Alternative dispute resolution in employment cases
By Hon. Anthony J. Mercurella, Retired Justice

Employment Alternative Dispute Resolution ("ADR") has become an increasingly attractive means to resolve employment disputes. Conflicts that arise during the course of employment, such as wrongful termination, sexual harassment and discrimination based on race, color, religion, sex, national origin, age and disability have altered employee relations and re-defined what is considered to be responsible corporate practice. Corporate downsizing, in order to compete and remain in the market place, has resulted in an explosion of discrimination claims. Unprecedented corporate merger activity in recent years has also contributed to increased employment litigation. The pressure to find new and better ways to resolve workplace disputes is increasing due to record layoffs, as well as the passage of the 1991 Civil Rights Act and the Americans with Disabilities Act. Accordingly, employers have increasingly begun to utilize ADR techniques to avoid extensive and drawn out court battles and negative publicity that often arise in discrimination and other employment suits. ADR has the potential to resolve conflicts in a manner that is more expeditious, more flexible, less costly and less antagonistic than litigation.

Employers, when faced with the issue of whether to implement an ADR Program for employment disputes, should consider the following:

- Employment litigation has increased by 400% in the last 20 years.
- Defending against a wrongful discharge claim brought by a former employee can cost an employer hundreds of thousands of dollars in legal fees.
- The median time between the date the lawsuit is filed and the commencement of a civil trial is 2.5 years.

Arbitration is an adversarial proceeding in which each party presents its case to a neutral arbitrator or panel of arbitrators at a hearing similar to a trial, but with less formal evidentiary and procedural rules. The arbitrator renders a decision that can be enforced by a Court, but it is generally not subject to judicial review or modification except in limited circumstances.

The practical benefits of arbitration have also proven to be equally advantageous to both parties. The costs of pretrial discovery and a trial are reduced for both parties through arbitrated disputes. The relative speed of the arbitration process and the neutrality of arbitrators insures that the important goals of the anti-discrimination statutes are met without compromising employees' substantive rights.

Several different types of ADR

A key advantage of ADR policies is that they are flexible enough to be molded to fit each employer’s workplace needs or corporate culture. Compulsory arbitration allows for individual design, minimal discovery and time limits throughout the process. With that in mind, it is important to consider several factors. First, an employment ADR policy can, and in many cases should, encompass more than merely arbitration. Though arbitration is the most widely used dispute resolution method in the workplace, mediation and other voluntary, non-binding approaches are being used more frequently and have achieved positive results.

In Mediation, for example, a neutral third-party assists the parties to reach a mutually acceptable negotiated agreement. A mediator has no authority to make a decision to resolve the dispute. Through a combination of formal and informal procedures, the mediator hears both sides of the dispute and tries to bring the parties to a common ground through ongoing dialogue. Because mediation is a purely voluntary procedure, the parties may exit at any time. Although mediation will not necessarily end in a binding resolution of disputes, it often enables parties to vent their complaints and allow feelings of hostility to dissipate. At the same time, mediation allows each party to evaluate the strength of its case by working with the neutral party. By causing the parties to focus on rational settlement points, mediation allows for a speedier, more definitive resolution that might normally occur in unmediated settlement negotiations.

How Mediation and Arbitration Differ

Mediation is a process in which those involved in a dispute try to reach resolution with the aide of an outside neutral third-party, the mediator. In this process, the mediator helps to open lines for communication but does not hand down a final
decision. In arbitration, a dispute is submitted to an outside, neutral party for a final decision which cannot be overturned by the courts, except in rare circumstances.

Facilitation is a form of mediation in which a neutral party “facilitates” meaningful settlement discussions. In regard to settlement negotiations, a neutral party, such as a former Judge, works with the litigants and their attorneys to reach a negotiated settlement. The neutral party helps the litigants to evaluate their case and its likely outcome in the event the matter is litigated.

In Mini-trials, the parties’ attorneys make presentations to a decision maker who decides to dispute. The decision maker can be a present or former judge, or a jury that the parties have selected.

**The Advantages and Disadvantages of Arbitration**

The current debate surrounding the use of ADR involves a number of issues such as whether the referral to the arbitration process will yield a just result; whether the agreement to submit to ADR is fair; and whether the ADR process guarantees right which are substantially equivalent to those available in Court.

**The advantages of arbitration for employers:**

1. Less costly and time consuming than litigation.
2. Discovery is informal and streamlined.
3. Hearings are more informal, the rules of procedure and evidence are relaxed.
4. Arbitration is private and the dispute is not a matter of public record.
5. Less onerous penalties; e.g., New York Law prohibits arbitrators from awarding punitive damages for state law claims and arbitrators generally do not award attorneys fees to the prevailing party.
6. Disputes are resolved faster with less unnecessary delay. Arbitration circumvents the lengthy series of appeals that often follows the litigated verdict and arbitration awards are not subject to court review except in very limited circumstances (e.g.), where arbitrators can be shown an award is completely irrational, arbitrary or capricious.

**The disadvantages of arbitration for employers:**

1. Employees are more likely to invoke an arbitration proceeding because it is easier, less expensive and quicker than a lawsuit.
2. Limited discovery may make it harder to prepare defense.
3. No summary judgment or other litigation tactics to dismiss claim without a trial; employee will almost certainly be heard on their merits.
4. No meaningful appeal if arbitrator’s decision is unsatisfactory.
5. Arbitrators are often not lawyers and may not understand technical issues of law such as the burden of proof in discrimination cases.

**Why employees may not like arbitration:**

1. Perception that arbitrators have pro-employer bias.
2. Demographics of arbitrators (most are white males).
3. Arbitrators chosen to decide employment disputes are not always experts in employment law.
4. Lack of formal discovery.
5. No avenues for appeal and very limited judicial review.

**The Law on Arbitration of Statutory Employment Discrimination Claims**

The U.S. Supreme Court’s 1991 opinion in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, enforcing the arbitration of a federal statutory claim of age discrimination, has provided the impetus for employers to adopt employment arbitration procedures. Gilmer, an employee of Interstate/Johnson Lane Corporation ("Interstate") was required to register as a Securities representative with the New York Stock Exchange. The registration application he signed contained an agreement to arbitrate disputes as required by the NYSE Rules, including any controversy arising out of his employment or termination of employment.
Interstate terminated Gilmer’s employment at the age of 62. Following his termination, Gilmer filed an age discrimination charge with the Equal Employment Opportunity Commission ("EEOC") and brought suit in Federal District Court alleging that he had been terminated in violation of the Age Discrimination and Employment Act ("ADEA"). In response, Interstate moved to compel arbitration of Gilmer’s claim on the basis of the agreement in Gilmer’s registration application. The Supreme Court held that Gilmer’s age discrimination claim was subject to the compulsory arbitration he had agreed to when he signed his registration application. The Court found no inconsistency between the important social policies of the ADEA and the enforcement of agreements to arbitrate age discrimination claims, and it rejected Gilmer’s assertion that compulsory arbitration is improper because it deprives claimants of the judicial form provided for them by the ADEA. The court also rejected Gilmer’s challenge to the adequacy of the arbitration procedures, noting that the NYSE arbitration rules provide numerous safeguards to ensure that the arbitrators are competent and impartial, allow the parties to conduct pre-hearing discovery, and require the arbitrators words to be in writing.

The Gilmer decision settled the issue of whether statutory discrimination claims may ever be subject to compulsory arbitration and made it clear that at least certain employment related arbitration agreements may be enforced to require arbitration of employment discrimination claims. Due to the limited scope of the decision however, Gilmer’s impact outside the securities industry is questionable.

Although the case indicates that the court views arbitration of statutory discrimination claims favorably, it only holds that arbitration agreements between employees and regulatory or licensing bodies may be enforced to compel arbitration of these types of disputes, leaving open the question of whether similar agreements between employees are enforceable. The Supreme Court's failure to address the “contracts of employment” issue may have created some uncertainty around the use of ADR and the non-union setting. Although the debate over the right of a corporation to use mandatory arbitration for employment disputes, particularly for issues relating to sexual harassment and discrimination, continues to emerge generally, experience and case law has shown that where an employer and its counsel, design an Employment Dispute Resolution Program that ensures the individual due process and the remedies available to them under Federal and State law or through administrative agencies, the courts have upheld such programs.

Despite the unresolved issues regarding the use of ADR for employment disputes, corporate America, in its quest to resolve disputes privately, quickly and efficiently has moved forward and embraced the use of ADR, including binding arbitration, as an alternative to litigation. An increasing number of employers are seeking to require perspective and current employees to arbitrate employment related claims, including claims of discrimination. Although there has been much debate about the benefits and disadvantages of arbitrating such claims, as well as extensive litigation over the enforceability of such agreements, agreements to arbitrate employment disputes are generally valid, even when imposed as a condition of employment.

**Practical Considerations For Employers Who Use Arbitration**

When weighing fairness against time and cost, an employer designing an ADR policy must select which procedural rules to include, decide how much discovery to allow, determine how to distribute the cost of the proceeding, find the rule of representatives (attorneys or other), set time limits for bringing a claim and select the best method of choosing the neutral party.

Proper presentation of the ADR policy is important from a legal perspective. An open and full presentation will make the policy enforceable, by defeating claims that there was a lack of “knowing” waiver of a judicial forum. An essential element in constructing a successful ADR program is its appropriate presentation to employees. Employers should emphasize the advantages to employees, such as the less adversarial nature of the process, the savings and cost, and the rapid way in which disputes are resolved. Copies of the entire procedure should be given to all current employees when the policy is implemented. Any policy of ADR must be fair and as such should encourage “voluntariness, neutrality, confidentiality and enforceability.”

Employers seeking to use arbitration as an efficient cost-effective alternative for resolution of disputes should include a mandatory arbitration clause in all employment contracts, employee handbooks, policy manuals and employment application forms.

**Arbitration clause agreements should:**

1. Specify that arbitration is the exclusive remedy;
2. Define the types of claims covered (including all claims arising out of or relating to the employment relationship or determination thereof);
3. Define the persons and/or entities covered (e.g. supervisors, officers, parent and subsidiary companies);
4. Provide that the arbitrator’s decision is final and binding and that the decision may be judicially confirmed and entered as a judgment;
5. Contain a reaffirmation of the employees status and disclaim any intention to give the employee contractual employment rights; and
6. Include a choice of law provision.

In order to withstand employee challenges of unfairness or bias and increase the chances that the arbitration clause will be enforced by the Courts, the clause or agreement should:
1. Contain understandable language;
2. Use bold or larger type for provisions regarding waiver of judicial forum in any jury trial;
3. Suggest that the employee consult with an attorney before executing; and
4. Contain an integration clause to rule out alleged oral representations.

An Employer’s Arbitration Procedures should include the safeguards highlighted by the Supreme Court in Gilmer such as:
1. The use of impartial and competent arbitrators knowledgeable in the area of employment law;
2. reasonable discovery;
3. written arbitration decisions; and
4. availability of reliefs such as reinstatement.

Employers implementing ADR should continue to refine these policies to fit their individual work place needs and to take advantage of ADR’s benefits. ADR, if structured properly, can facilitate a more efficient resolution of employment disputes and lead to a substantial decrease in the amount of employment litigation.

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