Bloomberg BNA

Benefits Practice Resource Center™

Alternative Dispute Resolution in the Executive Employment Context

Holly H. Weiss
Schulte Roth & Zabel LLP
New York, New York

Introduction

The primary mechanism for resolving disputes between employees and employers has been civil litigation. Yet criticisms of litigation, particularly in the employment context, are ubiquitous. The adversarial system is expensive, disruptive, public, and protracted. Neither executives nor their employers wish to spend years and enormous sums of money litigating and publicly airing their disputes. Often, disputes between executives and their employers are not merely about money. Rather, they involve more personal issues, such as job performance, compensation, or discrimination based on age, race, disability, or gender, or some other protected characteristic. A courtroom is not necessarily the best place for the parties to hash out these issues. "Alternative dispute resolution" (ADR) is heralded by many as the means to avoid many of the pitfalls of litigation in the employment context.

Perhaps the most common disputes that arise between executives and their employers concern the reason for discharge. Disputes often arise over whether the executive's dismissal was for "cause." Even if the parties agree that a departing executive is not leaving for cause, disputes may arise as to the amount of separation benefits, particularly if they are not clearly outlined in an employment agreement.

Disputes may also arise if a departing executive is leaving to work for a competitor. Will the executive be violating a noncompete or nonsolicitation provision? What employer information does the executive have and can he or she use it? Finally, a departing executive may raise a panoply of claims of discrimination under the various federal, state, and local statutes that prohibit discrimination or various common law tort claims.

The forum in which disputes such as these are heard is critical. It may affect the ultimate outcome. It will affect the manner in which the dispute is resolved, the costs of resolving the dispute, and the timing of the resolution. The importance of paying careful attention to dispute resolution, if not at the outset of a new employment relationship, at least at the time a dispute arises, cannot be overstated.

Alternative Dispute Resolution Mechanisms

ADR refers to any dispute resolution mechanism other than traditional litigation or administrative agency adjudication. The two most common ADR mechanisms used in the context of resolving employment disputes are arbitration and mediation.

Arbitration

Arbitration is an ADR mechanism by which parties to a dispute submit the controversy to a neutral third party or panel, rather than to a judge or jury, for a binding decision. The primary distinction between arbitration and litigation is that, in arbitration, private decision makers, not courts, decide the merits of the dispute. Although many employers and employees associate ar-

bitration with collective bargaining, it is a viable mechanism for resolving employment-related disputes outside of the collective bargaining context, including individual employment contract and statutory employment discrimination claims.

Arbitration and litigation are alike in many ways. The parties, usually represented by counsel, present arguments, evidence, and testimony to a "judge" or, in cases decided by an arbitration panel, to a "jury" for resolution. The proceedings are usually commenced by initial pleadings (complaint or statement of claim and answer or response), which are followed by prehearing (albeit limited) discovery, prehearing motions or conferences, the hearing, and, finally, a decision.

There are significant differences nonetheless. Arbitrators need not apply strictly substantive law or apply procedural or evidentiary rules at all. Arbitration hearings are not conducted in public, and the papers and evidentiary materials filed with the arbitrators are not available to the public, as are most court filings.

Although prehearing discovery is permitted in arbitration, discovery is generally controlled by the arbitrator and/or the forum's rules and is usually far more limited than discovery in civil litigation. Moreover, the grounds for vacating an arbitration award are narrower than the grounds for appealing a trial court's judgment. Finally, with the exception of de minimis filing fees and transcription fees, court proceedings impose no fees on the parties. Arbitrators charge forum and arbitration fees directly to the parties, at their discretion or as apportioned by the parties.

Advantages of Arbitration

From an employer's perspective, arbitration's benefits include the lessened risk of a sizable award, lower expense for discovery, lower legal and internal costs, speedier resolution, the opportunity to select an arbitrator with expertise in the substantive law at issue and/or with industry experience (as opposed to a potentially capricious jury), and greater opportunity to preserve confidentiality (and thus less adverse publicity). Employees also share the benefits of economy, efficiency, and confidentiality.

Arbitration is nearly always less costly than litigation, at least with respect to cases that would not otherwise be summarily dismissed in court. Discovery is limited.[1] Procedures are typically informal. Appeal is virtually nonexistent. The informality of the arbitration hearing itself often saves time, as the parties do not get involved in time-consuming arguments concerning evidentiary issues.

A garden variety bonus dispute might in litigation involve numerous depositions, extensive document discovery, interrogatories, expert discovery, discovery disputes resolved by motion practice, motions for summary dismissal, pretrial motions regarding evidentiary issues, a trial before a jury, and at least one appeal.

In arbitration, the same dispute might proceed to a hearing and final conclusion, after minimal document exchange, one or two depositions, and a conference or two with the arbitrator. Discovery costs are an important consideration today, particularly in light of the increase in the amount of information maintained electronically that must be collected, reviewed, and produced.

The process from the commencement of the proceeding to final judgment is also usually speedier in arbitration because hearings are typically scheduled quickly after commencement of the action and appeals are unlikely. Moreover, because the arbitrator is being paid for his or her time, the parties have the incentive to minimize the time spent arguing during conferences or at hearings.

As for appeals, it bears noting that the losing party in a court proceeding can always appeal as of right. In some state courts, such as those of New York, interlocutory orders, such as orders regarding discovery issues, can be immediately appealed, adding significant time to complete litigation. The limitations on appeals in arbitration significantly reduce the time to final resolution of a dispute.

The value of confidentiality in arbitration cannot be overstated. Generally, in arbitration, neither the arbitration proceedings nor the filings are open to the public. Public disclosure is up to the parties.[2] Employers and employees are often united in their desire to maintain the confidentiality of a dispute in arbitration. Employees may have moved on in their careers and do not want their current employers to know that they are involved in a dispute with a former employer. Or, an employee may believe that public knowledge of a dispute with a former employer will impede his or her efforts to obtain alternative employment.

Employers similarly do not typically want to publicize even the existence of a dispute with a former employee. At a minimum, publicity may spur other employees or former employees to file claims they might have not otherwise filed. Especially in a tight labor market, pub-

---

[1] CPR RULES FOR NON-ADMINISTERED ARBITRATION: COMMENTARY ON INDIVIDUAL RULES, Rule 11 (CPR Institute for Dispute Resolution 2007) (explaining that "[a]rbitration is not for the litigator who will 'leave no stone unturned.' Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to that for which a party has a substantial demonstrable need."), available at http://www.cpradr.org.

[2] *See, e.g.*, 2007 CPR RULES FOR NON-ADMINISTERED ARBITRATION, Rule 18 (CPR Institute for Dispute Resolution 2007)("CPR RULES"), available at http://www.cpradr.org/Portals/0/2007%20CPR%20Rules%20for%20Non-Administered%20Arbitration.pdf. Rule 18 reads in full, "Unless the parties agree otherwise, the parties, the arbitrators and the Neutral Organization shall treat the proceedings, any related disclosure and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party. To the extent possible, any specific issues of confidentiality should be raised with and resolved by the Tribunal."

licity about an employment claim may seriously erode a company's recruiting efforts and ultimately damage a company's ability to do business and to compete effectively. Moreover, even immaterial disputes, if publicly known, can adversely affect a company's stock price, particularly in relatively volatile industries. Thus, it should come as no surprise that parties in arbitration willingly enter into confidentiality stipulations at the outset of a dispute, and, even when they do not, the fact that an arbitration proceeding occurred may never become known publicly.

The opportunity to select an arbitrator with expertise in the subject matter of the dispute is also a distinct advantage for both employers and employees. Not only is substantial time saved in educating the arbitrator about the law, but also the outcome is far more predictable than with a jury. A predictable result may enhance the chance of settlement. A jury, on the other hand, is generally believed to be more likely to favor an employee over an employer—particularly one with deep pockets—and render a verdict reflecting that innate bias. Notably, the "deep pocket" bias dissipates substantially if the employee is or was highly compensated.

Disadvantages of Arbitration

There are, nonetheless, disadvantages to arbitrating an employment dispute. Because the arbitrator's decision is subject only to limited appeal, the likelihood of vacating even an outlandish award is lower than the likelihood of overturning a comparably outlandish jury verdict. There is also the potential that an arbitrator might render an award driven by emotion rather than facts or law because of the limited review and minimal requirements for explaining decisions.[3] Although a summary disposition is available in arbitration, there is generally no formal motion practice for motions to dismiss or summary judgment motions. Most legal practitioners agree that civil court is the best place for a case they are litigating that should be dismissed as a matter of law on a motion to dismiss.

Some view the lack of substantial discovery in arbitration as a disadvantage, generally, and in particular cases, because the cost of extensive discovery may compel an adversary to settle rather than to litigate or arbitrate. The potential for surprise at arbitration can also irk some practitioners. Some also cite the lack of procedural formalities as a disadvantage because procedural posturing in litigation may also assist a party in obtaining a good result.

One of the most oft-cited criticisms of arbitration is the potential for arbitrators to favor employers over employees because it is only from employers that there is any hope for repeat business. Moreover, some critics believe that arbitration undermines the deterrent effects of employment statutes. Other critics find that, because employers arbitrate employment disputes privately, the lack of potential public scrutiny decreases an employer's incentive to adhere to the law. Finally, some find the idea of paying forum and arbitrator fees abhorrent (given that they would not have to pay directly a judge and jury); in addition, because of the expense of such forum fees, in some disputes, arbitration may sometimes prove more costly than litigation.

Deciding to Arbitrate an Employment Dispute

The question of whether to arbitrate or litigate arises in many different contexts for employers and employees. The decision may be made in advance of any dispute having arisen when the parties enter into a pre-dispute agreement, perhaps in an employment contract that directs disputes arising out of their relationship to be referred to arbitration and not to a judicial forum. Once there is a pre-dispute commitment to arbitrate that is enforceable, the parties, unless they both agree otherwise, must arbitrate, rather than litigate, their dispute.

Arbitration based on a pre-dispute agreement is known as "compulsory" or "mandatory" arbitration. After a dispute has arisen between an employer and employee, there is nothing to stop the parties from agreeing to arbitrate rather than litigate the dispute. This is known as "voluntary" arbitration.

Sometimes employees and employers have no choice but to arbitrate their disputes. Parties to most collective bargaining agreements usually must arbitrate most of their disputes. In the securities industry, exchange member firms must arbitrate disputes with certain of their employees (their registered representatives), and employees who are registered representatives of member firms, must arbitrate their disputes with their employers, other than statutory employment discrimination claims (unless otherwise agreed).[4]

Employers and employees may include a provision in an employment contract requiring that disputes be resolved by arbitration. When starting up a new company, revamping personnel policies, or hiring new employees, employers may adopt company-wide policies that either mandate arbitration in the event of a dispute between the employer and some or all employees arising from employment and its termination or encourage arbitration as a means to resolve disputes by adopting, and perhaps funding, a "voluntary" arbitration program.

In whatever context it arises, the decision as to whether to require arbitration before any dispute has arisen should not be taken lightly and should be reached after a thorough analysis of the costs and benefits. Unfortunately, no matter how much analysis is undertaken, because the decision to enter into a pre-dispute arbitration commitment is of necessity based on imperfect

[3] The counterbalance, of course, is that arbitrators who issue irrational awards will not likely be selected to be arbitrators by other parties in the future.

[4] Financial Industry Regulatory Authority (FINRA) Code of Arbitration Procedure for Industry Disputes, Rule 13200 ("FINRA Code"), available at http://www.finra.org/ArbitrationMediation/Rules/CodeOfArbitrationProcedure/. The FINRA Form U-4 provides for arbitration of disputes as provided for in the FINRA Code. The U-4 is available at http://www.finra.org/industry/web-crd/current-uniform-registration-forms-electronic-filing-web-crd.

information, there will surely be some disputes that arise that a party would prefer to have litigated.

Mediation

Mediation is a process by which parties to a dispute select a neutral third party to assist them in reaching a settlement. The process is confidential, informal, private, generally voluntary, and nonbinding. The mediator is not authorized to force a settlement or render a decision. No evidentiary hearing is held. Rather, the mediator is charged with the responsibility of assisting the parties to a dispute in reaching an amicable resolution through joint and individual meetings with the parties. Mediation does not replace adjudication. Rather, it should be viewed as a powerful settlement tool.

Parties sometimes have agreed to mediate before a dispute has even arisen. Sometimes, an administrative agency or court will compel parties to mediate a dispute before permitting litigation to proceed. In the Southern District of New York, for example, a judge or magistrate judge may order a civil case to the court's mediation program, with or without the consent of the parties, and the court may, by Administrative Order, direct that certain categories of cases shall automatically be submitted to this program.[5] In 2001, the court ordered that all employment discrimination cases, other than those arising under the Fair Labor Standards Act, be automatically referred to mediation.[6] Typically, however, parties who have already attempted to settle a dispute among themselves will agree to mediation, each hoping that the mediator will cause the other side to "be reasonable."

It is common knowledge that upwards of 90 percent of civil lawsuits are settled before judgment. Many disputes are settled before litigation has even commenced. Given the likelihood of settlement in any event, it is usually advantageous to settle earlier rather than later. Mediation is a mechanism for ascertaining whether a case can be resolved early on.

Mediation carries with it some of the same advantages of arbitration, including the ability of the parties to: (1) control disclosure regarding the dispute; (2) choose a neutral third party with subject-matter expertise; (3) reduce costs; (4) avoid unpredictable results; and (5) conclude the matter quickly. Because of its flexibility, mediation also provides the prospect that the parties may reach a mutually beneficial outcome that would not be obtainable in court or in arbitration. For example, in a wrongful discharge dispute, it is almost always in the parties' interest that the former employee obtain comparable employment as soon as possible. A mediator will likely explore with the parties ways that the employee can be assisted in obtaining other employment. An employer would not in court be ordered to provide a reference in a wrongful discharge suit. In mediation, however, the parties can agree to the specific terms of a reference. In addition, mediation provides an opportunity for the parties to vent and to part on good terms. These considerations are particularly relevant in the employment context.

Another advantage of mediation is that, even if it is not successful in resolving the dispute, the information exchanged during a mediation is often helpful in evaluating and ultimately resolving the dispute. The parties may obtain some understanding of whether the adversary will be a "good" witness. They may learn information about, for example, a former employee's present job or job prospects. During an early mediation, the parties may hear for the first time details about the claims and defenses that are not spelled out in the pleadings. At the least, the parties will proceed to litigation (or arbitration) with the knowledge that they did everything they could to resolve the dispute before embarking on a costly litigation.

Notwithstanding its advantages, a party should probably not undertake to mediate a dispute if the party does not intend to make a good-faith effort to resolve it. The "discovery" that is obtained "freely" at mediation would be obtainable through the discovery process in any event, and it really is not "free." The expense of the mediator's fee, the parties' preparation costs, and the time spent at the mediation all must be considered.

Other ADR Mechanisms—the "Hybrids"

There are a number of ADR mechanisms other than mediation and traditional arbitration that can be used to resolve employment disputes.

Nonbinding Arbitration

Far less common than binding arbitration, described above, is "nonbinding arbitration," which differs from binding arbitration only in that the decision rendered by the arbitrator is merely advisory.

Med-Arb

"Med-Arb," a shorthand reference for mediation-arbitration, is mediation followed by binding arbitration, if the mediation is not successful in resolving the dispute. Typically, the parties agree before the mediation whether to use the same person as arbitrator and mediator. Although use of the same person for both processes can save time, there is a downside. The parties may be less open with the mediator with the knowledge that, if the mediation is unsuccessful, the mediator may become disposed to ultimately decide against the party who appears more inclined to settle in mediation.

Arb-Med

"Arb-Med," a shorthand reference for arbitration-mediation, is a proceeding in which the parties arbitrate their case, but, before the arbitrator announces the decision, the parties attempt to mediate the dispute, usually before the arbitrator. This process mimics a process that often occurs in litigation—the settlement that occurs "on the courthouse steps," when the case is submitted for decision to the jury.

---

[5] Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, Local Civil Rule 83.9 Alternative Dispute Resolution (Southern District Only).

[6] Standing Administrative Order, In re: Cases Assigned to Mediation by Automatic Referral (S.D.N.Y. Jan. 3, 2011), available at http://www.nysd.uscourts.gov/rules/Standing_Order_ADR_01032011.pdf.

Baseball and Hi-Low Arbitration

"Baseball arbitration" has its name because it is the method that baseball players use to resolve compensation disputes with team owners. After the arbitration hearing has concluded, each party submits its best offer to the other side, and the arbitrator decides the matter by selecting one of the submitted offers. "Hi-low" arbitration is the same thing, except the parties submit their offers to the arbitrator in advance of the hearing.

Mini-Trial

A "mini-trial" is a structured settlement process, whereby attorneys for the parties present their clients' positions in an abbreviated fashion to representatives of the parties. After the presentation, the parties' representatives meet and attempt to settle the case. Sometimes, a neutral advisor is retained by the parties to hear the attorneys' presentations and act as a mediator. A major advantage of a mini-trial is that it effectively and inexpensively educates the parties about their adversaries' positions.

Other Methods

Other creative hybrid ADR mechanisms abound. Parties may agree, for example, to try their dispute to a retained "jury" for either a binding or nonbinding decision or to present their positions to a neutral third party in writing, for a binding or advisory decision.

Arbitration Process

Enforceability of Pre-dispute Agreements to Arbitrate

Once a party has decided that it wishes to arbitrate a dispute, one of the threshold questions it faces is, in the absence of reaching an agreement to arbitrate with the adversary after the dispute has arisen, whether and under what circumstances can the party compel the unwilling adversary to arbitrate the dispute and forego a judicial forum. Congress in 1925 passed the Federal Arbitration Act (FAA)[7] to ensure that courts would enforce parties' agreements to arbitrate disputes. The FAA expressly provides that written agreements to arbitrate disputes shall be enforced by the courts.[8] The Supreme Court has repeatedly held that the FAA requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.[9] Thus, a provision in a written employment agreement that provides for arbitration of disputes that arise between the employer and employee under the agreement, the employee's employment, or the termination of the employee's employment is generally enforceable.

Disputes regarding whether an employee was discharged for "cause" or resigned with good reason, as set forth in an employment agreement, or was compensated in accordance with the employment agreement, must generally be arbitrated at the behest of one party if the parties have agreed beforehand to arbitrate their disputes.

It is useful to specify in a contractual provision: (1) what disputes are covered;[10] (2) how many arbitrators will adjudicate the dispute; (3) the forum (e.g., American Arbitration Association); (4) the location of the arbitration; (5) the governing rules; and (6) how costs will be allocated. A contractual provision might read as follows:

> All disputes arising from this Agreement or from Employee's employment or the termination thereof shall be resolved by arbitration, except such disputes as are not legally arbitrable. Such arbitration shall be held before a single arbitrator in New York City, and the Employment Arbitration Rules and Mediation Procedures of the American Arbitration Association shall govern. Costs of the arbitration shall be paid as determined by the arbitrator.

Notably, the FAA excludes from its coverage arbitration agreements made in the context of employment in maritime, railroad, and other transportation industries.[11] The U.S. Supreme Court has held that the exemption for such "workers engaged in interstate commerce" means that the FAA applies in every other employment context.[12] The FAA thus governs the arbitration of most, but not all, employment disputes.

Judicial Review of Arbitration Agreements

When a dispute with an employee concerns the formation of an agreement to arbitrate, resolution of the dispute generally falls to the courts. When an arbitration provision is contained in a separate contract, the determination of whether the contract as a whole is valid (e.g., whether the contract is unconscionable) is a determination for the arbitrator.[13] Arbitrators have domain over a contract's validity after formation; courts must decide whether an agreement to arbitrate was formed to begin with, and if it was, courts may then compel arbitration to determine the validity of the contract in general.[14]

---

[7] 9 U.S.C. §§ 1-307.

[8] 9 U.S.C. § 2.

[9] *Volt Information Sciences Inc. v. Bd. of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 1 EXC 183 (1989); see also *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 559 U.S. 662, 682, 2010 BL 92476, 9 EXC 10 (2010) ("the central or 'primary' purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms"); *Hall Street Assocs., L.L.C. v. Mattel Inc.*, 552 U.S. 576, 581, 2008 BL 62703 (2008) (arbitration agreements are accorded equal footing with all other contracts).

[10] Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), pre-dispute agreements to arbitrate whistleblower or retaliation claims provided for in the Act are invalid. 7 U.S.C. § 23(n) (amending the Commodity Exchange Act); 18 U.S.C. §§ 1514A(e)(1), (2) (amending the Sarbanes Oxley Act); Dodd-Frank § 1057(d)(1) - (2).

[11] 9 U.S.C. § 1 (stating, "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce").

[12] *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 1 EXC 155 (2001).

[13] *Rent-A-Center, West Inc. v. Jackson*, 561 U.S. 63, 80, 2010 BL 138828, 9 EXC 15 (2010).

[14] *Id.* at 78; *Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561

Arbitration is a matter of contract. As such, the parties may generally formulate the terms and conditions of the contract, subject to certain limitations applicable to contracts in general. The U.S. Supreme Court has recognized that parties can agree to arbitrate "gateway" questions of arbitrability, such as whether the parties have agreed to arbitrate or whether an arbitration agreement covers a particular controversy.[15] A court may not compel arbitration until it has resolved the question of whether the contract embodying an arbitration clause was formed in the first place, and it may only compel arbitration of issues that the parties have specifically agreed to submit to arbitration.[16] Questions, however, remain over which disputes may be tackled by an arbitrator and which disputes remain for the courts.

Arbitration of Statutory Claims: Gilmer v. Interstate/Johnson Lane Corporation

Questions of enforceability have frequently arisen when employees have sought to compel the arbitration of statutory claims of employment discrimination. The decision of the U.S. Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*,[17] spurred nearly two decades of controversy about whether and under what circumstances a party can be compelled to arbitrate a statutory employment discrimination claim based on an agreement executed before any dispute had arisen.

In *Gilmer*, the Court answered "yes" to the question of whether a former employee could be compelled pursuant to the FAA to arbitrate his claim under the Age Discrimination in Employment Act (ADEA) based on his pre-dispute agreement to do so in his securities registration application (Form U-4). Specifically, the Court held that individual agreements to arbitrate employment discrimination claims should be placed on the same footing as other arbitration agreements unless Congress itself has evinced an intent to preclude a waiver of judicial remedies for the statutory rights at issue.[18]

The Court rejected Gilmer's arguments that: (1) the arbitration panel would be biased; (2) the limited discovery allowed in arbitration would make it more difficult to prove age discrimination; and (3) the arbitration agreement should not be enforced because of inequality of bargaining power between employers and employees.[19] Essentially, the Court held, by agreeing to arbitrate statutory claims, a "party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."[20]

In the wake of *Gilmer*, federal courts, relying not only on *Gilmer* but also on other Supreme Court decisions that evidence strong support of arbitration,[21] held that federal statutory employment discrimination claims are subject to compulsory arbitration, on the basis of pre-dispute arbitration agreements contained not only in the Form U-4 but also in employee handbooks, employment applications, collective bargaining agreements and employment agreements.[22] State courts followed suit.[23] There has been backlash to this deference to arbitration of statutory employment discrimination claims, though. In 1999, the securities industry promulgated a rule that exempts statutory discrimination

---

U.S. 287, 289, 2010 BL 142332 (2010).

For an appeals court case summing up these principles, see, e.g., *Janiga v. Questar Capital Corp.*, 615 F.3d 735, 741-42, 2010 BL 178345 (7th Cir. 2010).

[15] *Rent-A-Center*, 561 U.S. at 68–69, 2010 BL 138828; *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79, 83-85 1 EXC 430 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). Courts, however, should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so. *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Rent-A-Center*, 561 U.S. at 69, n.1, 2010 BL 138828.

[16] *See, e.g., Arrigo v. Blue Fish Commodities, Inc.*, 408 Fed. Appx. 480, 481, 2011 BL 31094 (2d Cir. 2011).

[17] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 1 EXC 165 (1991).

[18] *Id.* at 26.

[19] *Id.* at 30-33.

[20] *Id.*

[21] *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 625, 1 EXC 172 (1985) (stating the FAA "was designed to overcome an anachronistic judicial hostility to agreements to arbitrate"); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25, 1 EXC 173 (1983) (explaining that any doubts about the scope of arbitrable issues must be resolved in favor of arbitration).

[22] Courts in each federal circuit have held that federal statutory claims are subject to pre-dispute arbitration. *See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 170 F.3d 1, 1 EXC 189 (1st Cir. 1999) (holding Title VII does not prohibit mandatory pre-dispute agreements to arbitrate); *Oldroyd v. Elmira Sav. Bank*, 134 F.3d 72 (2d Cir. 1998) (holding that retaliatory discharge claims under the whistleblower protections of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 are arbitrable); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212 (3d Cir. 2003); *Micro Strategy Inc. v. Lauricia*, 268 F.3d 244, 1 EXC 231 (4th Cir. 2001); *Long John Silver's Restaurants Inc. v. Cole*, 514 F.3d 345, 2008 BL 15070 (4th Cir. 2008); *Garrett v. Circuit City Stores Inc.*, 449 F.3d 672 (5th Cir. 2006) (holding that claims by servicemen under USERRA are arbitrable); *Carter v. Countrywide Credit Indus. Inc.*, 362 F.3d 294 (5th Cir. 2004); *Willis v. Dean Witter Reynolds Inc.*, 948 F.2d 305, 1 EXC 257 (6th Cir. 1991) (holding that Title VII claims were subject to an arbitration clause based on a Form U-4); *Landis v. Pinnacle Eye Care LLC*, 537 F.3d 559, 2008 BL 166021, 9 EXC 12 (6th Cir. 2008); *Koveleskie v. SBC Capital Mkts. Inc.*, 167 F.3d 361, 1 EXC 425 (7th Cir. 1999); *Bailey v. Ameriquest Mortg. Co.*, 346 F.3d 821 (8th Cir. 2003); *Patterson v. Tenet Health-Care Inc.*, 113 F.3d 832, 1 EXC 262 (8th Cir. 1997) (holding Title VII claims are subject to pre-dispute arbitration agreements); *Equal Employment Opportunity Comm'n v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 2 EXC 42 (9th Cir. 2003); *Lozano v. AT&T Wireless Services Inc.*, 504 F.3d 718, 2007 BL 105080 (9th Cir. 2007); *Metz v. Merrill Lynch, Pierce, Fenner & Smith*, 39 F.3d 1482, 1 EXC 291 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons Inc.*, 971 F.2d 698, 1 EXC 297 (11th Cir. 1992); *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307 (11th Cir. 2002); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1 EXC 307 (D.C. Cir. 1997); *Booker v. Robert Half Int'l Inc.*, 413 F.3d 77 (D.C. Cir. 2005).

[23] *See, e.g., Fletcher v. Kidder Peabody & Co.*, 619 N.E.2d 998, 1993 BL 701, 1 EXC 405 (N.Y. 1993) (enforcing pre-dispute arbitration provision for discrimination claims brought pursuant to state law).

claims from pre-dispute arbitration agreements.[24] Similarly, under the Dodd-Frank Wall Street Reform and Consumer Protection Act, whistleblower and retaliation claims arising under the Act may not be subject to pre-dispute arbitration agreements.[25]

Invalidating Arbitration Agreements

Although mandatory pre-dispute arbitration agreements are, as a rule, enforceable, even if statutory claims are included, the agreement may be invalidated in whole or in part if it does not conform to the principles of contract law.[26] Section 2 of the FAA states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[27] Thus, courts have often scrutinized arbitration agreements and the circumstances of their execution under state contract law to ensure that they are fair, that employees maintain their rights and remedies under applicable statutes and that their due process rights are not abridged, that the agreements are not overly coercive or unconscionable, and that employees knowingly and voluntarily agree to arbitration.

Fairness

The fairness of an arbitration agreement is a prerequisite to an agreement's validity as a whole. Pervasive unfairness, in some instances, may cause a court to invalidate an entire arbitration agreement. In other cases, inherent unfairness will lead a court to sever certain provisions, while leaving the agreement itself intact. Still, courts have failed to come to a consensus on what provisions will invalidate an arbitration agreement in the employment context. In light of this, even though a "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context,"[28] employers should take care to craft agreements with provisions that are not patently one-sided and that have procedural safeguards.[29]

The decision of the Court of Appeals for the Fourth Circuit in *Hooters of America Inc. v. Phillips*,[30] is illustrative of decisions dealing with the fairness of arbitration provisions and the procedural safeguards necessary to uphold the terms of an agreement. In *Hooters*, the court held that whereas "pre-dispute agreements to arbitrate Title VII claims are . . . valid and enforceable," the particular agreement at issue in that case would not be enforced because the arbitration rules referenced in the agreement were egregiously unfair.[31] The arbitration rules promulgated by the employer in *Hooters* were patently one-sided. The employee was required to file detailed pleadings and to provide the employer with notice of a claim, but the employer did not need to file a response or give the employee notice of its defenses. Only the employee had to submit a witness list in advance of the hearing. The arbitrators were selected by the employer. Only the employer could request summary judgment and record the hearing, and only the employer could seek to vacate or modify the award in court. Finally, the employer reserved the right to modify the arbitration rules in whole or in part, without notifying the employee. The unfairness of the provisions led the Fourth Circuit to refuse to enforce the agreement in its entirety.

Another illustrative decision is *Armendariz v. Foundation Health Psychcare Services Inc.*[32] In *Armendariz*, the California Supreme Court refused to enforce an arbitration agreement against two employees who claimed they were discriminated against on the basis of their sex because the arbitration provisions were deemed to be contrary to public policy and unconscionably unilateral. According to the court, only agreements that provide for an arbitration process in which employees can vindicate their statutory rights through minimal requirements, including neutral arbitrators, adequate discovery, availability of all remedies that would be available in court, a written decision, and a prohibition of charging costs to employees, are enforceable. Thus, where the arbitration provision precluded an award of front pay, compensatory and punitive damages, and injunctive relief, the employees could not be compelled to arbitrate their statutory discrimination disputes. The court further held that because the agreement provided that only the employer could compel arbitration, it was unconscionably unilateral.[33]

The California Supreme Court reiterated this holding in *Sonic-Calabasas A Inc. v. Moreno*,[34] further extending the ruling to include an employee's waiver of the right to

---

[24] FINRA CODE, *supra* note 4, Rule 13201.

[25] 7 U.S.C. § 23(n) (amending the Commodity Exchange Act); 18 U.S.C. §§ 1514A(e)(1), (2) (amending the Sarbanes Oxley Act); Dodd-Frank § 1057(d)(1)-(2).

[26] *Rent-A-Center*, 561 U.S. at 68, 2010 BL 138828; *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

[27] 9 U.S.C. § 2.

[28] *Gilmer*, 500 U.S. at 33

[29] The American Arbitration Association is likewise concerned with fairness in employment arbitration. It examined due process issues arising out of the use of mediation and arbitration for resolving employment disputes in its Employment Due Process Protocol. The Protocol, adopted in 1995, advocates a number of procedural fairness standards, including an employee's right to be represented during mediation or arbitration proceedings, cost sharing between the employee and employer, adequate but limited discovery, including pre-hearing depositions, joint selection of unbiased mediators and arbitrators familiar with employment statutes and issues, and limited judicial review of an arbitral award. EMPLOYMENT DUE PROCESS PROTOCOL (American Arbitration Association, May 9, 1995), available at https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTAGE2025665&revision=latestreleased.

[30] *Hooters of Am. Inc. v. Phillips*, 173 F.3d 933, 1 EXC 226 (4th Cir. 1999).

[31] *Id.* at 937.

[32] *Armendariz v. Found. Health Psychcare Servs. Inc.*, 6 P.3d 669, 1 EXC 375 (Cal. 2000).

[33] *See also Penn v. Ryan's Family Steak Houses Inc.*, 269 F.3d 753, 1 EXC 427 (7th Cir. 2001) (holding that arbitration agreement was unenforceable because it lacked detail).

[34] *Sonic-Calabasas A Inc. v. Moreno*, 51 Cal. 4th 659, 2011 BL 50174 (Cal. 2011).

a Berman hearing and post-hearing protections.[35] In California, a Berman hearing provides an employee the right to bring wage claims administratively before the California Labor Commissioner. The court ruled that a mandatory waiver of these hearings violates public policy, because the Berman hearing process provides lower costs and risks to the employee, greater deterrence of frivolous employer claims, and greater assurance that awards will be collected than does the binding arbitration process alone.[36] Therefore, the waiver of Berman hearings in mandatory arbitration provisions is prohibited.

Similarly, the Sixth Circuit declined to enforce a pre-employment arbitration provision that provided a fundamentally unfair arbitral forum in *Walker v. Ryan's Family Steak Houses Inc.* [37] Unlike most pre-employment arbitration agreements, which are between an applicant and potential employer, the *Walker* arbitration agreement was between the applicant and a third-party employee dispute resolution company. The employer contracted with this third-party to provide arbitration services. The third-party service provided adjudicators selected, in part, from supervisors and employees of other employers who contract with the third-party for arbitration services. The court found the forum furnished by this agreement to be fundamentally unfair. It emphasized that because the employer accounted for 42 percent of the fees earned by the third-party service, it effectively controlled the selection of arbitrators. The court also noted that there were no minimum eligibility or selection criteria for the arbitrators. The structural bias inherent in the arbitration program prevented effective vindication of the plaintiffs' claims.

The lesson of these cases is that employers who wish to be able to compel their employees to arbitrate their disputes with them should not overreach; rather, they should ensure that their arbitration provisions are fair.

Vindication of Statutory Rights

Employers should also beware of drafting arbitration agreements that strip employees of statutory rights. The Supreme Court has long held that by "agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[38] The importance of a guarantee that employees be permitted to vindicate their statutory rights in arbitration is illustrated by the decision of the Court of Appeals for the District of Columbia Circuit in *Cole v. Burns International Security Services*.[39] In *Cole*, the court upheld an arbitration provision that provided for neutral arbitrators, more than minimal discovery, a written award, and all statutorily available remedies.[40] Notably, the court required the employer to pay the arbitrator's fee.[41] The D.C. Circuit reiterated the importance of the vindication of statutory rights in *Booker v. Robert Half Int'l Inc.*,[42] in which it severed a provision banning punitive damages in an arbitration agreement where the District of Columbia Human Rights Act allowed for them, and upheld the remainder of the agreement. In deciding to sever the provision banning punitive damages, the court acknowledged that invalidation of an entire agreement may sometimes be necessary. "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties."[43]

As in *Cole* and *Booker*, other courts have held that agreements to arbitrate federal statutory claims may not abrogate substantive statutory rights.[44] In *DeGaetano v. Smith Barney Inc.*,[45] for example, a federal district court refused to compel arbitration where the

[35] *Id.* at 682.

[36] *Id.* at 681.

[37] *Walker v. Ryan's Family Steak Houses Inc.*, 400 F.3d 370, 3 EXC 39 (6th Cir. 2005).

[38] *Mitsubishi Motors Corp.*, 473 U.S. at 628. *See also Gilmer*, 500 U.S. at 26.

[39] *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1 EXC 307 (D.C. Cir. 1997).

[40] *See id.* at 1480; *see also Patterson v. Tenet Health Care Inc.*, 113 F.3d 832, 837, 1 EXC 262 (8th Cir. 1997) (stating that the "resolution of a claim in an arbitral forum must effectively vindicate the employee's statutory cause of action . . . [and] must be accomplished through the use of neutral arbitrators, adequate discovery[, and] adequate type of relief").

[41] 105 F.3d at 1485. In a later decision, the same court affirmed the district court's confirmation of an arbitration award requiring the claimant to pay a portion of the forum fees for arbitration of her statutory and nonstatutory employment claims. See *La Prade v. Kidder, Peabody & Co.*, 246 F.3d 702, 1 EXC 308 (D.C. Cir. 2001). Other courts have refused to compel arbitration where the arbitration provision required the employee to pay some or all of the arbitrator's fees. See *Shankle v. B-G Maint. Mgmt. of Colo. Inc.*, 163 F.3d 1230, 1 EXC 295 (10th Cir. 1999); *Paladino v. Avnet Computer Tech.*, 134 F.3d 1054, 1 EXC 304 (11th Cir. 1998). The First and Seventh circuits have declined to invalidate arbitration agreements based on the fact that the employee may have to pay the arbitrator's fees. See *Rosenberg v. Merrill Lynch*, 170 F.3d 1, 1 EXC 189 (1st Cir. 1999); *Koveleskie v. SBC Capital Mkts. Inc.*, 167 F.3d 361, 1 EXC 425 (7th Cir. 1999). But see *Martin v. SCI Mgmt. L.P.*, 296 F. Supp. 2d 462, 469 (S.D.N.Y. 2003) (without a showing that employee is likely to bear the costs of arbitration, provision permitting cost-sharing is enforceable), and *Bradford v. Rockwell Semiconductor Sys. Inc.*, 238 F.3d 549, 1 EXC 222 (4th Cir. 2001) (compelling arbitration when employee was required to pay half of the forum fees).

[42] *Booker v. Robert Half Int'l Inc.*, 413 F.3d 77 (D.C. Cir. 2005).

[43] *Id.* at 84-85.

[44] *See, e.g., Landis v. Pinnacle Eye Care LLC*, 537 F.3d 559, 2008 BL 166021 (6th Cir. 2008) (reiterating *Gilmer's* conclusion and holding that USERRA claims are arbitrable); *Underwood v. Chef Fransico/Heinz*, 200 F. Supp. 2d 475, 3 EXC 43 (E.D. Pa. 2002) (refusing to enforce an agreement that placed a significantly higher burden on the employee to prove an employment discrimination claim than would attach under Title VII). The court found that such a burden was "fundamentally incompatible with the remedial and deterrent functions of Title VII," and denied enforcement of the arbitration provision. *Id.* at 481 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 1 EXC 165 (1991)) (internal quotations omitted).

[45] *DeGaetano v. Smith Barney Inc.*, 983 F. Supp. 459, 1 EXC 341 (S.D.N.Y. 1997).

arbitration provision prohibited the employee, who had alleged a federal statutory employment discrimination claim, from recovering attorneys' fees, which may be awarded to successful plaintiffs under the antidiscrimination statute. These cases stand for the proposition that an arbitration provision that provides an employee with less protection or less remedial relief than applicable employment statutes may not be enforced.

In contrast, the Eighth and Third Circuits have held that arbitration agreements that provide fewer remedies than those available under statutes are enforceable by a court, because the extent of an arbitrator's remedial authority is an issue for the arbitrator.[46] In *Arkcom Digital Corp. v. Xerox Corp.*,[47] the court addressed whether an arbitration agreement that conflicts with rights and remedies provided by state law is enforceable. In holding that such an agreement was enforceable, the court reasoned that while the FAA preempts state laws limiting the selection of an arbitral forum, it does not broadly preempt substantive state law rights. Thus, the issue was whether the parties validly waived state law rights by entering into an arbitration provision that restricts the available remedies under state law.[48] "[I]ssues of remedy go to the merits of the dispute and are for the arbitrator to resolve in the first instance;" courts do not enjoy first review of these issues.[49]

Knowing and Voluntary Waiver

The Court of Appeals for the Ninth Circuit issued one of the first appellate decisions declining to compel arbitration on the ground that the employee did not "knowingly" waive the right to pursue statutory rights in court in *Prudential Insurance Co. of Am. v. Lai*.[50] In *Lai*, the court held that there must "be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the protections prescribed in the statute. . . ."[51] Thus, the employee was not required to arbitrate her discrimination claims when: (1) the employee was directed to sign the arbitration commitment without having an opportunity to read it; (2) the employee was told that the form was simply an application for registration with a regulatory agency; (3) the terms of the arbitration commitment were not spelled out in the agreement the employee signed but in a manual the employee did not receive; and (4) the agreement did not specify the types of disputes subject to arbitration.

Courts generally will enforce arbitration agreements if they sufficiently put the employee on notice that the employee's claims are covered by the agreement.[52] Agreements to arbitrate will be enforced when signed by an employee even if the employee fails to read the agreement,[53] or when the employer does not inform the employee about the arbitration rules to which he or she has agreed to be bound.[54]

Courts differ, however, on whether arbitration agreements found solely in employee handbooks provide employees with the requisite notice and are thus

---

[46] *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 2 EXC 36 (8th Cir. 2002); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004) ("Questions about remedy are also outside our scope of review because they do not affect the validity of the agreement to arbitrate."); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 3 EXC 42 (3d Cir. 1997) (extent of remedies is arbitrator's decision); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610-11 (3d Cir. 2002) (declining to overrule *Great W. Mortgage*, and reiterating that whether plaintiff waived any rights under state law was a question for the arbitrator).

[47] 289 F.3d 536, 2 EXC 36 (8th Cir. 2002).

[48] *Id.* at 539.

[49] *Id. See also Faust v. Command Center Inc.*, 484 F. Supp. 2d 953, 2007 BL 15322 (S.D. Iowa 2007) (holding that it is for the arbitrator, not the court, to decide whether a waiver of punitive damages under state law is unenforceable).

[50] *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1 EXC 280 (9th Cir. 1994).

[51] *Id.* at 1304. *Lai* was narrowed by the Ninth Circuit in *Renteria v. Prudential Ins. Co. of Am.*, 113 F.3d 1104, 1 EXC 281 (9th Cir. 1997) (limiting the holding in *Lai* to statutory employment discrimination laws).

[52] *See, e.g., Rajjak v. McFrank & Williams*, No. 01 Civ 0493, 2001 BL 1807 (S.D.N.Y. July 13, 2001) (unreported) (arbitration agreement enforceable, even though it did not specify it covered employment disputes, because it put employee on notice that he agreed to arbitrate all claims against employer).

[53] *See, e.g., Medina v. Hispanic Broad. Corp.*, No. 01 C 2278, 2002 BL 2259 (N.D. Ill. Mar. 12, 2002) (unreported) (agreement enforceable when employee signed but did not read the one-page form explaining arbitration provision).

[54] In *Paul Revere Variable Annuity Ins. Co. v. Zang*, 248 F.3d 1, 2 EXC 43 (1st Cir. 2001), for example, the First Circuit limited its prior holding in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 170 F.3d 1, 1 EXC 189 (1st Cir. 1999). *Rosenberg* required an employer to put its employees on notice that they had agreed to arbitrate their federal employment discrimination claims. The *Paul Revere* court held that an employer has no duty to inform its employees about the terms of a self-regulatory organization's (e.g., NYSE) rules regarding arbitration. In *Paul Revere*, employees had signed a securities registration application (Form U-4), which subjected them to the rules of the NASD, as such rules were "adopted, changed or amended." The NASD later amended its rules to require arbitration of employment-related disputes. The employees were terminated, and sought to sue the employer for breach of employment contract. The employer moved to stay the proceeding and compel arbitration pursuant to the NASD rules. The employees objected, citing to *Rosenberg* and arguing that because they were not made aware of the new NASD rules, the arbitration agreement was unenforceable. The court found that the *Rosenberg* notice requirement was based on the strong public policy against discrimination, and did not apply in regular employment contract disputes. *See Paul Revere*, 248 F.3d at 10.

The Sixth Circuit similarly disagreed with *Rosenberg* in *Haskins v. Prudential Ins. Co. of Am.*, 230 F.3d 231, 3 EXC 54 (6th Cir. 2000). The *Haskins* court held that, absent a showing of fraud, duress, mistake or some other ground on which a contract may be voided, employees are generally chargeable with knowledge of the scope of an arbitration clause within a document signed by the employee. In *Haskins*, the court found that an employee who signed a Form U-4 became bound by the NASD rules to arbitrate his employment-related claims, even though he did not receive a copy of the NASD rules. The court reasoned that when a Form U-4 clearly informs the employee that he is bound by NASD rules requiring him to arbitrate employment-related claims, that employee is responsible for informing himself about those rules. *Id.* at 241.

enforceable. An employer may, in some circuits, face difficulty in compelling arbitration based on its unilateral insertion of an arbitration commitment into an employee handbook, especially when employees are not required to acknowledge their receipt of arbitration policies in writing.[55] Other circuits have concluded that arbitration provisions contained in handbooks are enforceable.[56]

Courts have also invalidated arbitration agreements when an employer used email to give notice of broad arbitration policies to all employees,[57] and when arbitration provisions did not specifically delineate that employment claims were covered. [58]

Drafting an Enforceable Arbitration Commitment

Although the law is always evolving, case law has provided some practical guideposts for drafting enforceable arbitration agreements with respect to statutory discrimination claims.

Some tips for drafting an enforceable and useful arbitration commitment are listed below.

(a) Specify what types of claims are covered by the arbitration provisions, e.g., specify, "all claims arising out of your employment or the termination thereof, including claims brought pursuant to federal or state statutes prohibiting discrimination in employment, such as the ADEA, the ADA, and Title VII."

(b) Specify that the arbitrators will be mutually agreed on and impartial.

(c) Assure that prehearing discovery will be permitted.

(d) Assure that the arbitrator will be bound to apply applicable employment laws and that the arbitrator has authority to award all remedies guaranteed by employment discrimination statutes (including punitive damages and attorneys' fees).

(e) Assure that both the employer and employee are bound to arbitrate.

(f) Do not require the employee to pay all of the costs of the arbitration hearing.

(g) Assure that there will be a written award.

(h) Specify that the employee will have a right to be represented by counsel.

(i) Ensure that the employee has a copy of the agreement, has read it, and has sufficient time to review and understand it. Get a signature on the agreement, or, at minimum, a written acknowledgment of receipt and understanding of a unilaterally promulgated policy.

Mandatory Arbitration Critics

Although courts have generally approved of mandatory arbitration of employment disputes, others have been vocal in their criticism. The Equal Employment Opportunity Commission (EEOC), for example, considers mandatory arbitration to be contrary to the fundamental principles of employment discrimination laws. The EEOC's 1997 policy statement provides that "[m]andatory arbitration not only denies victims of discrimination access to their rights to go to court, but it also keeps

---

[55] For example, in *Moran v. Ceiling Fans Direct Inc.*, 239 Fed. Appx. 931 (5th Cir. 2007), the Fifth Circuit rejected an arbitration agreement contained in an employee handbook because of insufficient notice to employees of the terms of the policy. After the commencement of wage and hour litigation between employees and the employer, the employer instituted an arbitration policy covering all disputes. To notify employees of various policy changes, the employer held a meeting in which copies of the arbitration policy were made available, but which the employer admitted no employees had taken to read. The employer also issued a new employee handbook containing the arbitration agreement and an acknowledgment page. However, the company did not require that the employees sign the arbitration acknowledgment, even though they were required to sign an acknowledgment of the company's drug and alcohol policy. Based on these omissions, the court concluded that the employer "did not conclusively establish unequivocal notification" and that, without such proof, the employees' continued employment did not equal acceptance of the arbitration agreement. *Id.* at 937.
See also Barnett v. Cigna Health Plan of Ariz., 72 Fed. Appx. 566 (9th Cir. 2003) (refusing to compel arbitration where arbitration provisions in employee handbook were not incorporated into employment contract between employee and employer); *Nelson v. Cypress Bagdad Copper Corp.*, 119 F.3d 756, 1 EXC 276 (9th Cir. 1997) (refusing to compel arbitration based on insertion of arbitration provision into employment manual); *Shaffer v. ACS Gov't Servs.*, 321 F. Supp. 2d 682 (D. Md. 2004) (holding that signed acknowledgment of handbook did not constitute acceptance of arbitration policy contained in handbook, where the acknowledgment form did not directly acknowledgment acceptance of the arbitration policy).

[56] *See Brown v. St. Paul Travelers Cos..*, 331 Fed. Appx. 68, 2009 BL 131797 (2d Cir. 2009) (ruling that under New York law, employee was deemed to have accepted a mandatory arbitration policy contained in an employee handbook by continuing to work after employer advised that it was employee's responsibility to read and understand all company policies, including arbitration policy, and even though employee never signed the policy, and where employer repeatedly distributed handbook in question to employees); *Pennington v. Frisch's Restaurants Inc.*, 147 Fed. Appx. 463 (6th Cir. 2005) (holding that arbitration agreement was enforceable under Ohio law where employees signed forms acknowledging their receipt of arbitration agreement contained in employee handbook, even where employees claim they did not read agreement); *Blair v. Scott Specialty Gases,* 283 F.3d 595 (3rd Cir. 2002) (finding that adequate consideration for an arbitration agreement in an employee handbook existed where employee signed acknowledgment of receipt of handbook).

[57] *Campbell v. General Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005) (email notice was not specific enough and disguised the import of the communication); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 2007 BL 151951 (1st Cir. 2007) (email notice was insufficient to constitute waiver of right to pursue class action waiver).

[58] *See Shaffer v. ACS Gov't Servs.*, 321 F. Supp. 2d 682 (D. Md. 2004) (holding that signed acknowledgment of handbook did not constitute acceptance of arbitration policy, where policy did not divulge that employment matters required to be arbitrated); *Paladino v. Avnet Computer Techs. Inc.*, 134 F.3d 1054, 1 EXC 304 (11th Cir. 1998) (explaining that arbitration provision did not specify that statutory claims were subject to arbitration); *Rojas v. TK Communications Inc.*, 87 F.3d 745, 1 EXC 247 (5th Cir. 1996) (holding that an agreement that merely referred actions concerning the validity of the agreement, its financial terms, or "other disputes" did not commit plaintiff to arbitrate a statutory employment discrimination claim).

the courts from playing an essential role in enforcing civil rights laws."[59]

Some legislators have similarly vocalized opposition to compulsory arbitration of statutory employment disputes. In 2009, the Arbitration Fairness Act was introduced in the U.S. House of Representatives, proposing to make pre-dispute arbitration agreements unenforceable except in the collective bargaining context.[60] The justification for this proposal to amend the FAA was the "greatly disparate economic power" between parties facing arbitration, which resulted in "millions of consumers and employees [giving] up their right to have disputes resolved by a judge or jury."[61] The sponsors of the bill noted their belief that "[m]andatory arbitration undermines the development of public law for civil rights and consumer rights," in that it does not allow for meaningful judicial review of arbitrators' decisions, is not transparent, does not render public decisions, and encourages corporations to write unfair provisions into their arbitration agreements, deliberately biasing the system against individuals and stripping them of their statutory rights.[62] The bill did not pass. Subsequent versions of the bill have been introduced[63] but have also failed to pass. A new version of the bill was recently introduced[64] and is currently pending.

A similar bill was proposed in 1997 but also failed. In introducing this earlier bill, known as the Civil Rights Procedures Protection Act of 1997, Rep. Edward J. Markey hailed the proposed law as "reinforcing the fundamental rights established under various civil rights and fair employment practices laws" and restoring "integrity to employer-employee relationships."[65] Various federal bills have proposed to prohibit mandatory arbitration of other types of disputes, including those between long-term care facilities and residents[66] and those arising out of unilateral arbitration provisions in consumer transactions or contracts.[67] In addition, the Dodd-Frank Wall Street Reform and Consumer Protection Act, passed in 2010, expressly invalidates any provision providing for mandatory arbitration of the whistleblower provisions under the Act.[68]

Some states have attempted to prevent mandatory arbitration also. In 2010, a bill was introduced in the New Jersey Assembly that sought to prohibit employers from requiring employees to sign pre-dispute arbitration agreements as a condition of their hiring.[69] New York and California attempted to pass similar legislation in 1997 and 1998.[70]

Moreover, evidencing their negative view of compulsory arbitration of statutory employment and discrimination claims, the two self-regulatory organizations (SROs) in the financial services industry that preceded FINRA—the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD)—eliminated in 1999 the requirement that broker-dealer employees arbitrate statutory employment discrimination claims based on the Form U-4, thus doing away with precisely what the Supreme Court had upheld in *Gilmer*.[71] FINRA adopted this rule in its Code of Arbitration Procedures, effective April 16, 2007.

It bears noting that most critics of mandatory arbitration are proponents of voluntary arbitration. Consistent with its mandate to facilitate resolution of employment discrimination disputes, the EEOC supports voluntary arbitration agreements entered into after a dispute has arisen.[72] The Civil Rights Act of 1991, which, among other things, amended Title VII and the ADEA to allow for the award of punitive damages to the successful plaintiff and permitted jury trials, provides that "where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of federal law amended by this title."[73]

Selecting the Forum

As a general matter, unless a particular forum, arbitrator, or arbitration selection method is specified in the applicable pre-dispute arbitration agreement, the parties to a dispute have great leeway in selecting an arbitrator. Perhaps because that decision can lead to time-consuming debate, often the arbitration commitment specifies the particular arbitration organization that will be used or specifies a particular arbitrator. Collective bargaining agreements, for example, often include the name of a "contract arbitrator" who arbitrates all disputes arising under the same contract. Private employment contracts usually specify a particular arbitration organization.[74]

Employers and executives should be careful when selecting a forum to ensure no conflicting obligations exist. When an employee executes two agreements, each

---

[59] Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, EEOC Notice 915.002 (July 10, 1997), available at http://www.eeoc.gov/policy/docs/mandarb.html.

[60] H.R. 1020, 111th Cong. (2009-2010).

[61] *Id.*

[62] *Id.*

[63] H.R. 1873, 112th Cong. (2011-2013); H.R. 1844, 113th Cong. (2013-2015).

[64] H.R. 2087, 114th Cong. (2015-2016).

[65] H.R. 983, 105th Cong. (1997).

[66] H.R. 1237, Fairness in Nursing Home Arbitration Act of 2009, 111th Cong. (2009-2010) (not passed).

[67] H.R. 991, Consumer Fairness Act of 2009, 111th Cong. (2009-2010) (not passed).

[68] 18 U.S.C. § 1514A(e).

[69] A2252, 214th Leg. (N.J. 2010).

[70] S07441, 221st Leg. Reg. Sess. (N.Y. 1998); A.B. 1997-1998 Sess. (Cal. 1997).

[71] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 1 EXC 165 (1991).

[72] Policy Statement on Mandatory Binding Arbitration, *supra* note 59.

[73] Pub. L. No. 102-166 (codified as amended in scattered sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C.).

[74] Private employers do not typically specify a particular arbitrator in their arbitration agreements. Such a specification would likely engender accusations by employees that the arbitrator is in the "employer's pocket" and therefore is biased.

of which contains an arbitration clause inconsistent with the other, courts disagree as to which agreement should control. In *Credit Suisse First Boston Corp. v. Pitofsky*,[75] several executives were hired by the employer and signed Forms U-4, which required all employment disputes to be submitted to arbitration under the rules of one of the self-regulatory organizations (e.g., the NYSE). Later, the executives signed compensation agreements with the employer, which specifically incorporated the company's own employee dispute resolution program (EDRP). The executives were discharged, and followed the EDRP proceedings up until the final, binding arbitration phase. At this time, they filed claims with the NYSE, while the company filed with the Judicial Arbitration & Mediation Services Inc. (JAMS), in accordance with the EDRP. The appellate court ordered arbitration to proceed under the NYSE rules, reasoning that under New York law, employment agreements cannot supersede previously executed Forms U-4.[76] On appeal, the New York Court of Appeals held that the Appellate Division erred in ruling that employment agreements, as a matter of law, cannot supersede previously executed Form U-4 agreements.[77] Nonetheless, the New York Court of Appeals affirmed the Appellate Division's holding because the EDRP contained an exception for matters that were legally required to be arbitrated in another manner and it was clear from an NYSE rule that payment disputes between broker-dealers and their employers were legally required to be arbitrated by the NYSE.[78]

By contrast, in a case involving the same employer and the same underlying factual circumstances, the United States District Court for the Southern District of New York enforced the provisions of the employer's EDRP barring two former employees from pursuing arbitration under NYSE rules.[79] One former employee had signed an agreement to use the EDRP and a Form U-4 requiring him to arbitrate all employment-related disputes under the rules of the NYSE. The former employee, relying heavily upon the appellate court's decision in *Pitofsky*, commenced arbitration under the NYSE rules, arguing that the NYSE rules take precedence over the EDRP arbitration procedure. The court enforced the provisions of the EDRP and distinguished the appellate court's decision in *Pitofsky*, which relied on New York law, noting that here the court was applying federal law, which recognizes that a more specific arbitration agreement between the employer and employee supersedes an agreement such as the Form U-4.[80]

Another former employee had not signed the EDRP or a Form U-4, but had executed an employment agreement that contained an arbitration provision requiring all disputes arising from the agreement to be submitted to the Labor Courts in Mexico City, Mexico. The court rejected his attempt to submit his dispute to arbitration under the NYSE rules, requiring him to pursue arbitration in the forum agreed to in his employment agreement.[81]

Arbitration Organizations

The American Arbitration Association (AAA), the Judicial Arbitration & Mediation Services Inc. (JAMS) and the International Institute for Conflict Prevention & Resolution (CPR) are three of the more well-known organizations that provide arbitration services. AAA, JAMS and CPR provide administrative services and facilities for arbitrations, maintain rosters of arbitrators, and have established rules for arbitration proceedings. These "off the rack" rules are useful in that they may limit negotiations with adversaries about nonsubstantive issues.

AAA

The AAA has adopted special rules for the resolution of employment disputes, which differ from the AAA's general commercial rules in significant respects.[82]

The AAA Employment Arbitration Rules and Mediation Procedures, amended in 2009, were developed by a committee of employment management and plaintiffs' attorneys, retired judges and arbitrators, and AAA staff. They allow for greater discovery than the AAA's general commercial rules by way of deposition, interrogatories, and document production in the discretion of the arbitrator. They also provide that the parties bear the same burdens of proof as they would if they were litigating the dispute in court and require that the arbitrator provide written reasons for the ultimate award, unless the parties agree otherwise. Most significantly, the rules provide that the arbitrators deciding employment disputes pursuant to the rules have experience in the field of employment law. The parties participate in the selection process and are given the privilege of striking unacceptable arbitrators.

JAMS

JAMS arbitrates employment claims and operates under its own internal rules.[83] However, this organization will not arbitrate a statutory employment discrimination claim in connection with an arbitration agreement

---

[75] 2 A.D.3d 6, 768 N.Y.S.2d 436, 2 EXC 44 (1st Dep't 2003).

[76] *Id.* at 9-10, 768 N.Y.S.2d at 439 (citing *Hamilton v. Cantor Fitzgerald Sec.*, 265 A.D.2d 526, 697 N.Y.S.2d 134 (2d Dep't 1999)).

[77] *Credit Suisse First Boston v. Pitofsky*, 824 N.E.2d 929 (N.Y. 2005)

[78] *Id.* at 494.

[79] *Credit Suisse First Boston LLC v. Padilla*, 326 F. Supp. 2d 508, 2 EXC 45 (S.D.N.Y. 2004).

[80] *Id.* at 513 (citing *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Georgiadis*, 903 F.2d 109 (2d Cir. 1990); *Chanchani v. Salomon/Smith Barney, Inc.*, No. 99 Civ. 9219 RCC, 2001 BL 1102, 9 EXC 13 (S.D.N.Y. Mar. 1, 2001)).

[81] *Id.*

[82] *See* EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES (American Arbitration Ass'n, Nov. 1, 2009)("AAA RULES"), available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362. These rules were formerly called the National Rules for the Resolution of Employment Disputes.

[83] JAMS EMPLOYMENT ARBITRATION RULES AND PROCEDURES (Rev. Jul. 1, 2014) (" JAMS RULES"), available at http://www.jamsadr.com/rules-employment-arbitration/#one.

signed as a condition of employment unless the arbitration agreement meets certain minimal fairness standards, including that (1) the claimant is afforded the same remedies as he or she would have in a lawsuit (e.g., reinstatement or front pay, back pay, punitive damages, attorneys' fees); (2) the claimant is entitled to participate in arbitrator selection and a neutral arbitrator; (3) the agreement gives the claimant the right to be represented by counsel and to present proof through testimony and documentary evidence and to cross-examine witnesses; and (4) the agreement allows for an exchange of core information prior to the arbitration, generally including exchange of relevant documents, identification of witnesses, and one deposition per side.[84] JAMS further requires that the award be written and contain a concise statement of the reasons for the award, stating essential findings and conclusions on which the award is based.[85] If an agreement's compliance with these minimum standards is in question, JAMS will defer arbitration for a reasonable period of time to allow the party contesting the fairness of the standards to seek a judicial ruling on the issue. If there is no judicial determination within a reasonable amount of time, JAMS will resolve questions of arbitrability under the JAMS rules.[86]

CPR

CPR provides administered arbitration rules,[87] non-administered arbitration rules,[88] and model employment arbitration procedures for employers wishing to develop their own rules.[89] However, CPR will only arbitrate an employment dispute if the arbitration agreement provides, or the employer has agreed in writing, that the following due process requirements will be provided for the employee: (1) the employee is required to pay as costs of arbitration no more than the filing fee to file the case in court; (2) the arbitrator may award any remedy available under law; (3) both the employee and the employer shall have the right to nominate any person they wish to serve as the arbitrator; (4) the employee and the employer shall have adequate access to relevant information through some form of discovery; (5) the employee and the employer shall have the right to be represented by their choice of counsel; and (6) the arbitrator shall issue a written, reasoned award.[90]

Securities Industry Arbitration

Securities industry participants arbitrate disputes before a securities regulatory organization (SRO). Prior to 2007, the two primary SROs that offered arbitration were the NASD and the NYSE, both of which modified their rules, effective Jan. 1, 1999, so that employees no longer were required to submit statutory employment discrimination claims to arbitration based solely on the Form U-4.[91] In 2007, the NASD combined with the arbitration functions of the NYSE and created the Financial Industry Regulatory Authority, or FINRA. Today, FINRA is the largest independent regulator for securities firms doing business in the United States.[92] Although FINRA does not require arbitration of statutory employment discrimination claims FINRA will arbitrate such claims filed on or after April 16, 2007, if the parties agreed to arbitrate them either before or after the dispute arose, apart from in the Form U-4.[93]

FINRA has enacted certain special procedures for employment discrimination claims. [94] Unless otherwise agreed by the parties, only public arbitrators hear employment discrimination disputes.[95] Disputes involving claims of $100,000 or less are heard by a single arbitrator, and disputes involving claims over $100,000 are heard by a panel of three arbitrators.[96] Single arbitrators and chairs of three-person panels must, unless the parties agree otherwise, meet stringent criteria that guarantee experience and impartiality.[97] All statutory relief, including punitive damages, is available, and reasonable attorneys' fees may be awarded in accordance with applicable law.[98] The rules strongly discourage depositions in arbitration, but upon motion of a party, the

---

[84] *See* JAMS POLICY ON EMPLOYMENT ARBITRATION MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (Rev. July 15, 2009)("JAMS POLICY"), available at http://www.jamsadr.com/employment-minimum-standards/. JAMS does not encourage the use of arbitration agreements required as a condition of employment, but will arbitrate these disputes provided they comply with the minimum standards.

[85] JAMS RULES, *supra* note 83, Rule 24(h).

[86] JAMS POLICY, *supra* note 84.

[87] *See* 2013 CPR ADMINISTERED ARBITRATION RULES (CPR Institute for Dispute Resolution 2013), available at http://www.cpradr.org/Portals/0/Administered%20Arbitration%20Rules-%20July%201.pdf.

[88] *See* CPR RULES, *supra* note 2.

[89] *See* CPR EMPLOYMENT DISPUTE ARBITRATION PROCEDURE (CPR Institute for Dispute Resolution), available at http://www.cpradr.org/Portals/0/Committees/Industry%20Committees/Employment%20Committee/CPR%20Employment%20Arbitration%20Procedure.pdf.

[90] *See* http://www.cpradr.org/RulesCaseServices/CPRRules/EmploymentArbitrationProcedure.aspx.

[91] Exchange Act Release No. 34-40858, 64 Fed. Reg. 1051 (Jan. 7, 1999); Exchange Act Release No. 34-40109, 63 Fed. Reg. 35,299 (June 29, 1998).

[92] *See* http://www.finra.org/AboutFINRA/. FINRA oversees nearly 3,941 brokerage firms and 641,157 registered securities representatives, and has approximately 3,600 employees in Washington, D.C., New York, and 14 regional offices throughout the United States.

[93] FINRA CODE, *supra* note 4, Rule 13201. The FINRA Rules are available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4193.

[94] *Id.* Rule 13802.

[95] *Id.* Rule 13802(c).

[96] *Id.* Rule 13802(b).

[97] In particular, they must have law degrees, be members of a Bar, have "substantial familiarity" with employment law, and 10 or more years of legal experience, of which at least five years must be in either law practice, law school teaching, government enforcement of equal employment opportunity statutes, experience as a judge, arbitrator, or mediator or experience as an equal employment opportunity officer or in-house counsel. In addition, such arbitrators may not have represented primarily (50 percent or more) the views of employers or of employees within the last five years. *Id.* Rule 13802(c)(3).

[98] *Id.* Rules 13802(e), (f).

arbitrator or panel may permit depositions "if necessary and consistent with the expedited nature of arbitration."[99]

To the extent a claimant files an employment discrimination claim in court and an employment-related claim in arbitration, the respondent has the right to move to compel the claimant to bring the related arbitration claims in the same court proceeding in which the discrimination claim is pending.[100] Similarly, a respondent may bring a related counterclaim in court, rather than in arbitration, if the claimant has filed an employment discrimination claim in court.[101] FINRA will not arbitrate class action claims.[102]

Under FINRA rules, a claimant must submit a claim to arbitration within six years of the occurrence giving rise to the claim.[103] This rule does not extend any applicable statutes of limitations periods, and the six year time limit does not apply to claims directed to arbitration by a court.[104] The U.S. Supreme Court has ruled that the applicability of an SRO's time limit rules (in that case, the NASD) are "presumptively for the arbitrator, not for the judge" to decide. [105]

Choice of Law

Federal Versus State Law

The question of whether an arbitration agreement that contains a choice of law provision evidences an intent on the part of the contracting parties to apply a state law that conflicts with the FAA's broad policy of enforcement has been the subject of some controversy. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,[106] the U.S. Supreme Court first addressed this issue. In *Volt*, the parties had entered into a contract that contained an agreement to arbitrate all disputes arising out of or relating to the contract as well as a choice of law clause, providing that the agreement would be governed by the law of California. When a dispute arose, one party made a demand for arbitration and the other filed an action in state court alleging fraud and breach of contract and bringing third-party claims against two other companies with whom there was no arbitration agreement.

The California Civil Procedure Code permitted a court to stay an arbitration pending resolution of the litigation between one party to the arbitration agreement and the third parties not bound by the arbitration agreement. The arbitration was stayed. The stay was ultimately upheld by the U.S. Supreme Court, which concluded that the California court's interpretation of the choice of law provision to mean that the parties intended to apply California rules of arbitration, including the stay provision, did not offend the federal policy favoring arbitration.

After *Volt*, litigants began to rely on choice of law provisions to divest arbitrators of their authority to enter awards or to limit the relief awarded by arbitrators. Parties, for example, often relied on choice of law provisions to defeat punitive damage awards pursuant to state laws that prohibited arbitrators from awarding such relief. After a split in the circuits developed, the U.S. Supreme Court, in *Mastrobuono v. Shearson Lehman Hutton Inc.*,[107] addressed the issue. In *Mastrobuono*, a party to an arbitration agreement that contained a New York choice of law clause argued that the clause incorporated New York's rule prohibiting arbitrators from awarding punitive damages. The Court concluded that the choice of law provision could be read only to include New York substantive rights and obligations, and nowhere in the contract was there any exclusion of punitive damage claims. Most recently, the U.S. Supreme Court, in *Preston v. Ferrer*,[108] ruled that when parties agree to arbitrate all disputes arising under a contract, the FAA supersedes state laws that vest primary jurisdiction in a judicial or administrative forum, especially where the parties elect particular arbitral rules. As in *Mastrobuono*, the Court determined that the choice of law clause applied to substantive state law, and that procedural matters were to be determined by the AAA, the entity under whose rules the parties agreed to arbitrate.

These cases can be harmonized by concluding that choice of law provisions may incorporate state procedural rules provided that such rules do not undermine the enforceability of the arbitration commitment, but they do not incorporate state substantive laws that limit an arbitrator's ability to issue remedial awards.

Conflicts of State Law

Complicated issues regarding choice of law often arise in connection with employment disputes. Suppose, for example, there is a wrongful discharge dispute between an executive who worked exclusively in California and a company with a principal place of business in New York. If California substantive law applies, the executive has a cause of action. If New York law applies, the executive does not. The executive's employment contract provides that all disputes shall be resolved by arbitration in New York. Despite the contract, the executive files a lawsuit in state court in California. Depending on the circumstances surrounding the execution of the contract as well as those alleged in the complaint, it is possible that the California court could entertain the action—at least until there has been discovery about choice of law is-

---

[99] *Id.* Rule 13501.
[100] *Id.* Rule 13803(a)(1)(A).
[101] *Id.* Rule 13803(a)(2)(A).
[102] *Id.* Rule 13204.
[103] *Id.* Rule 13206(a).
[104] *Id.* Rule 13206(c).
[105] *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79, 85, 1 EXC 430 (2002). The Court reasoned that the time limitations rules are akin to procedural questions that the parties would expect an arbitrator to decide, rather than substantive "questions of arbitrability" that are issues for courts to decide.
[106] *Volt Info. Scis. Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 1 EXC 183 (1989).
[107] *Mastrobuono v. Shearson Lehman Hutton Inc.*, 514 U.S. 52, 1 EXC 171 (1995).
[108] *Preston v. Ferrer*, 552 U.S. 346, 2008 BL 32193, 9 EXC 14 (2008).

sues. At the least, the choice of law issue must be resolved as early as possible. It will be outcome determinative.

To minimize the chance of a dispute about choice of law issues, it is useful to designate the state law that will govern disputes that may arise between parties. The state law chosen should bear some relationship to the contract and the parties (e.g., the state where the contract is to be performed). Provided there is some nexus between the contract and the state law chosen, the choice of law clause should be enforceable.

Restrictive Covenants

Suppose an executive has signed an agreement that prohibits competition with the employer for six months after termination of employment. The agreement also provides that all disputes between the executive and employer are "to be resolved by arbitration." The executive, without notice, resigns. The employer discovers the following day that the executive has gone to work for a direct competitor. Where should this dispute be resolved? What forum is appropriate?

Although arbitration clauses in employment contracts are becoming common, there is still debate as to whether such provisions should be applied to disputes arising from the provisions of the contract that restrain competition, solicitation, or disclosure of trade secrets or other confidential information.

Waiting for an arbitrator to render a decision could result in the "status quo" being irreparably altered, e.g., a departing executive might have succeeded in soliciting away the company's major clients or employees. A court, however, could render injunctive relief relatively quickly, which would, at least temporarily, preserve the status quo.

Some courts have held that an injunction can still be obtained in court without the inclusion of a clause in an arbitration agreement that carves out such actions from arbitral decision making. In New York, a court may issue a preliminary injunction in connection with an arbitration that is pending or that will commence, upon the ground that the award to which the claimant may be entitled in arbitration may be rendered ineffectual without provisional relief.[109] Circuit courts have consistently held that parties may seek injunctive relief from a court pending arbitration.[110] Rather than relying on statutes or case law, the prudent course, however, is to preserve the employer's ability to seek injunctive relief in court explicitly in the arbitration agreement. This drafting technique allows both employers and employees to benefit from the efficient and cost-effective nature of arbitration, while still allowing for expedited relief from a court in order to preserve the status quo. Under this approach the arbitrator retains the power to decide on permanent injunctive relief and damages.

Once the dispute is on its way to the court, employers should be wary of unintentionally waiving their right to arbitrate the underlying contract dispute by, for example, pleading breach of contract and seeking damages in addition to injunctive relief. Employers should also take care to use language that grants a court authority to address the temporary and injunctive relief without addressing the merits of the underlying dispute. Further, in order to mirror the efficient nature of arbitration, employers may consider including a clause that provides for expedited discovery in court pending the outcome of the request for temporary or injunctive relief.

Employers may also consider giving an arbitrator the power to decide requests for emergency relief under expedited arbitration rules agreed to in an arbitration agreement. The AAA, for example, allows for emergency arbitration under its employment rules when the parties agree in their arbitration clause or by special agreement to adopt the AAA's Optional Rules for Emergency Measures of Protection. Under these rules, a party must request emergency relief in writing, and must notify the AAA and the other parties of the nature of the relief sought and the reasons why the relief is required.[111] The AAA will then appoint a single emergency arbitrator from a special panel of emergency arbitrators within one day of receipt of the party's request.[112] The arbitrator must establish a schedule of

---

[109] N.Y. C.P.L.R. § 7502(c).

[110] *See Teradyne Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986) (holding that "a district court can grant injunctive relief in an arbitrable dispute pending arbitration, provided the prerequisites for injunctive relief are satisfied"); *Blumenthal v. Merrill Lynch*, 910 F.2d 1049, 1054 (2d Cir. 1990) ("The issuance of an injunction to preserve the status quo pending arbitration fulfills the court's obligation under the FAA to enforce a valid agreement to arbitrate."); *Ortho Pharmaceutical Corp. v. Amgen Inc.*, 887 F.2d 460, 812 (3d Cir. 1989) (holding that "a district court has the authority to grant injunctive relief in an arbitrable dispute, provided that the traditional prerequisites for such relief are satisfied"); *Merrill Lynch v. Bradley*, 756 F.2d 1048, 1053 (4th Cir. 1985) (holding that "where a dispute is subject to mandatory arbitration under the Federal Arbitration Act, a district court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute if the enjoined conduct would render that process a 'hollow formality.' "); *RGI v. Tucker*, 858 F.2d 227 (5th Cir. 1988); *Performance Unltd. Inc. v. Questar*, 52 F.3d 1373, 1380 (6th Cir. 1995) (courts may grant preliminary injunctive relief in a suit subject to arbitration where prerequisites to relief are met); *Merrill Lynch v. Salvano*, 999 F.2d 211 (7th Cir. 1993) ("the weight of federal appellate authority recognizes some equitable power on the part of the district court to issue preliminary injunctive relief in disputes that are ultimately to be resolved by an arbitration panel"); *Peabody Coalsales Inc. v. Tampa Elec. Co.*, 36 F.3d 46, 47-48 (8th Cir. 1994) (a party may seek injunctive relief from a court pending arbitration when an arbitration agreement contains "qualifying contractual language" providing the court with clear grounds to grant relief without addressing the merits of the underlying arbitrable dispute); *PMS Dist. Co. v. Huber*, 863 F.2d 639, 642 (9th Cir. 1988) (court may grant writ of possession pending outcome of arbitration so long as criteria for writ are met); *Merrill Lynch v. Dutton*, 844 F.2d 726, 727-28 (10th Cir. 1988) (TRO to protect status quo was appropriate in a breach of restrictive covenant action where contract did not specify forum for temporary or injunctive relief).

[111] AAA RULES, *supra* note 82, Rule O-1.

[112] AAA RULES, *supra* note 82, Rule O-2.

consideration of the application within two days of appointment, which must provide a reasonable opportunity for all parties to be heard, either in a formal hearing or by telephone conference or by written submissions.[113] The arbitrator may then enter an interim award if he or she is satisfied that the party seeking the relief has shown that the party is entitled to, and that immediate and irreparable loss or damage will result in the absence of, the emergency relief.[114]

Prehearing Matters

Initiation of Proceedings

Initiating arbitration proceedings is a simple procedure, which typically requires filing a statement of claim or demand for arbitration, a submission agreement or arbitration agreement, and a filing or application fee with the arbitration organization.[115] A FINRA statement of claim must specify the relevant facts and remedies requested.[116] Complainants are not required to submit a pleading that meets the pleading requirements of a court, but it is generally worthwhile to take some time to submit a narrative that describes the material facts underlying the claims. A statement of claim that could have been thrown together in 30 minutes will not likely be met with the serious concern the typical complainant desires. Moreover, at the outset of the hearing, the only papers or information the arbitrator may have about the dispute are the statement of claim and the answer.

A concise statement of claim will likely be appreciated more than either a scant demand or one that is overly legalistic. An employee seeking to recover an unpaid bonus, for example, might briefly describe his or her title, tenure, and duties with the employer and then explain what money is demanded and why the employee believes he or she is entitled to it, including the legal theories on which the claim is based.

Once the statement of claim has been sent to the respondent (usually by the arbitration organization), an answer, with any counterclaims, or affirmative defenses, applicable fees, and, in some forums, a submission agreement must be filed with the arbitration organization within the time specified in the organization's rules.[117]

The response should deal with all allegations of the statement of claim. A general denial of the claims, although generally permitted, is not likely to be as effective as a narrative explanation of the facts as the respondent sees them. Merely denying that the claimant is entitled to a bonus, for example, would not be as effective as explaining that the claimant did not get a bonus because it is company policy not to pay bonuses to employees who are not employed at the time the bonuses are paid. Annexing a copy of the company's policy could go a long way toward disposing of the matter promptly.

A respondent need not revert to responding to a statement of claim with an answer suitable for a court proceeding merely because the statement of claim looks like a complaint drafted for a court. The better way to proceed may be to submit a narrative response that explains the respondent's position in a concise manner.

In a discriminatory discharge matter, for example, in addition to denying that any discrimination occurred, a respondent should also detail the nondiscriminatory basis for the discharge decision and respond to any purported evidence of discriminatory animus or pretext. In addition, it may be useful to add information that is positive but not directly referenced in the statement of claim, such as statistics regarding the diverse make-up of the workforce.

Exchange of Documents

Once an arbitration proceeding has been commenced, document discovery typically ensues promptly. Under the FINRA rules, "parties must cooperate to the fullest extent practicable in the exchange of documents and information to expedite the arbitration."[118] Written requests for documents "are generally limited to identification of individuals, entities, and time periods related to the dispute; such requests should be reasonable in number and not require narrative answers or fact finding. Standard interrogatories are generally not permitted in arbitration."[119]

FINRA rules specify that requests should be satisfied or objected to, or a written explanation provided of why the request cannot be met, within 60 days.[120] Objections must be served on all other parties, but FINRA does not need to be notified. Upon motion to compel discovery, arbitrators may rule on objections, considering the relevance of documents or discovery requests and the costs and burdens to parties to produce the information.[121]

AAA rules provide that the arbitrator has authority to order necessary discovery, by way of deposition, interrogatory, document production, or otherwise, "consistent with the expedited nature of arbitration."[122] Typically, discovery disputes are dealt with during the arbitration management conference, which is held within 60 days of the arbitrator's appointment.[123] JAMS

---

[113] AAA RULES, *supra* note 82, Rule O-3.

[114] AAA RULES, *supra* note 82, Rule O-4.

[115] *See, e.g.*, FINRA CODE, *supra* note 4, Rule 13302(a); AAA RULES, *supra* note 82, Rule 4; JAMS RULES, *supra* note 83, Rule 5; CPR RULES, *supra* note 2, Rule 3.

[116] *See, e.g.*, FINRA CODE, *supra* note 4, Rule 13302(a).

[117] *See, e.g., id.*, Rule 13303(a) (within 45 calendar days of receipt of the statement of claim); AAA RULES, *supra* note 82, Rule 4 (within 15 days of receipt of letter from AAA acknowledging receipt of the demand for arbitration); JAMS RULES, *supra* note 83, Rule 9 (within 14 days of service of the notice of claim); CPR RULES, *supra* note 2, Rule 3 (within 20 days of receipt of notice of arbitration).

[118] FINRA CODE, *supra* note 4, Rule 13505. "Parties may request documents or information from any party by serving a written request directly on the party." FINRA Rule 13506(a).

[119] *Id.* Rule 13506(a).

[120] *Id.* Rule 13507(a).

[121] *Id.* Rule 13508, 13509.

[122] AAA RULES, *supra* note 82, Rule 9.

[123] *Id.* Rule 8.

rules are similar. The parties must "cooperate in good faith in the voluntary, prompt and informal exchange of all non-privileged documents and other information" relevant to the dispute immediately after commencement of arbitration.[124] JAMS rules provide that the parties must complete the initial exchange of documents within 21 days after all pleadings or notices of claims have been received.[125] JAMS rules also impose a continuing obligation on all parties to turn over relevant documents and to supplement identification of witnesses and experts.[126] CPR rules state that ″[t]he Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.″ [127] CPR rules further provide that a pre-hearing conference to address discovery, among other things, should be held promptly after the constitution of the Tribunal. [128]

Whatever forum the parties are in, document discovery in arbitration should not mimic discovery in court. One of the major benefits of arbitration is that discovery costs less. Making demands and raising objections as one would in a court proceeding does not tend to meet that end.

Document requests should be tailored to the dispute at hand and should demand the production of relevant, nonprivileged material. Discovery should not be a fishing expedition. When drafting a document demand, the cardinal rule to keep in mind is that an arbitrator, who may not have the patience or experience that a judge has, will be ruling on disputes. The practitioner should, at the time the demand is made, be able to articulate a good reason for needing the information requested.

Without overgeneralizing, there are certain categories of documents that will almost always be demanded and produced in employment cases. These include:

(a) the employee's personnel file;

(b) the employer's personnel handbook, or excerpts thereof;

(c) documents directly relating to the employee's performance, such as commission history and performance reviews, and, if relevant (e.g., when the employee alleges disparate treatment), similar information about similarly situated employees;

(d) the employee's contract, if any;

(e) the employee's compensation history and, if relevant (e.g., in an equal pay case), similar information regarding other comparable employees;

(f) the employee's income subsequent to the termination of employment.

Objections should also be narrowly drawn. Boilerplate objections to a request's "vagueness" or "overbreadth" do not generally serve any purpose. In the absence of a rule or agreed-on procedure, the most efficient way to deal with overly burdensome document demands may simply be to have a discussion with opposing counsel, go through each request one by one, and attempt to reach an agreement as to what will be produced. A written confirmation of the discussion will serve both as a road map for gathering responsive documents and for framing discovery disputes for the arbitrator.

Subpoenas

Under the FAA, arbitrators may "summon in writing any person to attend as a witness," and may order that they bring any book, record, document, or paper that may be deemed material as evidence to the hearing.[129] If the person summoned fails to attend the hearing, a federal district court with personal jurisdiction over the witness may compel attendance.[130] State law may also provide for subpoenas in arbitration. In New York, for example, an arbitrator or the attorney of record in an arbitration proceeding has the power to issue subpoenas to be served within the state.[131] If the witness refuses to comply, the party that issued the subpoena will need to move in state court for an order compelling the witness' attendance.

A circuit split has developed over the issuance of subpoenas by arbitrators to non-parties under the FAA. Section 7 gives arbitrators the power to summon "any person to attend" a hearing as a witness, but only one Circuit has tenuously held that this clause grants arbitrators the power to compel non-party production of documents outside of a hearing. The Eighth Circuit has ruled that "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing."[132] The entity upon whom the ruling had effect was not named as a party in the arbitration; the Court held that the panel's implicit power was proper regardless of the entity's status as a party.[133] It is worth noting, however, that the entity in question was a party to the contract underlying the dispute at the heart of the arbitration.

The Second and Third Circuits, by contrast, have ruled that § 7 does not vest an arbitrator with the power to compel non-parties to produce documents, but does allow an arbitrator to require a non-party to appear before the panel as a testifying witness with the requested document in hand.[134] Therefore, arbitrators may not force non-parties to produce requested documents outside of a hearing. The Second Circuit has recognized

---

[124] JAMS RULES, *supra* note 83, Rule 17(a).
[125] *Id.*
[126] *Id.* Rule 17(c).
[127] CPR RULES, *supra* note 2, Rule 11.
[128] *Id.* Rule 9.

[129] 9 U.S.C. § 7 (2011).
[130] *Id.*
[131] N.Y. C.P.L.R. § 7505 (2011).
[132] *In re Security Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000).
[133] *Id.* at 871.
[134] *Hay Group Inc. v. E.B.S. Acquisition Group*, 360 F.3d 404 (3d Cir. 2004); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 2008 BL 264221 (2d Cir. 2008).

that "there may be valid reasons to empower arbitrators to subpoena documents from third parties," but ultimately Congress had not built such a power into the FAA.[135] The U.S. District Court for the Northern District of Illinois takes the same approach as the Second and Third Circuits, in light of the absence of guidance from the Seventh Circuit.[136]

The Fourth Circuit has taken an intermediate approach, holding that the FAA does not authorize an arbitrator to subpoena third parties during pre-hearing discovery, absent a showing of special need or hardship.[137] Parties to a private arbitration agreement cannot expect full-blown discovery in light of arbitration's promise of efficient and cost-effective resolution of disputes.[138] Under unusual circumstances, though, a party may petition the district court to compel pre-arbitration document discovery upon a showing of special need or hardship.[139] The court declined to define "special need" but posited that, at a minimum, a party would have to demonstrate that the information sought was otherwise unavailable, except by non-party production.[140]

Given these rulings, parties should consider subpoenas that compel appearance at a hearing. Subpoenas formulated in such a way may cause a non-party witness to simply deliver the documents and waive presence at a hearing.[141]

In FINRA arbitration proceedings, the arbitrators and counsel have the power to "issue subpoenas for the production of documents or the appearance of witnesses" and may issue a subpoena to a party or a non-party.[142] There is no chance for surprise. The party requesting the issuance of a subpoena by an arbitrator must serve the subpoena at the same time and in the same manner on all parties.[143] An arbitration panel also has the power to order the appearance of any employee or associated person of a member of FINRA, or to order the production of any documents in the possession or control of such persons or members, without the issuance of a subpoena.[144] The party requesting the appearance of witnesses by, or the production of documents from non-parties shall pay the reasonable costs of the appearance or production.[145]

Depositions

Largely because of their expense, depositions are uncommon in arbitration proceedings. Most arbitrators will permit some depositions, but each deposition's necessity will be carefully considered. FINRA rules specifically state that "depositions are strongly discouraged in arbitration," but may be permitted upon motion of a party under very limited circumstances.[146] In connection with employment discrimination disputes, depositions may be allowed "if necessary and consistent with the expedited nature of arbitration."[147] AAA rules similarly provide that the arbitrator has authority to order discovery by way of deposition as the arbitrator "considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration."[148] Under JAMS rules, each party is entitled to take one deposition of either the opposing party or a person within the opposing party's control.[149] CPR rules do not specifically address depositions. [150] The parties should attempt to agree on the number, time, location, and duration of depositions, but an arbitrator will determine these issues if the parties fail to come to an agreement.[151] Arbitrators may also, in their discretion, consider recorded testimony even if the other parties have not had the opportunity to cross-examine, but will only give that evidence such weight as the arbitrator deems appropriate.[152]

Sanctions

Occasionally, a party will refuse to comply with an arbitrator's order to produce documents or witnesses. When this happens, it is usually up to the recalcitrant party's adversary to request a sanction. Arbitrators have great leeway and flexibility to impose sanctions.[153] Therefore, it may pay to think creatively when requesting a sanction. Here are some sanctions worth considering.

(a) Ask the arbitrator to make an adverse inference against the party who did not comply with the order. For example, an employer might request that the arbitrator infer from an employee's refusal to provide information about his or her efforts to mitigate damages that no efforts were made.

(b) Ask the arbitrator to assess fees against the recalcitrant party for your time and/or the arbitrator's time dealing with the issue.

---

[135] *Life Receivables*, 549 F.3d at 216, 2008 BL 264221.
[136] *Ware v. C.D. Peacock Inc.*, No. 10 C 2587, 2010 BL 102533 (N.D. Ill. May 7, 2010).
[137] *COMSAT Corp. v. Nat'l Science Found.*, 190 F.3d 269 (4th Cir. 1999).
[138] *Id.* at 275-76.
[139] *Id.* at 276.
[140] *Id.*
[141] *See Life Receivables*, 549 F.3d at 218, 2008 BL 264221.
[142] FINRA CODE, *supra* note 4, Rule 13512.
[143] *Id.*
[144] *Id.* Rule 13513.
[145] *Id.*
[146] FINRA CODE, *supra* note 4, Rule 13510.
[147] *Id.*
[148] AAA RULES, *supra* note 82, Rule 9.
[149] JAMS RULES, *supra* note 83, Rule 17(b).
[150] CPR RULES, *supra* note 2, Rule 11.
[151] *Id.*
[152] *Id.* Rule 22(e).
[153] Under FINRA Rule 13212, an arbitration panel may sanction a party for failure to comply with any Rule or any order of the panel or of an arbitrator. Sanctions may include monetary penalties payable to other parties, preclusion of a party from presenting evidence, the making of an adverse inference against a party, or the assessment of postponement fees, attorneys' fees, or costs and expenses. Sanction powers under JAMS Rule 29 are similar. *See Reliastar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co.*, 564 F.3d 81, 2009 BL 77417 (2d Cir. 2009) (confirming arbitrator's authority to sanction a party for participating in arbitration in bad faith); *Credit Suisse First Boston Corp. v. Patel*, No. 120490-98, 1999 BL 8712 (Sup. Ct. N.Y. County Aug. 4, 1998) (upholding arbitrator's $2,000 sanction against a claimant due to his counsel's conduct; the arbitrators have the power to control the proceedings before them, including by sanctions).

(c) Ask the arbitrator to preclude testimony or evidence from being introduced at the hearing.

(d) Ask the arbitrator to strike a claim or response.

Written Witness Statements

The parties to an arbitration proceeding sometimes agree to provide to the arbitrator and each other written witness statements in advance of the hearing. The statements, usually in narrative form, are sworn and submitted in lieu of direct testimony. Unless the witness appears at the hearing for cross-examination (and rebuttal), witness statements are given little weight by arbitrators.

A typical exchange of written statements would occur as follows. First, the parties contemporaneously exchange the statements with each other. Thereafter, the parties exchange supplemental statements. Finally, the statements and supplemental statements are submitted to the arbitrator. Cross-examination and rebuttal are all that is left for the hearing.

The submission of written witness statements can save significant time (and thus cut costs) at a hearing. Moreover, if the parties exchange witness statements before the hearing, cross-examination preparation time is significantly reduced. Nonetheless, written witness statements have disadvantages. First, the time and effort spent preparing them may exceed the time and expense saved at the hearing. Moreover, they reduce the ability of a party to change positions or theories during the hearing, as the scope of the testimony a particular witness can give is limited by the initial statement.

Prehearing Exchanges

In addition to exchanging documents and, sometimes, witness statements before an arbitration hearing, the parties usually exchange a list of witnesses whom they intend to produce on their direct case and documents they intend to introduce into evidence at the hearing.

FINRA rules, for example, require the parties to exchange, at least 20 days before the first scheduled hearing date, documents they intend to present at the hearing and a list identifying witnesses they intend to present.[154] Witnesses not identified and documents not produced in accordance with the rules will be excluded, unless the arbitrator(s) determines that good cause exists for the failure to produce or identify.[155] JAMS rules require prehearing exchange of document and witness lists at least 14 days before the arbitration hearing.[156] The witness list must include "a short description of the anticipated testimony of each such witness, and an estimate of the length of the witness' direct testimony."[157]

Prehearing Briefs and Motions

There are few hard and fast rules governing prehearing submissions and motions. JAMS rules provide that arbitrators may require parties to submit "concise written statements of position" at least seven days before the hearing date.[158] Rebuttal statements or other written submissions may be permitted at the discretion of the arbitrator.[159] JAMS does not require position statements in complex cases, leaving this to the discretion of the arbitrator.[160]

A prehearing brief that sets forth the applicable substantive legal principles and the facts the party intends to prove at the hearing is particularly useful in a complex case. Such a submission, however, may limit the party's flexibility to adjust his or her position at the hearing and, in any event, is not an inexpensive endeavor. Unless the arbitrator orders such a prehearing submission, it is prudent to consult with one's adversary and at least advise him or her of one's intentions. The arbitrator may be unwilling to accept a prehearing submission from only one party, particularly when the party who has not prepared one was not advised in advance of the adversary's planned submission. Motions for summary dismissal, based on purely legal matters such as the applicable statute of limitations, should also be considered and should be predisclosed to one's adversary.

Finally, it may be worthwhile to make a motion in advance of the hearing, or at its outset, regarding important evidentiary matters that a party believes will arise. For example, if a party to a compensation dispute believes that the opponent's proposed compensation expert is unqualified, it may be sensible to raise that issue, in a written submission, early on.

Arbitration Hearing

Applicability of Rules of Evidence

Unless the parties agree to the use and applicability of evidentiary rules in arbitration, such rules typically do not apply. Generally, the arbitrator or panel decides what evidence to admit based on judgments of materiality and relevance, and is not required to follow state or federal rules of evidence.[161] JAMS rules, however, do require the arbitrator to "apply applicable law relating to privileges and work product."[162] CPR rules similarly state that "the Tribunal shall apply the lawyer-client privilege and the work product immunity."[163] Aside from this limitation, under JAMS rules, "strict conformity to the rules of evidence is not required."[164] Although arbitrators, particularly arbitrators who are lawyers, may use evidentiary rules as guidelines, their lack of rigorous application tends to contribute to the informality of arbitration.

---

[154] FINRA CODE, *supra* note 4, Rule 13514.
[155] *Id.*
[156] JAMS RULES, *supra* note 83, Rule 20(a).
[157] *Id.*
[158] *Id.* Rule 20(b).
[159] *Id.*
[160] *Id.*
[161] FINRA CODE, *supra* note 4, Rule 13604; AAA RULES, *supra* note 82, Rule 30; JAMS RULES, *supra* note 83, Rule 22(d).
[162] JAMS RULES, *supra* note 83, Rule 22(d).
[163] CPR RULES, *supra* note 2, Rule 12.
[164] JAMS RULES, *supra* note 83, Rule 22(d).

Who May Attend?

Arbitration hearings are not open to the public. The arbitrator has authority, generally, to exclude witnesses and disinterested parties from the hearing room. In an employment dispute, the hearing is typically attended by only the employee and a representative of the employer and their counsel. FINRA rules provide, for example, that "[t]he parties and their representatives are entitled to attend all hearings. Absent persuasive reasons to the contrary, expert witnesses should be permitted to attend all hearings. . . . The panel will decide who else may attend any or all of the hearings."[165] Similarly, under AAA rules, the arbitrator has authority to "exclude witnesses, other than a party, from the hearing during the testimony of any other witness" and has authority to decide whether any nonwitnesses may attend.[166] Under JAMS rules, "[i]t is expected that the Employee will attend," as "will any other individual Party with information about a significant issue."[167]

Steps to Maintain Confidentiality

Confidentiality is often a paramount concern to parties to employment disputes. Both employees and employers have interests in maintaining confidentiality. In addition, because the private personnel records of nonparty employees are often involved, confidentiality is as a practical matter compulsory. Because confidentiality is one of the advantages of arbitration, the forum's rules often provide some measures to protect against disclosure. AAA rules, for example, provide that 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."[168] Similarly, JAMS rules provide that the parties and the arbitrators "will maintain the confidential nature of the Arbitration proceeding and the Award" and permit the arbitrator to issue orders to protect the confidentiality of proprietary information, trade secrets, or other sensitive information.[169] CPR rules also provide that "[u]nless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration. . .and unless otherwise required by law or to protect a legal right of a party." [170] Awards in FINRA proceedings are publicly available online, as are the names of the parties and their representatives, a summary of the issues in controversy, the relief requested, the names of the arbitrators, and the location of the hearings.[171]

At the outset of a dispute, before documents have been exchanged, it may be prudent to enter into a confidentiality stipulation with all parties. Such a stipulation should, at a minimum, provide that documents, information, and testimony only be used in connection with the dispute and not be disclosed to third parties, other than to the arbitrator and the forum's personnel. Additional provisions should be considered, including provisions requiring the return or destruction of documents upon resolution of the dispute and, with respect to particularly sensitive information (such as, for example, compensation information regarding employees who are not parties to the dispute), additional protections, such as that information can only be shared among counsel.

In addition, it may be advisable to agree to produce certain documents with confidential information redacted from them. For example, trade secret information or private information about employees not parties to the dispute should be redacted. The arbitrator may have to review and rule on the redactions if the parties do not agree to them.[172]

Order of Presentation

Unless otherwise agreed by the parties, an arbitration hearing usually proceeds as a court proceeding does. After opening statements by the claimant and then by the respondent, the claimant presents its case through live testimony of witnesses, each of whom is subject to cross-examination and rebuttal. After the completion of the claimant's direct case, the respondent presents its witnesses. There is usually an opportunity for a rebuttal case. Finally, there are closing arguments.

AAA rules specify the order of presentation at the hearing. Once administrative matters are taken care of (recording of date, time, place, attendance, and receipt into record of demand and answer), the arbitrator may ask for statements clarifying the issues involved.[173] Each witness is subject to direct and cross-examination.[174] The arbitrator has authority to set the rules for the conduct of the proceeding.[175] Under JAMS rules, the arbitrator determines the order of proof, "which will generally be similar to that of a court trial."[176] Similarly, under CPR rules, "[t]he Tribunal shall determine the manner in which the parties shall present their cases."[177] FINRA rules expressly provide that a claimant is entitled to proceed first, followed by the respondent's defense, but the panel has discretion to vary the order in which the hearing is conducted so long as each party is accorded a fair opportunity to present its case.[178]

Some modifications to the usual order of presentation may be worthwhile. Arbitration is usually a more flex-

---

[165] FINRA CODE, *supra* note 4, Rule 13602.
[166] AAA RULES, *supra* note 82, Rule 22.
[167] JAMS RULES, *supra* note 83, Rule 22(a).
[168] AAA RULES, *supra* note 82, Rule 23.
[169] JAMS RULES, *supra* note 83, Rule 26(a), (b).
[170] CPR RULES, *supra* note 2, Rule 18.
[171] FINRA CODE, *supra* note 4, Rule 13904.
[172] A "Sample Confidentiality Stipulation" appears as a practice tool.
[173] AAA RULES, *supra* note 82, Rule 28.
[174] *Id.*
[175] *Id.*
[176] JAMS RULES, *supra* note 83, Rule 22(b).
[177] CPR RULES, *supra* note 2, Rule 12.
[178] FINRA CODE, *supra* note 4, Rule 13607.

ible forum with respect to witness schedules than court. If a particular witness is not readily available, arbitrators may permit that witness to give testimony out of order or may interrupt the testimony of a readily available witness to obtain the necessary testimony. In the typical employment dispute, the employee usually calls as a witness the employer witness who was the decision maker. In a court proceeding, the employer might decide to waive cross-examination and recall the witness on its direct case. In arbitration, however, such a strategy, which is usually inconvenient for the employers' witnesses, is usually unnecessary.

The Record

Some arbitration forums require the proceedings to be transcribed or recorded. Others leave transcription up to the parties. When the record is transcribed, ordinarily the arbitrator is provided with a copy, as is the opposing party. FINRA rules, for example, provide that a tape, digital, or other recording of all hearings shall be made.[179] The panel may order the parties to provide a transcription of the proceedings, of which a copy must be provided to each arbitrator and party. The panel decides which party or parties will bear the cost of the transcription.[180] Under AAA rules, a party desiring a stenographic record of the hearing must make arrangements directly with a stenographer and must notify the other parties of this arrangement at least three days in advance of the hearing.[181] If a transcript is agreed by the parties, or is determined by the arbitrator to be the official record, it must be provided to the arbitrator and made available to the other parties for inspection.[182] Similar rules apply with respect to arbitrations before JAMS.[183]

When the party has a choice as to transcription, several considerations are relevant. First, cost must be considered. Transcription, particularly if fast turnaround is desired, is expensive. Second, it is wise to consider what use will be made of the transcript. If hearing dates are scheduled far apart, having a transcript can be very useful in avoiding duplication and confusion. If the matter is complicated or there are to be many hearing sessions, a transcript may also prove useful. A transcript is a necessity if the parties are required to or intend to submit a post-hearing brief to the arbitrator. A submission with citations to a record is far more convincing than a submission citing mere recollections of the testimony. A transcript is also useful if one wishes to be able to vacate the decision. Finally, it is also wise to consider that, because the hearing is being transcribed, there is an increased likelihood that the parties and their counsel will behave in a more civil manner.

[179] *Id.* Rule 13606(a)(1).
[180] *Id.* Rule 13606(a)(2).
[181] AAA RULES, *supra* note 82, Rule 20.
[182] *Id.*
[183] *See* JAMS RULES, *supra* note 83, Rule 22(k) ("The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.").

The Award

Parties may agree in advance to the form of the written award. The form of the award is significant with respect to an effort to vacate it. The usual request by the parties is that the award should contain "written reasons." Without "written reasons," a court faced with a motion to vacate an award will be hard-pressed to do so.

AAA rules provide that the award shall be made no later than 30 days from the closing of the hearing and that the award is publicly available (without the names of the parties), on a cost basis.[184] The award must be in writing, signed by a majority of the arbitrators, and shall provide "written reasons," unless the parties have agreed otherwise. JAMS rules are nearly identical.[185] CPR rules are similar to AAA and JAMS rules but do not provide a timetable for deciding an award.[186] FINRA arbitration rules require all awards to be publicly available, and to contain the names of the parties and their representatives, if any, a summary of the issues in controversy, the relief requested, the relief awarded, a statement of any other issues resolved, the number and dates of hearing sessions, the allocation of fees, the names of the arbitrators, and the location of the hearings.[187]

Confirmation, modification, and vacation of an award are governed by state law. In New York, a court must confirm an arbitration award within a specified time period for a judgment on the award to be enforceable. Applications to vacate or modify an award may be made at the time an adverse party moves to confirm the award or within a specified time of the award. If an application to vacate or modify an award is denied, the court must confirm the award.

Appeals

It is settled law that there are very few grounds on which a court may overturn a decision of arbitrators. The FAA allows a reviewing court to vacate an arbitration award only in extremely narrow circumstances, including when the award was procured by corruption, fraud, or undue means, bias of the arbitrators, or misconduct of the arbitrators or when the arbitrators exceeded their powers.[188] The statute does not permit judicial review of the merits of awards. Courts have recognized (1) FAA standards of corruption, fraud, or misconduct by the arbitrator,[189] (2) FAA standards of bias of the arbitrator,[190] and (3) FAA standards when

[184] AAA RULES, *supra* note 82, Rule 39.
[185] JAMS RULES, *supra* note 83, Rules 24(a), (h).
[186] CPR RULES, *supra* note 2, Rule 15.
[187] FINRA CODE, *supra* note 4, Rule 13904. FINRA awards are accessible online, at http://finraawardsonline.finra.org/.
[188] 9 U.S.C. § 10.
[189] *See United Food & Comm. Workers Int'l Union Local 50N v. SIPCO*, 8 F.3d 10, 1 EXC 263 (8th Cir. 1993).
[190] *See Olson v. Merrill Lynch, Pierce, Fenner & Smith*, 51 F.3d 157, 1 EXC 431 (8th Cir. 1995) (finding arbitrator had significant business relationship with respondent); *see also Seligman v. Allstate Ins. Co.*, 195 Misc.2d 553, 756 N.Y.S.2d 403 (N.Y. Sup. Ct. 2003) (vacating arbitration award because the arbitrator failed to disclose his 20-year employment with the respondent company).

the arbitrator exceeded his or her power.[191] The courts have fashioned some additional narrow standards, for example, that the arbitrator engaged in a "manifest disregard" of applicable law (although this standard has been subject to much scrutiny),[192] that the award is totally irrational,[193] or that the award is contrary to public policy.[194]

Historically, the "manifest disregard" standard of review was "severely limited"[195]—the court must have found "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit and clearly applicable to the case."[196] In 2008, the U.S. Supreme Court eliminated the manifest disregard standard. In *Hall Street Associates L.L.C. v. Mattel, Inc.*, the Supreme Court ruled that the grounds for vacatur and modification of arbitration awards under FAA sections 10 and 11 are exclusive, and that parties may not expand by contract a court's standard of review of awards.[197] Courts must grant confirmation of awards in all cases, "except when one of the 'prescribed' exceptions applies."[198] Indeed, a more expansive view of the grounds for vacatur would "open[] the door to full-bore legal and evidentiary appeals" that would fail to "maintain arbitration's essential virtue of resolving disputes straightaway."[199] Accordingly, it seems that an arbitrator's manifest disregard of the law may not be an *independent* ground for vacatur, although the Court acknowledged that the doctrine may originally have been intended as shorthand for FAA subsections authorizing vacatur when arbitrators were guilty of misconduct or had exceeded their powers.[200]

In the wake of *Hall Street*, circuit courts have split over whether manifest disregard of the law may still be a ground for challenging arbitration awards. The Fifth and Eleventh Circuits have held that *Hall Street* abrogates manifest disregard of the law completely as both a judicially and contractually created ground for vacatur under the FAA.[201] The Fifth Circuit extensively reviewed the legislative history of the FAA and stressed that "confining the perimeter of federal court review of arbitration awards" is a widely accepted practice that enjoys a long history in jurisprudence.[202] As a nonstatutory ground for vacatur, then, manifest disregard is invalid under *Hall Street* in these two circuits.

In contrast, the Sixth Circuit, although confirming that review of an arbitrator's award is one of the "narrowest standards of judicial review in all of American jurisprudence," has held that manifest disregard of the law remains a valid *independent* means of vacating an award.[203] While this seemingly contradicts the Supreme Court's holding in *Hall Street*, the Sixth Circuit insisted that *Hall Street* prohibited *private parties* from supple-

---

But see Skyview Owners Corp. v. Service Employees Int'l Local 32B-J, No. 04 Civ. 4643, 2004 BL 4096, 3 EXC 41 (S.D.N.Y. Oct. 5, 2004) (finding arbitrator's former business relationship with a partner in law firm representing party to the arbitration did not warrant vacating arbitration award); *Montez v. Prudential Sec. Inc.*, 260 F.3d 980, 3 EXC 40 (8th Cir. 2001) refusing to vacate arbitration award when the arbitrator failed to disclose that, five years prior to the arbitration, he had business relationships with the law firm that represented one of the parties because there was no "evident partiality" of the arbitrator because he did not have any financial interest related to the law firm or its client, and the relationship ended five years ago).

[191] *See Detroit Auto Inter-Ins. Exch. v. Gavin*, 331 N.W.2d 418, 1 EXC 395 (Mich. 1982).

[192] *See infra, this section.*

[193] *See Prudential-Bache Sec. Inc. v. Tanner*, 72 F.3d 234, 1 EXC 187 (1st Cir. 1995) (holding vacatur appropriate if decision is completely irrational); *Rochester City Sch. Dist. v. Rochester Teachers Ass'n*, 41 N.Y.2d 578, 1977 BL 810, 1 EXC 408 (1977) (same). *But see Sands Bros. & Co. Ltd. v. Generex Pharms. Inc.*, 749 N.Y.S.2d 17, 1 EXC 432 (N.Y. App. Div. 2002) (vacating a $28 million arbitration award that the court found to be "too indefinite to enforce").

[194] *See Exxon Corp. v. Baton Rouge Oil*, 77 F.3d 850, 1 EXC 242 (5th Cir. 1996); *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146, 1 EXC 406 (1995). In *Inv. Partners L.P. v. Glamour Shots Licensing Inc.*, 298 F.3d 314, 2 EXC 34 (5th Cir. 2002), the Fifth Circuit held that it did have appellate jurisdiction to determine whether an arbitration clause was against public policy, even though there had been no arbitration yet. In *Gulf Guaranty Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 2 EXC 39 (5th Cir. 2002), the Fifth Circuit held that objections to the fairness of the arbitrator selection process contained within an arbitration agreement are not ripe for judicial review until an award is issued. It distinguished its prior holding in *Glamour Shots*, noting that there, the appellant challenged the entire award on public policy grounds, whereas here, the appellant "makes no such challenges to the making of or validity of the arbitration agreement, nor do these claims suggest that the agreement is void, unenforceable, or worthy of rescission based on public policy or any other ground."

[195] *Gov't of India v. Cargill Inc.,* 867 F.2d 130, 133, 1 EXC 201 (2d Cir. 1988).

[196] *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 1 EXC 195 (2d Cir. 1997).

[197] *Hall Street Assocs. L.L.C. v. Mattel Inc.*, 552 U.S. 576, 2008 BL 62703 (2008). This holding resolved a previous circuit split about contractual expansion of standards of review under the FAA. The Third, Fourth, and Fifth Circuits allowed for contractual expansion, reasoning that arbitration agreements were contracts that could be modified by the parties. *See Roadway Package Sys. Inc. v. Kayser*, 257 F.3d 287, 293, 3 EXC 44 (3d Cir. 2001); *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262, 1997 BL 751 (4th Cir. 1997) (per curiam) (unpublished decision); *Gateway Tech. Inc., v. MCI Telecomm. Corp.*, 64 F.3d 993, 997, 3 EXC 48 (5th Cir. 1995). The Ninth and Tenth Circuits, however, did not permit contractual modification of the standard of review, reasoning that expansion would undermine the independence of the arbitration process. *See Kyocera Corp. v. Prudential-Bache Trade Servs. Inc.,* 341 F.3d 987, 1000, 3 EXC 52 (9th Cir. 2003) (overturning *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 1 EXC 274 (9th Cir. 1997)); *Bowen v. Amoco Pipeline*, 254 F.3d 925, 934, 2 EXC 40 (10th Cir. 2001).

[198] 552 U.S. at 587, 2008 BL 62703.

[199] *Id.* at 588.

[200] *Id.* at 585; 9 U.S.C. §§ 10(a)(3), (a)(4).

[201] *Frazier v. CitiFinancial Corp. LLC*, 604 F.3d 1313, 2010 BL 95026 (11th Cir. 2010); *Citigroup Global Mkts. Inc. v. Bacon*, 562 F.3d 349, 2009 BL 43335 (5th Cir. 2009).

[202] *Bacon*, 562 F.3d at 351, 352, 2009 BL 43335.

[203] *Coffee Beanery Ltd. v. WW LLC*, 300 Fed. Appx. 415, 418, 2008 BL 293737 (6th Cir. 2008).

menting by contract the FAA's statutory grounds, but did not restrict *judicially* created grounds for vacatur.[204] So, in light of *Hall Street*'s perceived ambiguity, judicial review for legal error remains alive and well in the Sixth Circuit as a judicial construct.[205]

The Second and Ninth Circuits, on the other hand, have taken a middle view of *Hall Street*. In both circuits, an arbitrator's manifest disregard of the law remains a valid ground for vacatur of an award, but only inasmuch as the doctrine defines existing statutory grounds under section 10 of the FAA.[206] In *Hall Street*, the Supreme Court speculated that manifest disregard may have "merely referred to the § 10 grounds collectively, rather than adding to them" or "may have been shorthand for . . . the subsections authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.' "[207] In *Stolt-Nielsen v. Animalfeeds*, the Second Circuit seized on this language, holding that where an arbitrator knows of relevant, applicable, and unambiguous law and manifestly disregards it, he has violated the contract by failing to arbitrate under its terms. Thus, he has exceeded his powers under the FAA.[208]

The Supreme Court affirmed the ambiguity of manifest disregard after *Hall Street* when it reviewed the Second Circuit's holding in *Stolt-Nielson v. Animalfeeds*. In a footnote, the Court stressed, "[w]e do not decide whether 'manifest disregard' survives our decision in *Hall Street* . . . as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10."[209] In its final ruling, though, the Court assumed and applied the Second Circuit's manifest disregard standard, and has not since ruled on its viability. Consequently, manifest disregard of the law remains an unsettled doctrine under the FAA. Expansion by contract of judicial review of arbitration awards under the FAA, however, has been virtually abolished by the Court's decision in *Hall Street*.

While employers and executives drafting arbitration agreements will not know whether they may be seeking to confirm or vacate an award, issues regarding the scope of judicial review should be carefully evaluated at the drafting stage. If seeking expansive judicial review, employers and executives should provide in their agreement that the arbitrator must issue a written decision explaining any findings. While arbitrators generally do not have to issue written decisions, such a contractual requirement, along with an enforceable forum selection clause in a jurisdiction providing for relatively expansive review of arbitral awards, will provide the most scrutiny of arbitral awards available.

Mediation Process

Threshold Issues

Once the parties have agreed that mediation should be attempted, the parties need to reach agreement on several matters.

The Mediator

First, the parties must select a mediator or mediation service. Organizations such as AAA, JAMS, and the CPR Institute for Dispute Resolution not only have lists of mediators but also have rules, which are designed to facilitate the mediation process. Also, some courts and administrative agencies offer mediation services at no cost to the parties.

When selecting a private mediator, several criteria are relevant, including the mediator's availability, experience, training, fees, and knowledge of the subject matter. The parties should select a mediator who can devote a significant block of time, at least half a day, to the mediation. The mediation may be doomed from the start if the parties are rushed or forced to cut short or adjourn a mediation session that is in progress. In addition, the mediator should be available in advance for consultation and guidance (e.g., does the mediator want a premediation position statement or copies of the pleadings? how will the mediation proceed?).

Particularly in complicated disputes, it is useful to select a mediator with subject matter expertise, so that extensive time need not be spent educating the mediator about the law. It goes without saying that a mediator who has been trained in mediation techniques and/or is experienced in successfully mediating employment disputes is more likely to achieve a settlement. Finally, the parties should select a mediator whose fees are reasonable. The parties should be willing to pay higher fees if the stakes are high.

Location of Mediation

Before any mediation, the parties need to agree to a location. Most organizations that provide mediation services also provide a neutral location. To increase the chances of a successful mediation, the mediation should not be held in a location that would likely make one or both of the parties uncomfortable. The parties are unlikely to make an effort to resolve the dispute if certain necessities, such as a private space in which to caucus outside of the presence of the adversary or food and drinks, are not available. A mediation may also be un-

---

[204] *Id.* at 418-19.

[205] The Sixth Circuit upheld its conclusion about manifest disregard in a second unpublished opinion a month after *Coffee Beanery*. *See Martin Marietta Materials Inc. v. Bank of Okla.*, 304 Fed. Appx. 360, 2008 BL 281386 (6th Cir. 2008) (holding that awards must be upheld where the arbitrator was arguably construing or applying the contract, but that a court may vacate where the award was so untethered to the terms of the agreement that it would cast doubt on whether the arbitrator was engaged in interpretation at all).

[206] *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 2009 BL 17465 (9th Cir. 2009); *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 548 F.3d 85, 2008 BL 248187 (2d Cir. 2008), *reversed on other grounds*, 130 S. Ct. 1758, 2010 BL 92476, 9 EXC 10 (2010); *T. Co. Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 2010 BL 7411 (2d Cir. 2010) (confirming that manifest disregard as an explanation of section 10 is valid as a ground for vacatur).

[207] *Hall Street*, 552 U.S. at 585, 2008 BL 62703.

[208] 9 U.S.C. § 10(a)(4).

[209] *Stolt-Nielsen*, 559 U.S., 672 n.3.

successful if a former employee is required to come to the employer's offices for the mediation.

Premediation Information Exchange

The parties may consider exchanging documents or information or position statements with each other or sharing information with the mediator in advance of the mediation to the extent that such exchange has not already occurred. It is usually a great time saver to provide the mediator, and sometimes one's adversary, with a position statement before the mediation. The parties should agree in advance in writing that any information obtained during or in connection with a mediation cannot be used in the litigation and cannot be disclosed publicly.

Who Will Attend?

One must also decide in advance of a mediation who will attend. Certainly, the party or representative of the party with information regarding the dispute and authorization to settle the dispute should attend. Parties may wish to obtain assurances before the mediation that a decision maker will attend the mediation.

Costs

The parties should agree as to how the costs of the mediation will be shared. Some employers may find it effective to pay the mediator's fee, if that is what it takes to get the employee to the table. However, some cost sharing is usually wise to ensure that all parties take the process seriously.

The Mediation Agreement

The parties should consider entering into a written agreement before the mediation that details the parties' and mediator's agreement as to fees, cost sharing, date and location, and confidentiality.

Preparing for the Mediation

Although mediation is an informal process, the parties and their counsel should prepare for the mediation, as detailed below.

(a) *Identify significant legal issues.* For example, to the extent a claim or defense is barred by applicable law, gather supporting legal authority. Consider the available remedies should the claim or defense be proven.

(b) *Gather significant documents and information concerning liability and damages.* An employee in a wrongful discharge case, for example, should be prepared to state the income lost as a result of the termination and the efforts made to mitigate damages. The employer should, in the same dispute, gather information concerning the employee's compensation before the termination.

(c) *Prepare a chronology or summary.* The parties should come to the mediation with knowledge of the significant factual issues.

(d) *Plan a presentation.* Both parties should be prepared to present orally the factual and legal issues of the dispute. In addition, it is worthwhile to determine, in advance, what information will be shared with the mediator and what information will be shared with both the mediator and the adverse party. Strategically, holding back certain information from the adverse party may prove important if the mediation fails to resolve the case.

(e) *Evaluate the stakes and determine monetary limits.* The parties should realistically assess the downside and upside of litigating the matter to closure. Once that is done, the parties should consider their monetary limits, taking into consideration the costs of litigating the matter (including nonmonetary costs).

(f) *Develop creative settlement options.* There may be items that the adverse party desires that can be offered at little or no cost to the other side, e.g., a reference, an apology, a public announcement, or a charitable contribution.

Procedures

Most mediations of employment disputes last a full day. Typically, the mediator opens the session by explaining the process or agenda. A joint session usually follows, during which each of the parties explains their substantive positions.

Ordinarily, the employee will speak first and will speak for himself or herself, rather than having his or her attorney speak. The employer's counsel (or employer representative) is then given the opportunity to speak. Generally, these opening statements are somewhat adversarial, but the goal is usually to enable the mediator and the parties to focus on areas of difference.

After opening statements, the mediator typically identifies the critical issues based on the parties' statements. The mediator then usually meets with the parties separately in private sessions called "caucuses." Shuffling back and forth between the parties, the mediator attempts to find common ground and offer alternatives for the parties to consider.

For example, a party may be very focused on legal issues, e.g., "there is no cause of action in this state for wrongful discharge." Assuming there are other legal theories under which the employee might recover, the mediator will communicate that position to the employee and also attempt to focus the employer on settlement options rather than on legal issues. There is usually a final joint session during which the parties either agree to settle the case or conclude the mediation.

Settlement Agreement

If a settlement is reached through mediation, the written agreement should be drafted and executed promptly. Some practitioners advocate entering into the agreement before closing or adjourning the mediation so that the mediator remains available to help resolve disputes. This may be particularly important in an employment dispute, when it is sometimes the case that, after a monetary settlement is reached, the settlement is foiled because the parties cannot agree to or misunderstand tax allocation issues and other terms of the settlement. It is useful to prepare a draft settlement agreement in advance of the mediation, which can be

quickly modified as necessary after the settlement has been reached.

Fundamentally, the settlement agreement will contain a general release of claims by the employee in exchange for usually monetary consideration. Other common provisions in settlement agreements include:[210]

(a) confidentiality of agreement,

(b) protection of confidential information,

(c) nondisparagement,

(d) the affirmation of continuing obligations (if any), such as noncompetes,

(e) return of employer property,

(f) tax allocation,

(g) attorneys' fees,

(h) liquidated damages for breach, and

(i) arbitration provision.

---

[210] A "Sample Settlement Agreement and Release" appears as a practice tool.