upon request of the parties, the designating agency should utilize a list procedure such as that of the AAA or select a panel composed of an odd number of mediators and arbitrators from its roster or pool. The panel cards for such individuals should be submitted to the parties for their perusal prior to alternate striking of the names on the list, resulting in the designation of the remaining mediator and/or arbitrator.

The selection process could empower the designating agency to appoint a mediator and/or arbitrator if the striking procedure is unacceptable or unsuccessful. As noted above, subject to the consent of the parties, the designating agency should provide the names of the parties and their representatives in recent cases decided by the listed arbitrators.

4. Conflicts of Interest

The mediator and arbitrator for a case has a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest.

The designated mediator and/or arbitrator should be required to sign an oath provided by the designating agency, if any, affirming the absence of such present or preexisting ties.

5. Authority of the Arbitrator

The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating agency, including the authority to determine the time and place of the hearing, permit reasonable discovery, issue subpoenas, decide arbitrability issues, preserve order and privacy in the hearings, rule on evidentiary matters, determine the close of the hearing and procedures for post-hearing submissions, and issue an award resolving the submitted dispute.

The arbitrator should be empowered to award whatever relief would be available in court under the law. The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

6. Compensation of the Mediator and Arbitrator

Impartiality is best assured by the parties sharing the fees and expenses of the

mediator and arbitrator. In cases where the economic condition of a party does not permit equal sharing, the parties should make mutually acceptable arrangements to achieve that goal if at all possible. In the absence of such agreement, the arbitrator should determine allocation of fees. The designating agency, by negotiating the parties' share of costs and collecting such fees, might be able to reduce the bias potential of disparate contributions by forwarding payment to the mediator and/or arbitrator without disclosing the parties' share therein.

D. Scope of Review

The arbitrator's award should be final and binding and the scope of review should be limited.

Dated: May 9, 1995

Signatories

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APPENDIX B

Welcome
Overview
Fast Facts
What's New
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Fast Facts

Printer Friendly

I. National Rules for the Resolution of Employment Disputes

II. (Including Mediation and Arbitration Rules)

As Amended and Effective November 1, 2002

NOTICE: The administrative fee schedule for cases arising out of individually-negotiated contracts has been amended as of July 1, 2003. Click here to view the current effective administrative fee schedule for cases arising out of individually-negotiated contracts.

A. Introduction

Federal and state laws reflecting societal intolerance for certain workplace conduct, as well as court decisions interpreting and applying those statutes, have redefined responsible corporate practice and employee relations. Increasingly, employers and employees face workplace disputes involving alleged wrongful termination, sexual harassment, or discrimination based on race, color, religion, sex, national origin, age and disability.

As courts and administrative agencies become less accessible to civil litigants, employers and their employees now see alternative dispute resolution ("ADR") as a way to promptly and effectively resolve

workplace disputes. ADR procedures are becoming more common in contracts of employment, personnel manuals and employee handbooks. Increasingly, corporations and their employees look to the American Arbitration Association as a resource in developing prompt and effective employment procedures for employment-related disputes.
These rules have been developed for employers and employees who wish to use a private alternative to resolve their disputes, enabling them to have complaints heard by an impartial person with expertise in the employment field. These procedures benefit both the employer and the individual employee by making it possible to resolve disputes without extensive litigation.

B. Role of the American Arbitration Association

The American Arbitration Association, founded in 1926, is a not-for-profit, public service organization dedicated to the resolution of disputes through mediation, arbitration, elections, and other voluntary dispute resolution procedures. Over 4,000,000 workers are now covered by employment ADR plans administered by the AAA.
In addition, the AAA provides education and training, specialized publications, and research on all forms of dispute settlement. With 36 offices nationwide and cooperative agreements with arbitral institutions in 38 other nations, the American Arbitration Association is the nation's largest private provider of ADR services.
For seventy-five years, the American Arbitration Association has set the standards for the development of fair and equitable dispute resolution procedures. The development of the National Rules for the Resolution of Employment Disputes, and the reconstitution of a select and diverse roster of expert neutrals to hear and resolve disputes, are the most recent initiatives of the Association to provide private, efficient and cost-effective procedures for out-of-court settlement of workplace disputes.

C. Legal Basis of Employment ADR

Since the beginning of this decade, Congress has twice reaffirmed the important role of ADR in the area of employment discrimination - in the Americans with Disabilities Act in 1990, and a year later in Section 118 of the Civil Rights Act in 1991. While technically not dealing with a contract of employment, the seminal court case dealing with the arbitration of disputes relating to the non-union workplace is Gilmer v. Interstate/Johnson Lane, 500 U.S. 20, 111 S.Ct. 1647 (1991). The Supreme Court refused to invalidate Gilmer's agreement with the New York Stock Exchange that he would arbitrate disputes with his employer (Interstate/ Johnson Lane) simply because he was obliged to sign it in order to work as a securities dealer whose trades were executed on the Exchange. Although the Gilmer Court found that the Age Discrimination in Employment Act did not preclude arbitration of age discrimination claims, it specifically declined to decide whether employment arbitration agreements were the type of “contracts of employment” which are not made enforceable by the Federal Arbitration Act.
Since Gilmer, lower federal courts have generally enforced employer-imposed ADR programs, as long as the programs are fair. Some courts have held that the employee must have received adequate notice of the program. However, the issue of binding arbitration programs that are a condition of employment is still giving rise to litigation.

D. The Fairness Issue: The Due Process Protocol

The Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship was developed in 1995 by a special task force composed of individuals representing management, labor, employment, civil rights organizations, private administrative agencies, government, and the American Arbitration Association. The Due Process Protocol, which was endorsed by the Association in 1995, seeks to ensure fairness and equity in resolving workplace disputes. The Due Process Protocol encourages mediation and arbitration of statutory disputes, provided there are due process safeguards. It conveys the hope that ADR will reduce delays caused by the huge backlog of cases pending before administrative agencies and the courts. The Due Process Protocol “recognizes the dilemma inherent in the timing of an agreement to mediate and/or arbitrate statutory disputes” but does not take a position on whether an employer can require a pre-dispute, binding arbitration program as a condition of employment.
The Due Process Protocol has been endorsed by organizations representing a broad range of constituencies. They include the American Arbitration Association, the American Bar Association Labor and Employment Section, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the National Society of Professionals in Dispute Resolution. The National Employment Lawyers Association has endorsed the substantive provisions of the Due Process Protocol. It has been incorporated into the ADR procedures of the Massachusetts Commission Against Discrimination (MCAD) and into the Report of the United States Secretary of Labor's Task Force in Excellence in State and Local Government.

E. AAA's Employment ADR Rules

On June 1, 1996, the Association issued National Rules for the Resolution of Employment Disputes. The rules reflected the guidelines outlined in the Due Process Protocol and were based upon the AAA's California Employment Dispute Resolution Rules, which were developed by a committee of employment

management and plaintiff attorneys, retired judges and arbitrators, in addition to Association executives. The revised rules were developed for employers and employees who wish to use a private alternative to resolve their disputes. The rules enabled parties to have complaints heard by an impartial person of their joint selection, with expertise in the employment field. Both employers and individual employees benefit by having experts resolve their disputes without the costs and delay of litigation. The rules included procedures which ensure due process in both the mediation and arbitration of employment disputes. After a year of use, the rules have been amended to address technical issues.

F. AAA's Policy on Employment ADR

The AAA's policy on employment ADR is guided by the state of existing law, as well as its obligation to act in an impartial manner. In following the law, and in the interest of providing an appropriate forum for the resolution of employment disputes, the Association administers dispute resolution programs which meet the due process standards as outlined in its National Rules for the Resolution of Employment Disputes and the Due Process Protocol. If the Association determines that a dispute resolution program on its face substantially and materially deviates from the minimum due process standards of the National Rules for the Resolution of Employment Disputes and the Due Process Protocol, the Association may decline to administer cases under that program. Other issues will be presented to the arbitrator for determination.

G. Notification

If an employer intends to utilize the dispute resolution services of the Association in an employment ADR plan, it shall, at least thirty (30) days prior to the planned effective date of the program: (1) notify the Association of its intention to do so; and (2) provide the Association with a copy of the employment dispute resolution plan. If an employer does not comply with this requirement, the Association reserves the right to decline its administrative services. Copies of all plans should be sent to the American Arbitration Association's Office of Program Development, 335 Madison Avenue, New York, NY 10017; FAX: 212-716-5913.

H. Designing an ADR Program

The guiding principle in designing a successful employment ADR system is that it must be fair in fact and perception. The American Arbitration Association has considerable experience in administering and assisting in the design of employment ADR plans, which gives it an informed perspective on how to effectively design ADR systems, as well as the problems to avoid. Its guidance to those designing employment ADR systems is summarized as follows:

- The American Arbitration Association encourages employers to consider the wide range of legally-available options to resolve workplace disputes outside the courtroom.
- A special emphasis is placed by the Association on encouraging the development of in-house dispute resolution procedures, such as open door policies, ombuds, peer review, and internal mediation.
- The Association recommends an external mediation component to resolve disputes not settled by the internal dispute resolution process.
- Programs which use arbitration as a final step may employ:
    - pre-dispute, voluntary final and binding arbitration;
    - pre-dispute, mandatory nonbinding arbitration;
    - pre-dispute, mandatory final and binding arbitration; or
    - post-dispute, voluntary final and binding arbitration.
- Although the AAA administers binding arbitration systems that have been required as a condition of initial or continued employment, such programs must be consistent with the Association's National Rules for the Resolution of Employment Disputes and the Due Process Protocol.

Specific guidance on the responsible development and design of employment ADR systems is contained in the Association's publication, Resolving Employment Disputes: A Practical Guide, which is available from any AAA office.

I. Alternative Dispute Resolution Options

Open Door Policy: Employees are encouraged to meet with their immediate manager or supervisor to discuss problems arising out of the workplace environment. In some systems, the employee is free to approach anyone in the chain of command.

Ombuds: A neutral third party (either from within or outside the company) is designated to confidentially investigate and propose settlement of employment complaints brought by employees.

Peer Review: A panel of employees (or employees and managers) works together to resolve employment complaints. Peer review panel members are trained in the handling of sensitive issues.

Internal Mediation: A process for resolving disputes in which a neutral third person from within the company, trained in mediation techniques, helps the disputing parties negotiate a mutually acceptable

settlement. Mediation is a nonbinding process in which the parties discuss their disputes with an impartial person who assists them in reaching a settlement. The mediator may suggest ways of resolving the dispute but may not impose a settlement on the parties.

Fact-Finding: The investigation of a complaint by an impartial third person (or team) who examines the complaint and the facts and issues a non-binding report. Fact-finding is particularly helpful for allegations of sexual harassment, where a fact-finding team, composed of one male and one female neutral, investigates the allegations and presents its findings to the employer and the employee.

Arbitration: Arbitration is generally defined as the submission of disputes to one or more impartial persons for final and binding determination. It can be the final step in a workplace program that includes other dispute resolution methods. There are many possibilities for designing this final step. They include:

Pre-Dispute, Voluntary Final and Binding Arbitration: The parties agree in advance, on a voluntary basis, to use arbitration to resolve disputes and they are bound by the outcome.

Pre-Dispute, Mandatory Nonbinding Arbitration: The parties must use the arbitration process to resolve disputes, but they are not bound by the outcome.

Pre-Dispute, Mandatory Final and Binding Arbitration: The parties must arbitrate unresolved disputes and they are bound by the outcome.

Post-Dispute, Voluntary Final and Binding Arbitration: The parties have the option of deciding whether to use final and binding arbitration after a dispute arises.

J. Types of Disputes Covered

The dispute resolution procedures contained in this booklet can be inserted into an employee personnel manual, an employment application of an individual employment agreement, or can be used for a specific dispute. They do not apply to disputes arising out of collective bargaining agreements.

K. NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES

1. Applicable Rules of Arbitration

The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter "AAA") or under its National Rules for the Resolution of Employment Disputes. If a party establishes that an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules.

If, within thirty (30) days after the Association's commencement of administration, a party seeks judicial intervention with respect to a pending arbitration, the Association will suspend administration for sixty (60) days to permit the party to obtain a stay of arbitration from the court.

These rules, and any amendment of them, shall apply in the form obtaining at the time the demand for arbitration or submission is received by the AAA.

2. Notification

An employer intending to incorporate these rules or to refer to the dispute resolution services of the AAA in an employment ADR plan, shall, at least thirty (30) days prior to the planned effective date of the program:

i) notify the Association of its intention to do so and,

ii) provide the Association with a copy of the employment dispute resolution plan.

Compliance with this requirement shall not preclude an arbitrator from entertaining challenges as provided in Section 1. If an employer does not comply with this requirement, the Association reserves the right to decline its administrative services.

3. AAA as Administrator of the Arbitration

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in these rules, and may be carried out through such of the AAA's representatives as it may direct.

4. Initiation of Arbitration

Arbitration shall be initiated in the following manner.

a. The parties may submit a joint request for arbitration.

b. In the absence of a joint request for arbitration:

(i) The initiating party (hereinafter "Claimant[s]") shall:

(1) File a written notice (hereinafter "Demand") of its intention to arbitrate at any regional office of the AAA, within the time limit established by the applicable statute of limitations if the dispute involves statutory rights. If no statutory rights are involved, the time limit established by the applicable arbitration agreement shall be followed. Any dispute over such issues shall be referred to the arbitrator. The filing shall be made in duplicate, and each copy shall include the applicable arbitration agreement. The Demand shall set forth the names, addresses, and telephone numbers of the parties; a brief statement of the nature of the dispute; the amount in controversy, if any; the remedy sought; and requested hearing location.

(2) Simultaneously mail a copy of the Demand to the party (hereinafter "Respondent[s]").

(3) Include with its Demand the applicable filing fee, unless the parties agree to some other method of fee advancement.

(ii) The Respondent(s) shall file an Answer with the AAA within ten (10) days after the date of the letter from the AAA acknowledging receipt of the Demand. The Answer shall provide the

Respondent's brief response to the claim and the issues presented. The Respondent(s) shall make its filing in duplicate with the AAA, and simultaneously shall mail a copy of the Answer to the Claimant.

(iii) The Respondent(s):

(1) May file a counterclaim with the AAA within ten (10) days after the letter from the AAA acknowledging receipt of the Demand. The filing shall be made in duplicate. The counterclaim shall set forth the nature of the claim, the amount in controversy, if any, and the remedy sought.

(2) Simultaneously shall mail a copy of any counterclaim to the Claimant.

(3) Shall include with its filing the applicable filing fee provided for by these rules.

(iv) The Claimant may file an Answer to the counterclaim with the AAA within ten (10) days after the date of the letter from the AAA acknowledging receipt of the counterclaim. The Answer shall provide Claimant's brief response to the counterclaim and the issues presented. The Claimant shall make its filing in duplicate with the AAA, and simultaneously shall mail a copy of the Answer to the Respondent(s).

c. The form of any filing in these rules shall not be subject to technical pleading requirements.

5. Changes of Claim

Before the appointment of the arbitrator, if either party desires to offer a new or different claim or counterclaim, such party must do so in writing by filing a written statement with the AAA and simultaneously mailing a copy to the other party(s), who shall have ten (10) days from the date of such mailing within which to file an answer with the AAA. After the appointment of the arbitrator, a party may offer a new or different claim or counterclaim only at the discretion of the arbitrator.

6. Administrative and Mediation Conferences

Before the appointment of the arbitrator, any party may request, or the AAA, in its discretion, may schedule an administrative conference with a representative of the AAA and the parties and/or their representatives. The purpose of the administrative conference is to organize and expedite the arbitration, explore its administrative aspects, establish the most efficient means of selecting an arbitrator, and to consider mediation as a dispute resolution option. There is no administrative fee for this service.

At any time after the filing of the Demand, with the consent of the parties, the AAA will arrange a mediation conference under its Mediation Rules to facilitate settlement. The mediator shall not be any arbitrator appointed to the case, except by mutual agreement of the parties. There is no administrative fee for initiating a mediation under AAA Mediation Rules for parties to a pending arbitration.

7. Discovery

The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.

8. Arbitration Management Conference

As soon as possible after the appointment of the arbitrator but not later than sixty (60) days thereafter, the arbitrator shall conduct an Arbitration Management Conference with the parties and/or their representatives, in person or by telephone, to explore and resolve matters that will expedite the arbitration proceedings. The specific matters to be addressed include:

(i) the issues to be arbitrated;

(ii) the date, time, place and estimated duration of the hearing;

(iii) the resolution of outstanding discovery issues and establishment of discovery parameters;

(iv) the law, standards, rules of evidence and burdens of proof that are to apply to the proceeding;

(v) the exchange of stipulations and declarations regarding facts, exhibits, witnesses and other issues;

(vi) the names of witnesses (including expert witnesses), the scope of witness testimony, and witness exclusion;

(vii) the value of bifurcating the arbitration into a liability phase and damages phase;

(viii) the need for a stenographic record;

(ix) whether the parties will summarize their arguments orally or in writing;

(x) the form of the award;

(xi) any other issues relating to the subject or conduct of the arbitration;

(xii) the allocation of attorney's fees and costs.

The arbitrator shall issue oral or written orders reflecting his or her decisions on the above matters and may conduct additional conferences when the need arises.

There is no AAA administrative fee for an Arbitration Management Conference.

9. Location of the Arbitration

The parties may designate the location of the arbitration by mutual agreement. In the absence of such agreement before the appointment of the arbitrator, any party may request a specific hearing location by notifying the AAA in writing and simultaneously mailing a copy of the request to the other party(s). If the AAA receives no objection within ten (10) days of the date of the request, the hearing shall be held at the requested location. If a timely objection is filed with the AAA, the AAA shall have the power to determine the location and its decision shall be final and binding. After the appointment of the arbitrator,

the arbitrator shall resolve all disputes regarding the location of the hearing.

10. Date and Time of Hearing

The arbitrator shall have the authority to set the date and time of the hearing in consultation with the parties.

11. Qualifications to Serve as Arbitrator and Rights of Parties to Disqualify Arbitrator

a. Standards of Experience and Neutrality

(i) Arbitrators serving under these rules shall be experienced in the field of employment law.

(ii) Arbitrators serving under these rules shall have no personal or financial interest in the results of the proceedings in which they are appointed and shall have no relation to the underlying dispute or to the parties or their counsel that may create an appearance of bias.

(iii) The roster of available arbitrators will be established on a non-discriminatory basis, diverse by gender, ethnicity, background and qualifications.

(iv) The Association may, upon request of a party or upon its own initiative, supplement the list of proposed arbitrators in disputes arising out of individually negotiated employment contracts with persons from the regular Commercial Roster, to allow the Association to respond to the particular needs of the dispute. In multi-arbitrator disputes, at least one of the arbitrators shall be experienced in the field of employment law.

b. Standards of Disclosure by Arbitrator

Prior to accepting appointment, the prospective arbitrator shall disclose all information that might be relevant to the standards of neutrality set forth in this Section, including but not limited to service as a neutral in any past or pending case involving any of the parties and/or their representatives or that may prevent a prompt hearing.

c. Disqualification for Failure To Meet Standards of Experience and Neutrality

An arbitrator may be disqualified in two ways:

(i) No later than ten (10) days after the appointment of the arbitrator, all parties jointly may challenge the qualifications of an arbitrator by communicating their objection to the AAA in writing. Upon receipt of a joint objection, the arbitrator shall be replaced.

(ii) Any party may challenge the qualifications of an arbitrator by communicating its objection to the AAA in writing. Upon receipt of the objection, the AAA either shall replace the arbitrator or communicate the objection to the other parties. If any party believes that the objection does not merit disqualification of the arbitrator, the party shall so communicate to the AAA and to the other parties within ten (10) days of the receipt of the objection from the AAA. Upon objection of a party to the service of an arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

12. Number and Appointment of Neutral Arbitrators

a. If the parties do not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator. If the parties cannot agree upon the number of arbitrators, the AAA shall have the authority to determine the number of arbitrators.

b. If the parties have not appointed an arbitrator and have not provided any method of appointment, the arbitrator shall be appointed in the following manner:

(i) Immediately after it receives the Demand, the AAA shall mail simultaneously to each party a letter containing an identical list of the names of all arbitrators who are members of the regional Employment Dispute Resolution Roster.

(ii) Each party shall have ten (10) days from the date of the letter in which to select the name of a mutually acceptable arbitrator to hear and determine their dispute. If the parties cannot agree upon a mutually acceptable arbitrator, they shall so notify the AAA. Within ten (10) days of the receipt of that notice, the AAA shall send the parties a shorter list of arbitrators who are members of the regional Employment Dispute Resolution Roster. Each party shall have ten (10) days from the date of the letter containing the revised list to strike any names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all of the listed persons shall be deemed acceptable to that party.

(iii) The AAA shall invite the acceptance of the arbitrator whom both parties have selected as mutually acceptable or, in the case of resort to the ranking procedure, the arbitrator who has received the highest rating in the order of preference that the parties have specified.

(iv) If the parties fail to agree on any of the persons whom the AAA submits for consideration, or if mutually acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the list of persons whom the AAA submits for consideration, the AAA shall have the power to make the appointment from among other members of the Roster without the submission of additional lists.

13. Vacancies

If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. The vacancy shall be filled in accordance with applicable provisions of these Rules.

In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

14. Representation

Any party may be represented by counsel or other authorized representative. For parties without

representation the AAA will, upon request, provide reference to institutions which might offer assistance. A party who intends to be represented shall notify the other party and the AAA of the name and address of the representative at least ten (10) days prior to the date set for the hearing or conference at which that person is first to appear. If a representative files a Demand or an Answer, the obligation to give notice of representative status is deemed satisfied.

15. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

16. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

17. Attendance at Hearings

The arbitrator shall have the authority to exclude witnesses, other than a party, from the hearing during the testimony of any other witness. The arbitrator also shall have the authority to decide whether any person who is not a witness may attend the hearing.

18. Confidentiality

The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary.

19. Postponements

The arbitrator: (1) may postpone any hearing upon the request of a party for good cause shown; (2) must postpone any hearing upon the mutual agreement of the parties; and (3) may postpone any hearing on his or her own initiative.

20. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

21. Majority Decision

All decisions and awards of the arbitrators must be by a majority, unless the unanimous decision of all arbitrators is expressly required by the arbitration agreement or by law.

22. Order of Proceedings and Communication with Arbitrators

A hearing shall be opened by: (1) filing the oath of the arbitrator, where required; (2) recording the date, time, and place of the hearing; (3) recording the presence of the arbitrator, the parties, and their representatives, if any; and (4) receiving into the record the Demand and the Answer, if any. The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved.

The parties shall bear the same burdens of proof and burdens of producing evidence as would apply if their claims and counterclaims had been brought in court.

Witnesses for each party shall submit to direct and cross examination as approved by the arbitrator.

With the exception of the rules regarding the allocation of the burdens of proof and going forward with the evidence, the arbitrator has the authority to set the rules for the conduct of the proceedings and shall exercise that authority to afford a full and equal opportunity to all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute.

Documentary and other forms of physical evidence, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of the record.

There shall be no ex parte communication with the arbitrator, unless the parties and the arbitrator agree to the contrary in advance of the communication.

23. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be based solely on the default of a party. The arbitrator shall require the party who is in attendance to present such evidence as the arbitrator may require for the making of the award.

24. Evidence

The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute. An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. The arbitrator may in his or her discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any party is absent, in default, or has waived the right to be present.

25. Evidence by Affidavit or Declaration and Post-Hearing Filing of Documents or Other Evidence

The arbitrator may receive and consider the evidence of witnesses by affidavit, but shall give it only

such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.
If the parties agree or the arbitrator directs that documents or other evidence may be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator, unless the parties agree to a different method of distribution. All parties shall be afforded an opportunity to examine such documents or other evidence and to lodge appropriate objections, if any.

26. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time, and the AAA shall notify the parties. Any party who so desires may be present during the inspection or investigation. In the event that one or all parties are not present during the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

27. Interim Measures

At the request of any party, the arbitrator may take whatever interim measures he or she deems necessary with respect to the dispute, including measures for the conservation of property.
Such interim measures may be taken in the form of an interim award and the arbitrator may require security for the costs of such measures.

28. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.
If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in Section 25 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearing. The time limit within which the arbitrator is required to make the award shall commence to run, in the absence of other agreements by the parties, upon closing of the hearing.

29. Reopening of Hearing

The hearing may be reopened by the arbitrator upon the arbitrator's initiative, or upon application of a party for cause shown, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed in the contract, the arbitrator may reopen the hearing and shall have thirty (30) days from the closing of the reopened hearing within which to make an award.

30. Waiver of Oral Hearing

The parties may provide, by written agreement, for the waiver of oral hearings in any case. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

31. Waiver of Objection/Lack of Compliance with These Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with, and who fails to state objections thereto in writing, shall be deemed to have waived the right to object.

32. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any extension.

33. Serving of Notice

Each party shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these Rules; for any court actions in connection therewith; or for the entry of judgment on an award made under these procedures may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held.
The AAA and the parties may also use facsimile transmission, telex, telegram, or other written forms of electronic communication to give the notices required by these Rules.

34. The Award

a. The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than thirty (30) days from the date of closing of the hearing or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

b. An award issued under these rules shall be publicly available, on a cost basis. The names of the parties and witnesses will not be publicly available, unless a party expressly agrees to have its name made public in the award.

c. The award shall be in writing and shall be signed by a majority of the arbitrators and shall provide the written reasons for the award unless the parties agree otherwise. It shall be executed in the manner required by law.

d. The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court. The arbitrator shall, in the award, assess arbitration fees, expenses, and compensation as provided in Sections 38, 39, and 40 in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA.

e. The arbitrator shall have the authority to provide for the reimbursement of representative's fees, in whole or in part, as part of the remedy, in accordance with applicable law.

f. If the parties settle their dispute during the course of the arbitration, the arbitrator may set forth the terms of the settlement in a consent award.
g. The parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail, addressed to a party or its representative at the last known address, personal service of the award, or the filing of the award in any manner that may be required by law.
h. The arbitrator's award shall be final and binding. Judicial review shall be limited, as provided by law.

35. Modification of Award

Within twenty (20) days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator to correct any clerical, typographical, technical or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided.
The other parties shall be given ten (10) days to respond to the request. The arbitrator shall dispose of the request within twenty (20) days after transmittal by the AAA to the arbitrator of the request and any response thereto.
If applicable law requires a different procedural time frame, that procedure shall be followed.

36. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at that party's expense, certified copies of any papers in the AAA's case file that may be required in judicial proceedings relating to the arbitration.

37. Judicial Proceedings and Exclusion of Liability

a. No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
b. Neither the AAA nor any arbitrator in a proceeding under these rules is or shall be considered a necessary or proper party in judicial proceedings relating to the arbitration.
c. Parties to these procedures shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction.
d. Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these procedures.

38. Administrative Fees*

As a not-for-profit organization, the AAA shall prescribe filing and other administrative fees to compensate it for the cost of providing administrative services. The AAA administrative fee schedule in effect at the time the demand for arbitration or submission agreement is received shall be applicable.
AAA fees shall be paid in accordance with the Administrative Fee Schedule (see below).
The AAA may, in the event of extreme hardship on any party, defer or reduce the administrative fees.
(To ensure that you have the most current information, see our Web site at www.adr.org).

*Pursuant to Section 1284.3 of the California Code of Civil Procedure, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the California Arbitration Act, and to all consumer arbitrations conducted in California. Only those disputes arising out of employer promulgated plans are included in the consumer definition. If you believe that you meet these requirements, you must submit to the AAA a declaration under oath regarding your monthly income and the number of persons in your household. Please contact the AAA's Western Case Management Center at 1-877-528-0879 if you have any questions regarding the waiver of administrative fees. (Effective January 1, 2003)

39. Expenses

Unless otherwise agreed by the parties, the expenses of witnesses for either side shall be borne by the party producing such witnesses. All expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the costs relating to any proof produced at the direction of the arbitrator, shall be borne by the employer, unless the parties agree otherwise or unless the arbitrator directs otherwise in the award as provided for in the Administrative Fee Schedule.

40. Neutral Arbitrator's Compensation

Arbitrators shall charge a rate consistent with the arbitrator's stated rate of compensation. If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.
Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator. Payment of the arbitrator's fees and expenses shall be made by the AAA from the fees and moneys collected by the AAA for this purpose.

41. Deposits

The AAA may require deposits in advance of any hearings such sums of money as it deems necessary to cover the expenses of the arbitration, including the arbitrator's fee, if any, and shall render an accounting and return any unexpended balance at the conclusion of the case.

42. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these Rules, it shall be resolved by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other procedures shall be interpreted and applied by the AAA.

For disputes arising out of employer-promulgated plans:

L. ADMINISTRATIVE FEE SCHEDULE

M. For disputes arising out of employer-promulgated plans:

N. Administrative Fee

The AAA's administrative fees are based on filing and service charges. Arbitrator compensation is not included in this schedule. Unless the employee chooses to pay a portion of the arbitrator's compensation, such compensation shall be paid in total by the employer. Arbitrator compensation and administrative fees are not subject to reallocation by the arbitrator(s) except upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.

O. Filing Fees

In cases before a single arbitrator, a nonrefundable filing fee capped in the amount of $125, is payable in full by the employee when a claim is filed, unless the plan provides that the employee pay less. A nonrefundable fee in the amount of $375 is payable in full by the employer, unless the plan provides that the employer pay more.
In cases before three or more arbitrators, a nonrefundable filing fee capped in the amount of $125, is payable in full by the employee when a claim is filed, unless the plan provides that the employee pay less. A nonrefundable fee in the amount of $1,375 is payable in full by the employer, unless the plan provides that the employer pay more.

P. Hearing Fees

For each day of hearing held before a single arbitrator, an administrative fee of $300 is payable by the employer.
For each day of hearing held before a multi-arbitrator panel, an administrative fee of $500 is payable by the employer.
There is no AAA hearing fee for the initial Arbitration Management Conference.

Q. Postponement/Cancellation Fees

A fee of $150 is payable by a party causing a postponement of any hearing scheduled before a single arbitrator.
A fee of $250 is payable by a party causing a postponement of any hearing scheduled before a multi-arbitrator panel.

R. Hearing Room Rental

The hearing fees described above do not cover the rental of hearing rooms, which are available on a rental basis. Check with the administrator for availability and rates. Hearing room rental fees will be borne by the employer.

S. Suspension for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the administrator may so inform the parties in order that one of them may advance the required payment. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the administrator may suspend the proceedings.
For disputes arising out of individually-negotiated employment agreements and contracts
The AAA's Commercial Fee Schedule, listed below, will apply to disputes arising out of individually-negotiated employment agreements and contracts, even if such agreements and contracts reference or incorporate an employer-promulgated plan. Any questions or disagreements about whether a matter arises out of an employer-promulgated plan or an individually-negotiated agreement or contract shall be determined by the AAA and its determination shall be final.

T. Administrative Fee (Notice: The administrative fee schedule for cases arising out of individually-negotiated contracts has been amended as of July 1, 2003. The administrative fee schedule below is only applicable to cases filed *before* July 1, 2003. Click here for the current effective administrative fee schedule, which applies to cases filed on or after July 1, 2003.)

The administrative fees of the AAA are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

U. Fees

A nonrefundable initial filing fee is payable in full by a filing party when a claim, counterclaim or additional claim is filed.

A case service fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred.

However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the case service fee will remain due and will not be refunded.

These fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Case Service Fee
Above $0 to $10,000	$500	N/A
Above $10,000 to $75,000	$750	N/A
Above $75,000 to $150,000	$1,250	$750
Above $150,000 to $300,000	$2,750	$1,000
Above $300,000 to $500,000	$4,250	$1,250
Above $500,000 to $1,000,000	$6,000	$2,000
Above $1,000,000 to $7,000,000	$8,500	$2,500
Above $7,000,000 to $10,000,000	$13,000	$3,000
Above $10,000,000	*	*
No Amount Stated	$3,250	$750

*Contact your local AAA office for fees for claims in excess of $10 million.

** This fee is applicable when no amount can be stated at the time of filing, or when a claim or counterclaim is not for a monetary amount. The fees are subject to increase or decrease when the claim or counterclaim is disclosed.

The minimum fees for any case having three or more arbitrators are $2,750 for the filing fee, plus a $1,000 case service fee.

Parties on cases held in abeyance for one year by agreement, will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be closed.

Hearing Room Rental

The fees described above do not cover the rental of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.

EMPLOYMENT MEDIATION RULES

1. Agreement of Parties

Whenever, by provision in an employment dispute resolution program, or by separate submission, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association (hereinafter “AAA”) or under these rules, they shall be deemed to have made these rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement.

2. Initiation of Mediation

Any party to an employment dispute may initiate mediation by filing with the AAA a submission to mediation or a written request for mediation pursuant to these rules, together with the applicable administrative fee.

3. Request for Mediation

A request for mediation shall contain a brief statement of the nature of the dispute and the names, addresses, and telephone numbers of all parties to the dispute and those who will represent them, if any, in the mediation. The initiating party shall simultaneously file two copies of the request with the AAA and one copy with every other party to the dispute.

4. Appointment of Mediator

Upon receipt of a request for mediation, the AAA will appoint a qualified mediator to serve. Normally, a single mediator will be appointed unless the parties agree otherwise or the AAA determines otherwise. If the agreement of the parties names a mediator or specifies a method of appointing a mediator, that designation or method shall be followed.

5. Qualifications of Mediator

No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation, except by the written consent of all parties. Prior to accepting an appointment, the prospective mediator shall disclose any circumstance likely to create a presumption of bias or prevent a prompt meeting with the parties. Upon receipt of such information, the AAA shall either replace the mediator or immediately communicate the information to the parties for their comments. In the event that the parties disagree as to whether the mediator shall serve, the AAA will appoint another mediator. The AAA is authorized to appoint another mediator if the appointed mediator is unable to serve promptly.

6. Vacancies
If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise.
7. Representation
Any party may be represented by a person of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.
8. Date, Time, and Place of Mediation
The mediator shall fix the date and the time of each mediation session. The mediation shall be held at the appropriate regional office of the AAA, or at any other convenient location agreeable to the mediator and the parties, as the mediator shall determine.
9. Identification of Matters in Dispute
At least ten (10) days prior to the first scheduled mediation session, each party shall provide the mediator with a brief memorandum setting forth its position with regard to the issues that need to be resolved. At the discretion of the mediator, such memoranda may be mutually exchanged by the parties. At the first session, the parties will be expected to produce all information reasonably required for the mediator to understand the issues presented. The mediator may require any party to supplement such information.
10. Authority of Mediator
The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties and to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the mediator or the parties, as the mediator shall determine.
The mediator is authorized to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties.
11. Privacy
Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.
12. Confidentiality
Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the mediator. All records, reports, or other documents received by a mediator while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.
The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding:
a. views expressed or suggestions made by another party with respect to a possible settlement of the dispute;
b. admissions made by another party in the course of the mediation proceedings;
c. proposals made or views expressed by the mediator; or
d. the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator.
13. No Stenographic Record
There shall be no stenographic record of the mediation process.
14. Termination of Mediation
The mediation shall be terminated:
a. by the execution of a settlement agreement by the parties;
b. by a written declaration of the mediator to the effect that further efforts at mediation are no longer worthwhile; or
c. by a written declaration of a party or parties to the effect that the mediation proceedings are terminated.
15. Exclusion of Liability
Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any act or omission in connection with any mediation conducted under these rules.
16. Interpretation and Application of Rules
The mediator shall interpret and apply these rules insofar as they relate to the mediator's duties and responsibilities. All other rules shall be interpreted and applied by the AAA.
17. Expenses
The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, including required traveling and other expenses of the mediator and representatives of the AAA, and the expenses of any witness and the cost of any proofs or expert advice produced at the direct request of the mediator, shall be borne equally by the parties unless they agree otherwise.

V. MEDIATION FEE SCHEDULE

The nonrefundable case set-up fee is $150 per party. An AAA administrative fee of $75 per every hour of conference time spent by the mediator is also charged. The $150 nonrefundable case set-up fees will

be applied toward the AAA administrative fee. In addition, the parties are responsible for compensating the mediator at his or her published rate, for conference and study time (hourly or per diem).
All expenses are generally borne equally by the parties. The parties may adjust this arrangement by agreement.
Before the commencement of the mediation, the AAA shall estimate anticipated total expenses. Each party shall pay its portion of that amount as per the agreed upon arrangement. When the mediation has terminated, the AAA shall render an accounting and return any unexpendable balance to the parties.
Rules, forms, procedures and guides are subject to periodic change and updating. To ensure that you have the most current information, see our World Wide Web home page at www.adr.org
AAA121-11/02

APPENDIX C

SURVEY OF COMPANIES WITH WORKPLACE ARBITRATION PROGRAMS

INDUSTRY	COMPANY	JURISDICTION	DATE
Arts			
	North Carolina Dance Theater, Inc.	North Carolina	11/92
Broadcasting			
	Japan Network Group	New York	7/99
	Clear Channel Communications	Tennessee	7/97
	TK Communications, Inc.	Texas	7/96
	Hubbard Broadcasting, Inc.	Minnesota	9/96
Building Maintenance			
	B-G Maintenance Management of Colorado, Inc.	Colorado	1/99
Defense Contractor			
	Logicon, Inc.	Kansas	5/98
Education			
	Duke University	North Carolina	8/97
	Northeastern University	Massachusetts	3/98
Finance			
	KPMG Peat Marwick LLP	New York	2/99
	Federal National Mortgage Association ("Fannie Mae")	District of Columbia	4/00
	Cigna Investments, Inc.	Connecticut	11/98
	Elmira Savings Bank, FSB	New York	1/98
	Great Western Mortgage Corp.	New Jersey	4/97
	Salomon/Smith Barney, Inc.	New York	3/01
Healthcare			
	Foundation Health Psychcare Svc., Inc.	California	8/00
	Hilton Head Hospital	South Carolina	6/97
	River Oaks Imaging and Diagnostic	Texas	4/95
	Neighborhood Health Clinics, Inc.	Indiana	8/97
	Tenet Healthcare, Inc.	Missouri	5/97
	West Jersey Health Systems	New Jersey	3/94
Human Resources			
	Management Recruiters International, Inc.	Missouri	2/99
Insurance			
	Blue Cross Blue Shield/Michigan	Michigan	8/96
	Gulf Insurance Co.	Texas	11/94
	Western and Southern Life Ins. Co.	Illinois Michigan	7/92 6/88
Law Firm			
	Katten, Muchin & Zavis	Illinois	11/93
Manufactured Housing			
	Oakwood Homes Corp.	North Carolina	7/99
Manufacturing			
	Tech Mold, Inc.	Arizona	8/98
Mining			
	Cyprus Bagdad Copper Corp.	Arizona	7/97

INDUSTRY	COMPANY	JURISDICTION	DATE
Oil Refinery Contractor			
	Brock Maintenance, Inc.	Texas	3/01
Restaurant			
	Hooters of America, Inc.	South Carolina	4/99
	Ryan's Family Steak Houses	Indiana	3/01
	Waffle House, Inc.	South Carolina	10/99
Retail			
	Frank's Nursery & Crafts, Inc.	Michigan	4/99
	Circuit City Stores	Wisconsin California Maryland Pennsylvania	6/94 7/98 1/98
Security			
	Burns International Security Svcs.	District of Columbia	2/97
Technology			
	Rockwell Semiconductor Sys. Inc.	North Carolina	1/01
	AVNET Computer Technologies, Inc.	Florida New Mexico	2/98 5/96
	NEC Electronics, Inc.	California	6/94
Tobacco Distribution			
	Premium Tobacco Inc.	California	12/00
Transportation			
	Burlington Northern Railroad Co.	Minnesota	11/93
Utility			
	Ferrelgas, L.P.	Washington	4/01
Miscellaneous			
	Public Storage Management, Inc.	Texas	9/97
	Rollins Hudig Hall Co.	Illinois	12/95
	Sun Microsystems, Inc.	Colorado	10/95
	Century Marketing Corp.	Ohio	7/98
	Norcom, Inc.	Georgia	1/85
	Borg-Warner Protective Servs. Corp.	District of Columbia	4/01
	Y-3 Holdings, Inc.	California	3/01
	Brown & Root, Inc.	California	10/00

APPENDIX D

RESOURCES

American Arbitration Association (AAA) -- www.adr.org

Founded in 1926, the American Arbitration Association offers a wide range of services, including education and training, membership, publications and the resolution of a wide range of disputes through mediation, arbitration, elections and other out-of-court settlement techniques. The AAA – with 37 offices in the United States and 53 cooperative agreements with arbitral institutions in 38 countries – provides a forum for the hearing of disputes, case administration, tested rules and procedures, and a roster of impartial experts to hear and resolve cases.

National Arbitration Forum -- www.arb-forum.com

The Forum is a nationwide network of former judges, litigators and law professors who share the Forum principle that disputes should be decided according to established legal principles. The Forum conducts arbitration under a Uniform Code of Procedure. The Forum's nationwide system ensures that awards are made according to strict timelines by professional decision makers, following the law, using the same rules and procedures for every case, every time, wherever the dispute or claim arises. In addition, the Forum provides dispute resolution services for other organizations pursuant to their rules.

CPR Institute for Dispute Resolution -- www.cpradr.org

Founded in 1979, as the Center for Public Resources, CPR's mission is to install alternative dispute resolution into the mainstream of corporate law department and law firm practice to make the legal profession the preferred delivery system of ADR. To fulfill its mission, CPR is engaged in an integrated agenda of research and development, education, advocacy and dispute resolution. It is a leading proponent of ADR that is managed by the parties and a highly qualified neutral, or self-administered ADR.

JAMS/Endispute -- www.jamsadr.com

The mission of JAMS is to provide the highest quality dispute resolution services to our clients and to our local, national and global communities. JAMS services include proper procedures and a JAMS neutral to help resolve the dispute. JAMS neutrals include mediators, arbitrators, private judges, facilitators, special masters and neutral advisors.