

RETHINKING EMPLOYMENT LAW STRATEGIES

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Paul Peter Nicolai, Esq.²

EMPLOYERS HAVE LOST THE WAR OVER WHETHER HANDBOOKS CAN BE ENFORCEABLE CONTRACTS. MOST STATES NOW HOLD THEY CAN. THE TESTS USED TO MAKE THIS DECISION CASE BY CASE ARE FACT AND MOTIVE DRIVEN. THIS MEANS MORE CASES REQUIRE MORE DISCOVERY AND TRIALS. THIS INCREASES COST AND EXPOSURE TO ALL PARTIES. THE RECENT **CIRCUIT CITY** DECISION, WITH RULINGS IN OTHER JURISDICTIONS, POINTS TO A WAY TO CONTROL THE EXPENSE AND RISK OF THIS PROCESS - AN EFFECTIVE MANDATORY ADR POLICY TIED TO AN INTERNAL GRIEVANCE SYSTEM. EMPLOYERS SHOULD WAKE UP TO THE FACT THAT CONTRACT-BASED EMPLOYMENT LITIGATION IS HERE TO STAY AND CHANGE THEIR PROGRAMS TO DEAL WITH THIS REALITY.

The "standard" employment policy strategy has for the past decade or so been a combination of (1) creating a set of employment policies; (2) publishing those policies in an employee handbook; (3) including language in the employee handbook that it is only a guide; (4) including language in the employee handbook to the effect that it is not a binding agreement; and (5) hoping for the best.

The recent decision by the United States Supreme Court in **CIRCUIT CITY v. ADAMS**³ with other legal developments, especially in Massachusetts, should cause employers to reconsider their employment policy strategies. They create a situation where employers can take a much more positive approach to controlling the process of and limiting the cost of employment disputes. A new strategy for handling employment disputes will benefit employers by reducing the transaction or legal costs associated with employment litigation and reducing some potential risk associated with these litigations. Even if an employer has employment practices liability insurance, setting up new employment policy strategies should lead to better underwriting and lower premiums.

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³ 121 S.Ct. 1302, 85 *Fair Empl.Prac.Cas.* (BNA) 266, 2001 *Daily Journal D.A.R.* 1466, 2001 *Daily Journal D.A.R.* 2849 (2001).

WHY AN ADR POLICY MAKES SENSE

There are several reasons why an alternative dispute resolution (ADR) policy⁴ makes sense, especially for employers:

(1) Cost. The cost of litigating an employment dispute with one employee can reach several hundred thousand dollars. One large national company experienced average costs per dispute of about \$11,000 per case - including attorney fees - after it set up an ADR program. A four year survey of litigation cost versus arbitration cost showed that arbitration cost was, on average, half the cost of traditional litigation and mediation was on average one-third the cost of traditional litigation.

(2) Time. ADR typically resolves disputes faster than litigation. Generally, an arbitration is over in several months. A lawsuit will take up to five years depending on the jurisdiction. For arbitration, it gives finality because an arbitration award is rarely appealable. A quick, inexpensive resolution of a dispute can be advantageous to both employees and employers. ADR also allows the parties to tailor the procedures used during the ADR process, such as controlling the amount and type of discovery and remedies available.

(3) Confidentiality. Because ADR is a private dispute resolution process, parties can more easily maintain the confidentiality of business, personal and medical information.

(4) Employees have won the handbook as contract war. As most employers know, the legal war over whether employee handbooks are contracts raged for twenty years. At first, employers won these cases fairly regularly, often on summary judgment motions.

Early cases frequently looked at the language of the handbook. If the handbook said it was not a contract, said the employer had the right to change the handbook whenever it wanted, and said it was merely a guide to the company's policies, employers generally won.⁵ This has changed through the application of the implied contract doctrine, the promissory estoppel doctrine and the unilateral contract doctrine. Most states now hold that employee handbooks can, under the right circumstances, be enforced.⁶

⁴ This article does not discuss the use of ADR in benefit plans subject to the Employee Retirement Income Security Act of 1974 (ERISA). That statute requires that all private pension and welfare plans establish a procedure to afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review of the decision denying the claim. The American Arbitration Association has promulgated its EMPLOYEE BENEFIT PLAN CLAIMS ARBITRATION RULES, effective in 1988 which provide a process for these claims.

⁵ An example of this kind of decision is found in JACKSON v. ACTION FOR BOSTON COMMUNITY DEVELOPMENT, INC., 403 Mass. 8, 122 Lab.Cas. P 56,947, 3 IER Cases 1102 (Mass., 1988).

⁶ See, e.g., Comment, UNILATERAL MODIFICATION OF EMPLOYMENT HANDBOOKS: FURTHER ENCROACHMENTS ON THE EMPLOYMENT-AT-WILL DOCTRINE, 139 U.Pa.L.Rev. 197, 208-209 n. 76 (1990) (citing cases from thirty-three States and the District of Columbia).

The modern view is that the idea that an employer may ignore promises made in a personnel manual is in increasing disfavor in this country.⁷ Management distributes personnel manuals because it is thought to be in its best interests to do so. Such a practice encourages employee security, satisfaction, and loyalty and a sense that every employee will be treated fairly and equally.⁸ Management expects that employees will follow the obligations that the manual sets forth. Courts recently have been reluctant to allow management to reap the benefits of a personnel manual while avoiding promises freely made in the manual that employees reasonably believed were part of their arrangement with the employer. Management voluntarily offers, and defines the terms of, any benefit set forth in its unbargained for personnel manual. The employees may have a reasonable expectancy that management will follow a manual's provisions. Without belittling the importance of its specific provisions, the context of the manual's preparation and distribution is the most persuasive proof that it would be almost inevitable for an employee to regard it as a binding commitment, legally enforceable, concerning the terms and conditions of his employment.^{9 10}

Lacking express employment contracts that prohibit or limit the discharge of an employee, many courts have inferred implied contractual obligations from the factual circumstances of relationships between particular employers and employees. A limitation of the right of the employer to end the employment may be implied if, from all the circumstances surrounding the employment relationship, a reasonable person could conclude that both parties intended that the employer's right to end the employment relationship at-will have been limited by the implied agreement of the parties. In deciding if implied contractual rights exist, courts look to evidence from which the essential elements of contracts can be inferred. These include offer and acceptance, consideration, intent, and authority to reach binding agreements. Factors to be considered in such determinations include timing, the existence of disclaimers, and the form of the agreements and the existence of modifications. Even where there has been no acceptance of an offer, obligations may be inferred under the doctrine of promissory estoppel when an employee has justifiably relied on an employer's promise to his detriment.¹¹

Even without the elements of an implied bilateral or unilateral contract, the doctrine of promissory estoppel may prevent an employer from denying the effect of its promises or assurances if an employee or prospective employee has justifiably relied on them to his detriment. Courts in several states have applied the doctrine to avoid injustice by enforcing promises on which at-will employees have relied. Specifically, an employee could probably enforce the firing procedures listed in an employee manual

⁷ See *SMALL v. SPRINGS INDUS., INC.*, 292 S.C. 481, 485-486, 357 S.E.2d 452 (1987).

⁸ See *TOUSSAINT v. BLUE CROSS & BLUE SHIELD OF MICH.*, 408 Mich. 579, 613, 292 N.W.2d 880 (1980).

⁹ *WOOLLEY v. HOFFMANN-LA ROCHE, INC.*, 99 N.J. 284, 299, 491 A.2d 1257, modified on other grounds, 101 N.J. 10, 499 A.2d 515 (1985).

¹⁰ The Massachusetts Supreme Judicial Court has adopted this position. See, *O'BRIEN v. NEW ENGLAND TEL. & TEL. CO.*, 422 Mass. 686, 664 N.E.2d 843, 847-49 (1996).

¹¹ 82 Am. Jur. 2d *WRONGFUL DISCHARGE* § 83 (1992)

under a theory of promissory estoppel if he can show that the employer should reasonably have expected the employee to consider the employee manual as a commitment from the employer to follow the firing procedures, that the employee reasonably relied on the firing procedures to his detriment, and that injustice can be avoided only by enforcement of the firing procedures.¹²

Finding that employee handbooks or manuals can be enforceable under one or more of the doctrines of implied contract, promissory estoppel or unilateral contract is the majority position and has been for some time.¹³

¹² 82 Am. Jur. 2d WRONGFUL DISCHARGE § 91 (1992)

¹³ As of 1998, 38 jurisdictions had recognized that implied employment contracts may be found from language in employee handbooks and in other personnel policies that restrict an employer's right to discharge an employee to particular reasons ("for cause") or procedures for firing. HOFFMAN-LAROCHE, INC. v. CAMPBELL, 512 So.2d 725, 728-34 (Ala.1987); JONES v. CENTRAL PENINSULA GEN. HOSP., 779 P.2d 783, 787 (Alaska 1989); LEIKVOLD v. VALLEY VIEW COMMUNITY HOSP., 141 Ariz. 544, 688 P.2d 170, 174 (1984); FOLEY v. INTERACTIVE DATA CORP., 47 Cal.3d 654, 254 Cal.Rptr. 211, 223, 765 P.2d 373, 385 (1988); CONTINENTAL AIR LINES, INC. v. KEENAN, 731 P.2d 708, 711-12 (Colo.1987); FINLEY v. AETNA LIFE & CAS. CO., 202 Conn. 190, 520 A.2d 208, 213 (1987), rev'd on other grounds, 225 Conn. 782, 626 A.2d 719 (1993); SISCO v. GSA NAT'L CAPITAL FED. CREDIT UNION, 689 A.2d 52, 54-55 (D.C.1997); KINOSHITA v. CANADIAN PACIFIC AIRLINES, LTD., 68 Haw. 594, 724 P.2d 110, 117 (1986); PARKER v. BOISE TELCO FED. CREDIT UNION, 129 Idaho 248, 923 P.2d 493, 497 (1996); DULDULAO v. SAINT MARY OF NAZARETH HOSP. CTR., 115 Ill.2d 482, 106 Ill.Dec. 8, 11-12, 505 N.E.2d 314, 317-18 (1987); ANDERSON v. DOUGLAS & LOMASON CO., 540 N.W.2d 277, 282-84 (Iowa 1995); MORRISS v. COLEMAN CO., INC., 241 Kan. 501, 738 P.2d 841, 847-49 (1987); BAGWELL v. PENINSULA REG'L MED. CTR., 106 Md.App. 470, 665 A.2d 297, 308-09 (1995), cert. denied, 341 Md. 172, 669 A.2d 1360 (1996); O'BRIEN v. NEW ENGLAND TEL. & TEL. CO., 422 Mass. 686, 664 N.E.2d 843, 847-49 (1996); TOUSSAINT v. BLUE CROSS & BLUE SHIELD, 408 Mich. 579, 292 N.W.2d 880, 893-94 (1980); PINE RIVER STATE BANK v. METTILLE, 333 N.W.2d 622, 630 (Minn.1983); BOBBITT v. THE ORCHARD, LTD., 603 So.2d 356, 361 (Miss.1992); HEBARD v. AT & T, 228 Neb. 15, 421 N.W.2d 10, 12 (1988); SOUTHWEST GAS CORP. v. VARGAS, 111 Nev. 1064, 901 P.2d 693, 697-98 (1995); WOOLLEY v. HOFFMANN-LAROCHE, INC., 99 N.J. 284, 491 A.2d 1257, 1264-68 (1985); HARTBARGER v. FRANK PAXTON CO, 115 N.M. 665, 857 P.2d 776, 779-80 (1993); BAILEY v. PERKINS RESTAURANTS, INC., 398 N.W.2d 120, 122-23 (N.D.1986); MERS v. DISPATCH PRINTING CO., 19 Ohio St.3d 100, 483 N.E.2d 150, 154 (1985); GILMORE v. ENOGEX, INC., 878 P.2d 360, 368 (Okla.1994); YARTZOFF v. DEMOCRAT-HERALD PUBL'G CO., 281 Or. 651, 576 P.2d 356, 359 (1978); FLEMING v. BORDEN, INC., 316 S.C. 452, 450 S.E.2d 589, 595-96 (1994); BUTTERFIELD v. CITIBANK OF SOUTH DAKOTA, N.A., 437 N.W.2d 857, 859 (S.D.1989); HOOKS v. GIBSON, 842 S.W.2d 625, 628 (Tenn.Ct.App.), appeal denied, (Tenn.1992); ARNOLD v. B.J. TITAN SERVS. CO., 783 P.2d 541, 543 (Utah 1989); TAYLOR v. NATIONAL LIFE INS. CO., 161 Vt. 457, 652 A.2d 466, 471 (1993); THOMPSON v. ST. REGIS PAPER CO., 102 Wash.2d 219, 685 P.2d 1081, 1087-88 (1984); COOK v. HECK'S, INC., 176 W.Va. 368, 342 S.E.2d 453, 459-60 (1986); MOBIL COAL PRODUCING, INC. v. PARKS, 704 P.2d 702, 707 (Wyo.1985); see also MANSER v. MISSOURI FARMERS ASS'N, INC., 652 F.Supp. 267, 273 (W.D.Mo.1986) (Missouri law); BARGER v. GENERAL ELEC. CO., 599 F.Supp. 1154, 1163-64 (W.D.Va.1984) (Virginia law). Two other courts

Since this position was adopted by Massachusetts in 1996, there have been about 40 reported decisions on the issue in that state alone. The majority found that there was no contract on a summary judgment or other dispositive motion.¹⁴ Several found that there was a contract.¹⁵ Most importantly, five decisions found that the case would have to be tried because whether there was a contract was a question of fact.¹⁶

(5) Public policy exceptions to the right to fire at will. This theory is under continuing development as cases are brought on specific issues, however, the general principal applied is that discharges that frustrate a clear statutory policy will generally cause a wrongful discharge action in at least three types of

have indicated acceptance of this position in dictum. See, *STRECKFUS v. GARDENSIDE TERRACE COOPERATIVE, Inc.*, 504 N.E.2d 273, 275 (Ind.1987) and *FERRARO v. KOELSCH*, 124 Wis.2d 154, 368 N.W.2d 666, 668 (1985). In one state an employer's violation of express provisions of its own written personnel policy is a statutory cause of action for wrongful discharge. Mont.Code Ann. § 39-2-904 (1996).

¹⁴ *MCMILLAN v. MASSACHUSETTS SOC. FOR PREVENTION OF CRUELTY TO ANIMALS*, 140 F.3d 288, 77 Fair Empl.Prac.Cas. (BNA) 589, 73 Empl. Prac. Dec. P 45,354 (1st Cir.(Mass.), 1998); *AISAGBONHI v. OSMONICS, INC.*, 2000 WL 33159236 (Mass.Super., 2000); *FIORILLO v. MAY DEPT. STORES CO.*, 11 Mass.L.Rptr. 478, 2000 WL 804649 (Mass.Super., 2000); *O'MALLEY v. MILFORD-NORTHBRIDGE VNA*, 10 Mass.L.Rptr. 567, 1999 WL 1025396 (Mass.Super., 1999); *GOODWIN v. TOYS ""R"" US*, 1998 WL 1181167 (Mass.Super., 1998); *BENNETT v. MASSACHUSETTS BAY TRANSP. AUTHORITY*, 8 Mass.L.Rptr. 154, 1998 WL 52245 (Mass.Super., 1998); *HINCHEY v. NYNEX CORP.*, 144 F.3d 134 (1st Cir.(Mass.), May 20, 1998); *BRENNAN v. KING*, 139 F.3d 258, 73 Empl. Prac. Dec. P 45,465, 125 Ed. Law Rep. 303, 12 NDLR P 117 (1st Cir.(Mass.), 1998); *CHILSON v. POLO RALPH LAUREN RETAIL CORP.*, 11 F.Supp.2d 153, 137 Lab.Cas. P 58,534 (D.Mass., 1998); *JOYCE v. MCDONALD*, 50 Mass.App.Ct. 1116, --- N.E.2d --- (Table, Text in WESTLAW), Unpublished Disposition, 2001 WL 96490 (Mass.App.Ct., 2001); *CLARK v. SOUTH MIDDLESEX OPPORTUNITY COUNCIL, INC.*, 2000 WL 1299269 (Mass.Super., 2000); *SMITH v. FALLON CLINIC, INC.*, 8 Mass.L.Rptr. 518, 1998 WL 296900 (Mass.Super., 1998). To the extent that any of these decisions is either (1) unpublished or (2) decision of the Massachusetts Superior Court, they are not binding precedent.

¹⁵ *DERRIG v. WAL-MART STORES, INC.*, 942 F.Supp. 49, 132 Lab.Cas. P 58,177, 12 IER Cases 188 (D.Mass., 1996); *WEBER v. COMMUNITY TEAMWORK, INC.*, 1998 WL 1181785 (Mass.Super., 1998); *ROSA v. POLAROID CORP.*, 1998 WL 1184203 (Mass.Super., 1998). To the extent that any of these decisions is either (1) unpublished or (2) decision of the Massachusetts Superior Court, they are not binding precedent.

¹⁶ *MARCHANT v. BURLINGTON MUN. EMPLOYEES' FEDERAL CREDIT UNION*, 1998 WL 1181674 (Mass.Super., 1998); *PETER BERKOWITZ v. PRESIDENTS, FELLOWS OF HARVARD COLLEGE*, 12 Mass.L.Rptr. 63, 2000 WL 1252104 (Mass.Super., 2000); *HOFF v. NORTHEASTERN UNIVERSITY*, 41 Mass.App.Ct. 511, 672 N.E.2d 13, 72 Fair Empl.Prac.Cas. (BNA) 545, 113 Ed. Law Rep. 1306 (Mass.App.Ct., 1996); *PATRIARCA v. CENTER FOR LIVING AND WORKING, INC.*, 10 Mass.L.Rptr. 486, 1999 WL 791888 (Mass.Super., 1999); *FRONTERA v. CITY OF SOMERVILLE*, 1998 Mass.App.Div. 197, 1998 WL 756696 (Mass.App.Div., 1998). To the extent that any of these decisions is either (1) unpublished or (2) decision of the Massachusetts Superior Court, they are not binding precedent.

circumstances; discharges for an employee's refusing to violate the law either for doing what the law requires or refusing to do what the law forbids; discharges for conduct that is not legally required but that the Legislature has clearly expressed a policy encouraging; and discharges in retaliation for an employee's exercise of a legally guaranteed right against his employer.¹⁷

(6) Risk. Unlike many other types of litigation, most employment litigation shares the dynamic of risking that damages will increase while the case is pending. One of the most common damage elements, back pay, is designed to make the successful plaintiff whole¹⁸ and is measured from the time the loss begins until either judgment is rendered or the plaintiff has, or through the exercise of reasonable diligence, should have, found comparable employment.¹⁹ Likewise, risk on the issue of front pay damages is also likely to increase with the passage of time since the jury can make a front pay award to cover the time it concludes the plaintiff would continue to suffer harm.²⁰ It is not unlikely that an argument will be made at closing that the jury should consider the fact that the plaintiff has not been able to find comparable employment for the several years the litigation was pending in coming to a decision on how long front pay should be awarded for. Furthermore, we know know that front pay damages are unlimited for the purposes of Federal law.²¹

THE CIRCUIT CITY DECISION

In this recent decision, the Supreme Court held that the Federal Arbitration Act applied to an employer's policy which required that all applicants and employees submit any dispute with the employer to arbitration. The Court upheld the policy and required the employee to go to arbitration.

The employee here had applied for a job at one of the employer's stores. He signed an employment application which included a provision that agreed to settle all claims or disputes relating to his application, employment or firing by final and binding arbitration. The provision included claims for discrimination, breach of contract and all other causes of action.

¹⁷ 78 Mass. L. Rev. 88, THE PUBLIC POLICY EXCEPTION TO THE AT-WILL EMPLOYMENT RULE (1993).

¹⁸ See, NEW YORK & MASSACHUSETTS MOTOR SERV., INC. v. MASSACHUSETTS COMM. AGAINST DISCRIMINATION, 401 Mass. 566, 582, 517 N.E.2d 1270 (1988) and J.C. HILLARY'S v. MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION, 27 Mass.App.Ct. 204 (1989).

¹⁹ BUCKLEY NURSING HOME, INC. v. MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION, 20 Mass.App.Ct. 172, 46 Fair Empl.Prac.Cas. (BNA) 752 (1985); NEW YORK & MASSACHUSETTS MOTOR SERV., INC. v. MASSACHUSETTS COMM. AGAINST DISCRIMINATION, *id.*

²⁰ CONWAY v. ELECTRO SWITCH CORP., 402 Mass 385, 523 NE2d 255 (1988).

²¹ POLLARD v. E.I. du PONT de NEMOURS & COMPANY, 121 S.Ct. 1946, 85 Fair Empl.Prac.Cas. (BNA) 1217, 1 Cal. Daily Op. Serv. 4522 (2001).

The employee was hired. Two years later, he filed an employment discrimination lawsuit in state court. The employer sued in federal court requesting that the state court lawsuit be stopped and the employee be required to arbitrate his disputes under the agreement. The Federal District Court hearing the case agreed. The employee appealed the decision and the Court of Appeals ruled that the employee could not be forced to arbitrate his disputes because the Federal Arbitration Act did not apply to employment agreements.

In its decision, the Supreme Court did agree that the Federal Arbitration Act does not apply to contracts of employment for transportation workers. Other than that, the Court ruled that the Federal Arbitration Act can be used to enforce arbitration agreements in all other employment agreements that involve interstate commerce; language, which the Court held, exhibited Congress' intent to exercise its authority to the fullest extent possible.

In reaching this decision, the Court specifically rejected the argument that the states, under their traditional role in regulating employment, should be allowed to restrict or limit the ability of employers and employees to enter arbitration agreements especially in the area of antidiscrimination laws.

THE LAW BEFORE CIRCUIT CITY

This decision is the latest and broadest in a series of decisions where the Supreme Court has upheld the use of arbitration in the employment context. Among the more recent Supreme Court decisions on this subject are *GILMER v. INTERSTATE/JOHNSON LANE CORP.*,²² where the Court ruled that the Federal Arbitration Act required the arbitration of an age discrimination claim based on an agreement in a securities registration application and *SOUTHLAND CORP. v. KEATING*,²³ where it ruled that Congress intended the Federal Arbitration Act to apply in state courts, and preempt state antiarbitration laws to the contrary.

Indeed, these cases build upon a long history of an expansive interpretation of the Federal Arbitration Act including the Supreme Court decisions in *RODRIGUEZ DE QUIJAS v. SHEARSON/AMERICAN EXPRESS, INC.*,²⁴ *SHEARSON/AMERICAN EXPRESS INC. v. MCMAHON*,²⁵ *MITSUBISHI MOTORS CORP. v. SOLER CHRYSLER--PLYMOUTH, INC.*,²⁶ *MOSES H. CONE MEMORIAL HOSPITAL v. MERCURY CONSTR. CORP.*,²⁷

²²500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

²³ 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984).

²⁴ 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

²⁵ 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987).

²⁶ 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)

²⁷ 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

and PRIMA PAINT CORP. v. FLOOD & CONKLIN MFG. CO.²⁸ All these decisions applied a broad interpretation to the Federal Arbitration Act.

PRE-CIRCUIT CITY LAW IN MASSACHUSETTS

In MUGNANO-BORNSTEIN v. CROWELL,²⁹ the Massachusetts Appeals Court ruled that an employment agreement required arbitration of sexual harassment and gender discrimination claims under Massachusetts law. In CARPENTER v. POMERANTZ³⁰ the same court ordered an employer to arbitrate under a terminated employment contract, ruling that the commitment to arbitrate disputes survived termination of the contract, was not subject to the six-year contractual statute of limitations; and that the former employee's delay in asserting arbitration rights for seven years did not bar the right to arbitration.

Although the Massachusetts Appeals Court decision in GELLER v. TEMPLE B'NAI ABRAHAM³¹ did not involve a contest over whether an employment issue could be arbitrated, the Court enforced an arbitration award for breach of an employment agreement. In reaching its decision, the Court noted that where the agreement to arbitrate is expressed in general terms, it should be construed as broadly as the parties obviously intended.

The United States District Court for Massachusetts, in COADY v. ASHCRAFT & GEREL,³² presaged the CIRCUIT CITY decision when it ruled that an attorney's employment agreement fell within the scope of the Federal Arbitration Act and that the disputed issues which fell within the scope of the arbitration clause were required to be arbitrated. Most recently, the same court also ruled in PAUL REVERE VARIABLE ANNUITY INSURANCE COMPANY v. ZANG³³ and required arbitration by two former general managers of their actions for wrongful termination of their employment agreements under the National Association of Securities Dealers (NASD) mandatory arbitration rule. That Court further ruled that the companies were not required to notify the managers of the mandatory arbitration rule in order for it to be enforceable.³⁴

²⁸ 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).

²⁹ 677 N.E.2d 242, pages 1 - 2. 73 Fair Empl.Prac.Cas. (BNA) 1116 (1997).

³⁰ 634 N.E.2d 587, 9 IER Cases 1223 (1994).

³¹ 415 N.E.2d 246, (1981).

³² 996 F.Supp. 95 (1998).

³³ 81 F.Supp.2d 227, (2000).

³⁴ On this issue, the Court refused to extend the ROSENBERG decision discussed below. The securities industry has industry-wide mandatory arbitration rules which are a condition of employment in that industry.

It has, however, not been a one-way street. Several local decisions have found that arbitration could not be mandated in the employment context. Most of these decisions, however, were based on either the limited scope of the arbitration agreement itself or a flaw in the policy at issue. In *CANNAVO v. ENTERPRISE MESSAGING SERVICES, INC.*³⁵, the United States District Court for Massachusetts, while ruling that certain issues which had to do with stock ownership (which was the subject of a separate agreement) were required to be arbitrated, whether the employee was fired for cause for purposes of the employment agreement would not be referred to arbitration because that agreement contained no arbitration provision.

The United States Court of Appeals for the First Circuit, in *ROSENBERG v. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.*³⁶, also refused to order arbitration, this time under the New York Stock Exchange (NYSE) rules.³⁷ Following her discharge by a brokerage firm, Rosenberg sued in state court alleging age and gender discrimination and related claims against the firm and her supervisor. The case was removed to federal court and the United States District Court for the District of Massachusetts denied the employer's motion to compel arbitration. The employer appealed. The Court of Appeals ruled that Title VII, as amended by 1991 Civil Rights Act (CRA), did not prohibit predispute arbitration agreements; those agreements were also effective for federal claims under the Age Discrimination in Employment Act; there was no showing of actual bias in the NYSE arbitration process; the securities industry registration form and arbitration agreement was not unconscionable; but the arbitration agreement was not enforceable because it did not meet the standard in the CRA for enforcing arbitration clauses.

The CRA was passed by Congress to overturn several earlier Supreme Court decisions and made several amendments to federal antidiscrimination laws. The law has a provision on alternative dispute resolution which says 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.³⁸

The Court noted that the form Rosenberg signed said she agreed to arbitrate any dispute, claim or controversy that may arise that is required to be arbitrated under the rules, constitutions, or bylaws of the organizations listed in Item 10. The NYSE was listed in Item 10. The NYSE Rules in turn required Rosenberg to arbitrate any controversy arising out of her employment or termination of her employment. Rosenberg never received a copy of the NYSE rules and the employer provided no evidence it even told Rosenberg that the clause required her to arbitrate any employment discrimination claims. Had the form provided for arbitration of all disputes, or given explicit notice that employment disputes were subject to arbitration, the Court said it would have had little difficulty in finding that Rosenberg had

³⁵ 982 F.Supp. 54 (1997).

³⁶ 170 F.3d 1, 75 Empl. Prac. Dec. P 45,823, 22 Employee Benefits Cas. 2980 (1999).

³⁷ The NYSE rules, like the NASD rules, mandate arbitration of all employment disputes.

³⁸ PL 102-166, 1991 S 1745, page 31.

agreed to arbitrate her employment discrimination claims within the meaning of the CRA. For purposes of the CRA, the agreement to arbitrate had to be knowing and voluntary to be appropriate and authorized by law.³⁹

THE CONTRACT OF ADHESION PROBLEM

Creating a policy of binding arbitration for employment disputes is not a simple matter of creating the policy. This is because of the application of a longstanding principle of contract law regarding a type of contract called an adhesion contract.

An adhesion contract is a standardized contract form offered to persons on essentially "take it or leave it" terms. They do not afford the person entering into the contract a realistic opportunity to bargain and create a condition where the person cannot obtain the desired result except by agreeing to the form contract. The distinctive feature of an adhesion contract is that the weaker party has no realistic choice as to its terms.⁴⁰

Recognizing that these contracts are not the result of traditionally bargained agreements, the trend is to relieve parties from onerous conditions imposed by them. However, not every such contract is unconscionable.⁴¹

³⁹ This is still an open issue which the *CIRCUIT CITY* case did not address. The argument comes from a footnote in the *GARDNER-DENVER* case where the Supreme Court said that to decide the effectiveness of any such waiver, a court would have to decide at the outset that the employee's consent was voluntary and knowing. 415 U.S. at 52 n. 15, 94 S.Ct. 1011.

The "knowing and voluntary" language comes from thinking of arbitration as a waiver of judicial remedies. It is a common rule that waivers of certain rights, particularly substantive rights, are enforceable only if they are knowing and voluntary. Some courts have noted that the knowing and voluntary standard is meant to add another layer of protection for the employee. Whether there is a heightened level of protection has not been directly decided by the Supreme Court and there is a split in the federal courts on it.

The Ninth Circuit has expressly adopted a "knowing" standard for such arbitration clauses and has described the standard as a heightened one. See *RENTERIA v. PRUDENTIAL INS. CO. OF AMERICA*, 113 F.3d 1104, 1105-06 (9th Cir.1997). The Third Circuit has rejected any heightened standard. The Eighth Circuit appears to have done the same. The Seventh Circuit has recognized the issue but did not resolve it.

⁴⁰ *CUBIC CORP. v. MARTY*, 4 Dist., 185 CA3d 438, 299 CAL. Rptr. 828, 833; *STANDARD OIL CO. OF CALIF. v. PERKINS*, C.A. Or., 347 F.2d 379, 383.

⁴¹ *LECHMERE TIRE & SALES CO. v. BURWICK*, 360 Mass. 713, 277 NE2d 503.

When construction of such an agreement is in issue, it is to be construed strictly against the drafter.⁴² Generally, these contracts are enforceable unless they are unconscionable, offend public policy, or are shown to be unfair in the particular circumstances. People who follow standardized contractual terms ordinarily understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.⁴³

A widely used standard for deciding when and how an adhesion contract will be allowed to be effective is the Restatement of Contracts, published by the American Law Institute. That standard says that where a party to an agreement signs or otherwise agrees to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing. The standard also says that where the other party has reason to believe that the party making the agreement would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.⁴⁴

Standardized agreements are commonly prepared by one party. Standard terms are construed against the drafter and are subject to the overriding power of the court to refuse to enforce an unconscionable contract or term.

If a contract or term of it is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result. The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy. Particularly for standardized agreements, the rule allows the court to pass directly on the unconscionability of the contract or clause rather than to avoid unconscionable results by interpretation. Inadequacy of consideration does not of itself invalidate a bargain, but gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable and may be sufficient ground, without more, for denying specific performance. A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, plus terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms. A

⁴² See *LECHMERE TIRE & SALES CO. v. BURWICK*, 360 Mass. 718, 720-721, 277 N.E.2d 503 (1972).

⁴³ *CARPENTER v. SUFFOLK FRANKLIN SAV. BANK*, 370 Mass. 314, 327, 346 N.E.2d 892 (1976).

⁴⁴ *RESTATEMENT (SECOND) OF CONTRACTS* 211 (1979).

determination that a contract or term is unconscionable is made by the court in the light of all the material facts.⁴⁵

Under Massachusetts law (and most jurisdictions), contracts of adhesion are construed strictly against the drafter and the risks of ambiguity fall on the drafter.⁴⁶

HOW THE CONTRACT OF ADHESION DOCTRINE AFFECTS EMPLOYMENT ARBITRATION POLICIES

Practically, imposing a policy which requires the arbitration of employment disputes is a classic example of a contract of adhesion. People applying for jobs or actual employees have no or relatively little bargaining power in that situation. For many reasons, not the least of which is making sure that policies are uniformly enforced, employers using these policies will present them to applicants and employees on a "take it or leave it" basis.

Because attorneys representing employees or former employees in disputes with these employers will most likely view mandatory arbitration provisions as restricting the employee's rights, the likelihood of a challenge is high. Employers using these policies should expect that they will be challenged by prospective litigants. When that happens, these policies will be reviewed by courts for unconscionable or unfair provisions using the doctrines noted above.

Though the *CIRCUIT CITY* decision is an important statement by the highest court in the land affirming the effectiveness of mandatory arbitration provisions in the employment setting, since the *GILMER* decision, the most troubling challenges to arbitration policies have focussed on the fairness of the process.⁴⁷

Many cases underscore this point. Courts have enforced predispute arbitration agreements unless the fairness and integrity of the arbitration process has been compromised. Because employment arbitration is a critical cost control and litigation avoidance technique, it is imperative that the policy actually is effective. An ineffective policy will undo the benefits of the policy and actually create more litigation and cost.

The *GILMER* decision is based on the Court's finding that an arbitration clause does not waive any substantive rights. It merely shifts the resolution of these rights to an arbitral forum. The Court held that the private agreement to arbitrate is essentially the selection of an alternative forum. Implicit in the

⁴⁵ RESTATEMENT (SECOND) OF CONTRACTS 208 (1979).

⁴⁶ See, 17 R. Bishop, MASSACHUSETTS PRACTICE, 2.2, at 15 (4th ed.1997); *BULL HN INFORMATION SYSTEMS, INC. v. HUTSON*, 229 F.3d 321; *CHASE COMMERCIAL CORP. v. OWEN*, 588 N.E.2d 705.

⁴⁷ See Jay W. Waks & John Roberti, "Challenges to Employment ADR: Processes, Rather than Principles, Are At Issue." 21 Labor & Employment Law Sec. Newsletter (New York State Bar Association, New York, N.Y.), 2, June 1996.

decision is that the forum is equivalent. When employers create an arbitration remedy that weighs too heavily in their own favor, they run the risk of having a court decline to compel arbitration.

In the decade since the GILMER decision, courts and organizations have identified several issues which are key components to finding that a mandatory arbitration provision in the employment setting is fair and therefore enforceable. Among those key components are: (1) the employee's consent must be voluntary and informed; (2) the employee must have a right to representation; (3) the process must provide for neutral decisionmakers; (4) where the process is used to enforce statutory rights (like discrimination cases) it must allow for all of the remedies which would be available to the employee under the statute including, especially, attorneys' fees; (5) the filing fee which must be paid by the employee (assuming the employee must pay one) should not be so high as to limit the effectiveness of the arbitration process; (6) the employee and his or her representative should have access to relevant information needed for the arbitration; and (7) there should be some limited review of a final and binding arbitration award.

VOLUNTARY & INFORMED CONSENT

In PRUDENTIAL INSURANCE CO. v. LAI,⁴⁸ the Court found that where employees were given an insufficient time to review the arbitration agreement, they did not knowingly waive their right to go to court. This decision has generally not been followed elsewhere.⁴⁹ The LAI decision is, like the ROSENBERG decision, based on the idea that arbitration of Title VII claims is to be encouraged if the parties knowingly and voluntarily elected arbitration. In HOFFMAN v. AARON KAMHI INC., the Court held that an agreement to arbitrate is not knowingly and voluntarily made when the clause describing what claims are to be arbitrated is unclear.⁵⁰

The application of the Older Workers Benefit Protection Act's definition of a knowing and voluntary waiver has been rejected as applied to arbitration agreements.⁵¹

Also note that whether, as with post-hire non competition agreements⁵², separate consideration is

⁴⁸ 42 F3d 1299 (9th Cir. 1994) cert. Denied, 116 S.Ct. 61 (1995). The 9th Circuit reaffirmed this decision in RENTERIA v. PRUDENTIAL INS. CO., 95-16659, D.C. CV-94-00931-HDM, 1997 WL 259421 (9th Cir. May 20, 1997).

⁴⁹ See, e.g. MAYE v. SMITH BARNEY INC., 897 F.Supp. 100, 68 Fair Empl.Prac.Cas. (BNA) 1648 (S.D.N.Y. 1995); DEGAETANO v. SMITH BARNEY, INC., 1996 WL 44226, 70 Fair Empl.Prac.Cas. (BNA) 401, 68 Empl.Prac.Dec. P 44,024 (S.D.N.Y. 1996); COSGROVE v. SHEARSON LEHMAN BROS., 105 F.3d 659 (70 Empl. Prac. Dec. P 44,602 (6th Cir. (Ohio) 1997).

⁵⁰ 927 F. Supp. 640 (S.D.N.Y. 1996).

⁵¹ See e.g., RICE v. BROWN BROS. HARRIMAN & CO., 96 Civ. 6326, 1997 WL 129396 (S.D.N.Y. March 21, 1997).

⁵² Although there appears to be a growing trend AGAINST this position. See, COVENANTS NOT TO COMPETE, A State-By-State Survey, 2d Ed, ABA Section of Labor & Employment Law. The coverage of Question 13(c) in that survey shows that states in recent years have begun moving away from the

needed for a post-hire arbitration agreement is an open question. At least one appellate court has ruled that it is needed.⁵³

Employee Handbooks

How the arbitration agreement is presented to the employee or applicant is essential and implicates questions of mutuality and fairness. An issue is whether an arbitration policy found exclusively in an employee handbook is binding.

In *HEURTEBISE v. RELIABLE BUSINESS COMPUTERS INC.*,⁵⁴ the Michigan Supreme Court held that an arbitration provision in an employee handbook did not compel arbitration of a sex discrimination claim. The employer distributed the handbook but reserved the right to modify it "at its sole discretion." The Court said this language showed that the employer did not intend to be bound by the handbook. As a result, it found that the handbook did not create an enforceable arbitration agreement with respect to the dispute.

The meaning of the *HEURTEBISE* decision was clarified in the *LORENZ v. BULL HN INFORMATION SYS. INC.*, case,⁵⁵ where a lower Michigan Court held that the decision did not apply to the arbitration procedures in the Sales Compensation Plan there. The Court found that the *LORENZ* plan clearly set forth the parties' agreement to submit disputes to arbitration when it provided for arbitration of all claims for \$3,000 or more that arise out of employment or firing.

The *HEURTEBISE* decision does not mean that arbitration provisions in employee handbooks are not enforceable. Several cases around the country have enforced them.⁵⁶ The 8th Circuit, in *PATTERSON v. TENENT HEALTHCARE INC.*,⁵⁷ compelled arbitration under a handbook procedure where binding arbitration was the final step. The Court enforced the procedure although the handbook reserved discretion to the employer to change its terms and did not qualify as a contract. The critical difference was an "acknowledgment form" signed by the employee, which separated the arbitration procedure from the rest of the handbook.

Employers may not be able to enforce arbitration provisions which are only in a handbook if the handbook has a broad disclaimer saying the handbook is not binding. The Michigan Supreme Court has held that a handbook provision requiring arbitration of employment disputes was not enforceable

requirement of separate consideration for post-hire agreements not to compete.

⁵³ *J.M. DAVIDSON, INC. v. WEBSTER*, No. 13-00-626-CV. (Texas Court of Appeals 2001).

⁵⁴ 550 N.W.2d 243 (Mich. 1996), reh'g denied, 554 N.W.2d 10 (Mich. 1996), cert. denied, 117 S. Ct. 1311 (1997).

⁵⁵ 177502, LC 94-076871-CZ, slip op. (Mich. Ct. App. Sept. 10, 1996).

⁵⁶ See, e.g., *NGHIEM v. NEC ELECS. INC.*, 25 F.3d 1437 (9th Cir. 1994), cert. denied, 513 U.S. 1044 (1994); *TOPF v. WARNACO INC.* 942 F.Supp. 762 (D. Conn. 1996); *FREGARA v. JET AVIATION BUSINESS JETS*, 764 F.Supp. 940, 951 (D.N.J. 991).

⁵⁷ 96-2587, 1997 WL 236237 (8th Cir. May 12, 1997).

when the handbook had a broad disclaimer saying that the policies were not any sort of employment or personnel contract.

Employment Applications

As in *CIRCUIT CITY*, several courts have enforced arbitration provisions in employment applications. A federal court in Colorado has enforced a mandatory arbitration agreement in an employment application, ordering a terminated employee to arbitrate a variety of federal discrimination and state law claims. The arbitration provision was immediately above the signature line on the application. The employee claimed she was unable to read English. She asked the Court not to order arbitration because she did not knowingly agree to arbitrate.

A federal court in Illinois also enforced an arbitration provision in an employment application, rejecting arguments that the provision was voidable because the employees were minors.

State courts are also enforcing arbitration provisions in employment applications. In a Hawaii case, the employment application had a section called "Agreement." The first part said the applicant would be employed at-will. The second part said nothing in it was an employment contract. A third part was a mutual arbitration agreement. Despite the broad disclaimer, the Court found the arbitration provision enforceable.

Handbook Acknowledgment Forms

Many courts have compelled arbitration under provisions contained in broadly distributed documents.

One circuit court of appeals enforced an arbitration provision in an employee handbook and referenced in a handbook acknowledgment form. The provision was enforceable although the acknowledgment form contained a broad disclaimer. A federal court in South Carolina reached the same result in a similar case.

A Florida case ordered arbitration because the acknowledgment form for the company handbook, signed by the plaintiff, contained an express agreement to use an arbitration process.

A Kansas federal court required arbitration of claims for violation of federal and state statutory and common law claims based on a dispute resolution policy the employer distributed at a meeting attended by the plaintiff. The policy said that mediation/arbitration by a neutral third party was the required and final means for the resolution of any serious disagreements and problems not resolved by an internal dispute resolution process. The policy also said that it was not a guarantee employment would continue for any specified period and nothing limited the "at will" status of the employees. The employee argued the arbitration policy was not enforceable because it was not part of a written employment contract.

The Court concluded the employee was employed under a contract of "at will" employment and that a term was the arbitration provision. The district court relied on state law permitting employees to assert claims for breach of contract based on policies published by employers. The Court concluded that the arbitration policy created a contractual duty.

Offer Letters

If an employer uses offer letters for hiring new employees, this document offers another opportunity for documenting the employee's agreement to an arbitration clause. Of course, the arbitration provision could be part of the letter itself. It is, however, also possible to use language in an offer letter to make case separately stated arbitration provision binding.

For instance, a federal court ordered arbitration based on an arbitration policy in an employee handbook, because an offer letter, which the employee had signed under the phrase "accepted to and agreed to," noted that general terms of employment were stated in the handbook. The handbook said any controversy arising out of the employment relationship would be submitted to final and binding arbitration. The employee also signed an acknowledgement of receipt for the handbook. The form said the handbook was not intended to be a contract, except that the handbook was the entire agreement on the right to arbitrate employment disputes. The employee argued there was no agreement to arbitrate. The Court ruled that the offer letter incorporated the handbook, and the acknowledgement form clearly said that the handbook was not a contract except the arbitration provision.

The Scope Problem

Another aspect to whether consent is informed and voluntary centers on the scope of the arbitration provision itself. The more broad the arbitration provision is worded, the easier it is to require arbitration. This is strategically important where employees or former employees are represented by counsel. A narrowly worded arbitration scope provision creates an invitation for opposing counsel to make claims which are designed to get around the arbitration provision.

If properly worded, courts have held that even tort claims can come within the scope of an arbitration provision. However, even a broad provision will not require arbitration of claims by nonemployee spouses. If it is possible that spouses may allege that representations were made to them, employers should require the spouse to sign any agreement provided to the employee.

In a Colorado case, an employee signed a stock option agreement that required arbitration of any dispute that arose directly or indirectly concerning the Plan, the Option, the Optionee's employment or the end of the Optionee's employment, whether arising in contract, statute, tort, fraud, misrepresentation or other legal theory. The Court held this provision covered claims unrelated to the stock option agreement itself for breach of contract, retaliatory discharge, wrongful discharge, defamation, outrageous conduct and racial discrimination. The provision was also ruled broad enough to cover claims against individual defendants since they were acting as agents or employees of the employer.

On the other hand a Virginia Court refused to order arbitration of statutory claims because the arbitration provision said it applied to claims involving an employee handbook, and the handbook did not mention statutory rights. In *BRENNAN v. KING*,⁵⁸ an assistant professor at Northeastern University sued for breach of contract and violation of federal and state antidiscrimination laws. The Court ruled that the professor was required to arbitrate the breach of contract claim but not the other claims. The

⁵⁸ 139 F.3d 258, 73 Empl. Prac. Dec. P 45,465, 125 Ed. Law Rep. 303, 12 NDLR P 117 (1st CA, 1998).

University had a complex and multi-tracked arbitration system under which some issues could be fully resolved (the contract claims) and others where the arbitrator's authority was limited to procedural issues and arbitration was not designated as the exclusive means of dispute resolution. For tenure decisions, all the arbitrator was empowered to do was require the Provost to transmit to the President the Standing Appeals Committee's positive recommendation instead of the Provost's own. Both the President and the Board of Trustees remain entirely free to disregard the favorable Appeals Committee recommendation forwarded by the Provost pursuant to the arbitrator's directive. Consequently, the President receives nothing more than a recommendation, not a conclusive determination. Also the handbook said only that the employee had a right to request arbitration. The Court found that the arbitral procedure was an option that a candidate could invoke or not and, if invoked, had a very limited horizon. The presumption of arbitrability was overcome by the terms of the contract.

A recent decision by the Supreme Court of New Jersey ruled that because an arbitration provision in an employment agreement which was ambiguous with respect to whether statutory claims under its law against discrimination were to be arbitrated, the former employee had a right to pursue those claims in a court action⁵⁹. The Court at the same time specifically stated that it was affirming the well settled rule in New Jersey that statutory claims could be subjected to arbitration including, specifically, claims under the law against discrimination.⁶⁰ While not requiring a list of "every imaginable statute by name" in order to be a knowing and effective voluntary waiver of rights, the provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship and its termination.⁶¹ Citing previous New Jersey decisions, the Court noted that the provision should reflect the employee's general understanding of the types of claims included, like "workplace discrimination claims".⁶²

A federal court in New York ordered arbitration of claims that arose after the employment had been terminated because the provision was broad enough to include such claims in its scope. The arbitration provision required arbitration of disputes arising out of employment or termination of employment. The Court said this was broad enough to cover claims of defamation, breach of contract, tort and fraud about the employer's post-termination communications to third parties about the former employee.

To ensure knowing consent, employers should:

- Make sure employees are aware of the new policy. A signed acknowledgment form which says they read and understand the policy eliminates disputes.

⁵⁹ GARFINKEL v. MORRISTOWN OBSTETRICS & GYNECOLOGY ASSOCS., P.A., (A-52-00) (2001) reversing GARFINKEL v. MORRISTOWN OBSTETRICS & GYNECOLOGY ASSOCS., P.A., 333 N.J. Super. 291 (App. Div. 2000).

⁶⁰ Id., p. 8.

⁶¹ Id., p. 13.

⁶² Id. See also, QUIGLEY v. KMPG PEAT MARWICK, LLP, 330 N.J. Super. 252 (App. Div. 2000) and ALAMO RENT A CAR, INC. v. GALARZA, 306 N.J. Super. 384 (App. Div. 1997).

- Make sure it is understood.
- The arbitration agreement should be separately stated and distributed even if included in a handbook.
- Distribute both the arbitration policy and any procedural rules to each employee.
- Encourage employees to read the materials.
- Make sure the arbitration provisions are simply stated, with a summary emphasizing that jury trials are waived. Explicitly provide that all claims arising out of or relating to the employee's employment or its end must be arbitrated.
- Provide time for employees to read and question the provisions.
- Make it mutual, including any exclusions.

THE RIGHT TO REPRESENTATION

Employers considering mandatory arbitration policies must understand that employee advocates are hostile to them. The EEOC believes that predispute mandatory arbitration agreements are contrary to federal law. The Office of the General Counsel of the National Labor Relations Board has advised that unfair labor practice charges should be issued against an employer that required employees to sign a mandatory arbitration provision and fired an employee who refused to sign. Even the Massachusetts Commission Against Discrimination has held that it will not necessarily recognize decisions issued under predispute arbitration policies though it has its own arbitration program.⁶³ Lawyers who represent employees see these policies as a threat, and are likely to challenge the enforceability of mandatory arbitration provisions.

Although there does not appear to be a specific case where an employer issued an arbitration policy which denied employees the right to representation, given the scrutiny these policies will be subjected to and the standards used to review them, clearly such a policy would not likely be enforced.

Indeed, the major "standard" for employment arbitration provisions, the DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP ("Protocol") issued by the American Arbitration Association (AAA), the leading forum for employment and labor dispute resolution,⁶⁴ requires that employees should have the right to be

⁶³ The MCAD created an alternative dispute resolution program administered by the American Arbitration Association in 1996. MCAD Policy 96-1.

⁶⁴ This document of principles was issued in 1995 by the American Arbitration Association's Task Force on Alternative Dispute Resolution in Employment which included representatives of the Council of Labor & Employment Section, American Bar Association; International Ladies' Garment Workers' Union; National Academy of Arbitrators; Arbitration Committee of Labor & Employment Section, American Bar Association; American Arbitration Association; Society of Professionals in Dispute

represented by a spokesperson of their own choosing that the procedure should so specify and should include reference to institutions which might offer assistance, such as bar associations, legal service associations, civil rights organizations, trade unions, etc.

Likewise, the AAA NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES ("AAA Rules") states that any party may be represented by counsel or other authorized representative and that for parties without representation the Association will, upon request, provide reference to institutions which might offer assistance.⁶⁵

NEUTRAL DECISIONMAKERS

Although the Supreme Court's decision in *GILMER* and the plaintiff's argument that arbitration panels of the New York Stock Exchange, or arbitrators generally, are inherently biased, this is not a closed issue. In *CHENG-CANINDIN v. RENAISSANCE HOTEL ASSOCIATES*,⁶⁶ a California Court of Appeal denied an employer's motion to compel an employee to bring her wrongful discharge claim before its review board under a contractual ADR program. The Court held that the procedure was not arbitration, and that the employer was not entitled to compel participation.

The process there was a review board consisting of hotel employees and chaired by a personnel department employee. Tie votes were broken by the hotel's general manager. The Court said this was not impartial because everyone involved in the process was employed by, selected by, and under the control of the Hotel. In addition, this employer had the authority to decide which claims came within the jurisdiction of the system, the system discouraged employees from using counsel, and the system allowed management to set rules unilaterally regarding evidence.

The Court concluded that a dispute resolution procedure cannot be considered an arbitration unless there is a third-party decision maker, a final and binding decision, and a mechanism to assure a minimum level of impartiality.⁶⁷

Again, given the standards developed, simply having an "external" procedure may not be good enough when the arbitration policy is challenged by counsel representing an employee or applicant. The AAA Rules provide that arbitrators serving under them must (1) be experienced in the field of employment law; (2) have no personal or financial interest in the results of the proceedings in which they are appointed; and (3) have no relation to the underlying dispute or to the parties or their counsel that

Resolution; Federal Mediation & Conciliation Service; National Employment Lawyers Association and the American Civil Liberties Union.

⁶⁵ NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES, American Arbitration Association, R. 14.

⁶⁶ 57 Cal.Rptr.2d 867 (Cal. Ct. App. 1996), review denied, 1997 Calif. Lexis 817 (Calif. Feb. 19, 1997).

⁶⁷ Indeed, given the state of the law under the National Labor Relations Act, unless management controls the makeup and operation of these peer review committees, they are likely to be violations of that law.

may create an appearance of bias. The AAA Rules further require that the roster of available arbitrators be established on a nondiscriminatory basis, diverse by gender, ethnicity, background and qualifications and that before accepting appointment, the prospective arbitrator must reveal all information that might be relevant to the standards of neutrality including but not limited to service as a neutral in any past or pending case involving any of the parties and/or their representatives or that may prevent a prompt hearing.⁶⁸

Likewise, the Protocol requires that arbitrators selected for such cases should have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment. The roster of available mediators and arbitrators should be established on a nondiscriminatory basis, diverse by gender, ethnicity, background, experience, etc. to satisfy the parties that their interest and objectives will be respected and fully considered and be independent of bias toward either party. The Protocol also anticipates that arbitrators are trained in the statutes, including substantive, procedural and remedial issues to be confronted and due process and fairness in the conduct and control of arbitration hearings with training provided by government agencies, bar associations, academic institutions, etc., administered perhaps by the designating agency, such as the AAA, be updated periodically and be required of all arbitrators.⁶⁹

Employers can specify eligibility requirements for the arbitrator selected, such as being a lawyer, having several years of experience in the employer's industry, or being a member of or sanctioned by highly regarded organizations such as the AAA or another association which has qualifying standards for inclusion which meet the Protocol and AAA Rules requirements.

None of this means that there is no role for internal dispute resolution systems. Just the opposite is true. Many employers have "open door" or other policies where employees can bring problems to management attention. These policies give employees and management an opportunity to work out issues and head off litigation. The problem comes when attempting to make an internal process the final, binding, mandatory route for resolving all disputes including statutory rights.

A leading case on this point is the decision by the Massachusetts Supreme Judicial Court in O'BRIEN v. NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY.⁷⁰ The Court reversed a jury verdict in favor of an employee for breach of contract because the employee had not used the grievance procedure in the personnel manual. Relying on federal case law requiring an exhaustion of the grievance process in collective bargaining agreements, the Court adopted a similar rule for claims for breach of contract based upon personnel manuals that also contain a grievance procedure.

A Utah court dismissed claims for breach of contract and wrongful discharge violating public policy because the employee had not exhausted the employer's internal grievance system. Focusing on the

⁶⁸ NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES, American Arbitration Association, R. 11.

⁶⁹ DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP, American Arbitration Association, Article C (1995).

⁷⁰ 422 Mass. 686, 664 N.E.2d 843, 132 Lab.Cas. P 58,150, 11 IER Cases 1221 (1996).

employee's claim that he was constructively discharged, the Court noted that it was unreasonable for the employee to feel he had no choice but to resign when his grievance had not been fully processed.

Following O'BRIEN, in *ROSA v. POLAROID CORP.*,⁷¹ a Superior Court dismissed a former employee's claim that the employer breached its contract with her by failing to issue annual performance reviews pursuant to its personnel policies and practices because she never filed a grievance with the employer for its failure to issue a performance review. The same result happened in *BRENNAN v. KING*,⁷² where the Court affirmed a summary judgment for the employer on contract claims⁷³ ruling that the employee was required to pursue the grievance procedure outlined in his contract of employment before maintaining suit for breach of the employment contract.

What applies to the goose applies to the gander. In *FRONTERA v. CITY OF SOMERVILLE*,⁷⁴ the Appellate Division of the Massachusetts District Court ruled that an employee was allowed to pursue litigation in court because the employer failed to follow the grievance procedure which obligated the department head, to meet with the employee and her union representative before rendering a written decision. The Court found that this was a repudiation of the grievance procedure by the employer.⁷⁵

In addition, there are other approaches. Although mandatory, binding arbitration is the most common and most controversial approach, mandatory procedures such as those at Brown & Root Inc., Masco Corp. and Metallgesellschaft Corp., often incorporate a multi-step ADR procedure to ensure that many problems will be resolved well before arbitration.

Some large employers have adopted variations on this theme to resolve workplace disputes. For example, Hughes Aircraft Co. and Eaton Corp., among others, offer voluntary, binding arbitration as an option available to employees. Because of the voluntariness of the employee's participation in this process, after a dispute has arisen, there is little question as to its enforceability.

Other large employers, such as Texaco Inc. and TRW Inc., have multi-step workplace ADR systems with mandatory predispute arbitration procedures, the results of which are binding on the employer, but not the employee. While the employee is required to submit to arbitration before going to court, an arbitration decision against the employee would only be binding if accepted. This process gives both

⁷¹ 1998 WL 1184203 (Mass.Super., 1998) (NO. 963235) Superior Court decisions are not binding precedent in Massachusetts.

⁷² 139 F.3d 258, 73 Empl. Prac. Dec. P 45,465, 125 Ed. Law Rep. 303, 12 NDLR P 117 (1st Cir.(Mass.)1998).

⁷³ Non-contract claims were reinstated because of the scope of the arbitration provision. See above.

⁷⁴ 1998 Mass.App.Div. 197, 1998 WL 756696 (Mass.App.Div., 1998).

⁷⁵ See, *AZZI v. WESTERN ELEC. CO.*, 19 Mass.App.Ct. 406, 409, 474 N.E.2d 1166 (1985); *BALSAVICH v. LOCAL UNION 170, INTL BHD. OF TEAMSTERS*, 356 N.E.2d 1217 and *ROBBINS v. GEORGE PRESCOTT PUBLISHING CO.*, 457 F.Supp. 915, 921 (D.Mass.1978).

sides the ultimate education into the strengths and weaknesses of their respective cases, and should help resolution short of a court proceeding.

Internal dispute resolution procedures are helpful even if they do not preclude subsequent litigation. Where an employee's discharge had been upheld through an internal dispute resolution procedure and he sued for breach of contract, the Court concluded the employee could bring his claim in court, but restricted its inquiry on the breach of contract claim to whether the internal procedure was followed; not whether there had been just cause for the discharge. Finding that the internal grievance procedure had been followed, the Court granted summary judgment to the employer on the breach of contract claim.

Although internal systems may not preclude an employee from bringing a court action, they are valuable for other reasons. They can alert employers to mistaken disciplinary decisions relatively quickly and cheaply, allowing an early chance for correction. They can also demonstrate if the employer's definition of fairness is agreed to by employees. Finally, they can change the scope of a court's inquiry to whether the internal grievance procedures were followed.

STATUTORY REMEDIES

First, employers need to understand that whether a mandatory arbitration procedure for employment disputes can substitute for and prevent the filing of complaints with administrative agencies such as the Equal Employment Opportunity Commission (EEOC) or corollary state agencies is a very open one. Employers deciding to impose mandatory arbitration procedures should operate on the assumption that those procedures will not prevent the filing of complaints with administrative agencies and will only prevent the filing of court actions by the employee or former employee only after there has been a determination by the administrative agency.

For example, in *E.E.O.C. v. WAFFLE HOUSE, INC.*, an employee who was fired after he had a seizure at work filed a charge with the EEOC complaining that his firing violated the Americans with Disabilities Act. The EEOC sued the employer. The employer filed a petition under the Federal Arbitration Act to compel arbitration and stay the litigation and, alternatively, to dismiss the action. The Fourth Circuit Court of Appeals held that: (1) arbitration agreement in employment application governed employment relationship with employer; (2) in prosecuting a suit in its own name, the EEOC could not be compelled, by reason of the arbitration agreement, to arbitrate its claims; (3) arbitration agreement precluded EEOC's pursuit in court of individual remedies of backpay, reinstatement, and compensatory and punitive damages, although it could seek broad injunctive relief in its public enforcement role.⁷⁶ The Supreme Court has decided to hear this case.⁷⁷

In its *GILMER* decision, the Supreme Court noted that arbitration arguments are not relevant defenses before the EEOC. An individual subject to an arbitration agreement will still be free to file a charge with

⁷⁶ 193 F.3d 805, 76 Empl. Prac. Dec. P 46,129, 9 A.D. Cases 1313, 16 NDLR P 160 (4th Cir.(S.C.), 1999).

⁷⁷ *E.E.O.C. v. WAFFLE HOUSE, INC.* 121 S.Ct. 1401 (Mem), 68 USLW 3726, 69 USLW 3624, 69 USLW 3628 (2001).

the EEOC, though the claimant is not able to begin a private judicial action.⁷⁸ In a prior decision, *ALEXANDER v. GARDNER-DENVER CO.*⁷⁹, which upheld an arbitration provision, the Court noted that the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

The EEOC has said that agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles shown in these laws.⁸⁰ In its Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment⁸¹ the EEOC said that the use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination. Those whom the law seeks to regulate should not be allowed to exempt themselves from federal enforcement of civil rights laws. Nor should they be allowed to deprive civil rights claimants of the choice to vindicate their statutory rights in the courts -- an avenue of redress decided by Congress to be essential to enforcement. As a result, the EEOC has ordered its field offices that charges should be taken and processed in conformity with priority charge processing procedures despite whether the charging party has agreed to arbitrate employment disputes. The offices are instructed to closely scrutinize each charge involving an arbitration agreement to decide whether the agreement was secured under coercive circumstances (e.g., as a condition of employment). The EEOC will process a charge and sue, in appropriate cases, despite the charging party's agreement to arbitrate. Pursuant to its National Enforcement Plan, the EEOC will continue to challenge the legality of specific agreements that mandate binding arbitration of employment discrimination disputes as a condition of employment.⁸²

Likewise, in Massachusetts the Massachusetts Commission Against Discrimination (MCAD) has provided that when, pursuant to an employment contract, an aggrieved person enters grievance proceedings concerning the alleged discriminatory act(s) within six months of the conduct complained of, the person may file a complaint with the MCAD within six months of the outcome of such proceeding(s)⁸³. The Commission's Rules also provide that no waiver agreement signed by any individual shall affect the

⁷⁸ *GILMER v. INTERSTATE/JOHNSON LANE CORP.*, 500 U.S. 20, 28, 111 S.Ct. 1647, 1653, 114 L.Ed.2d 26 (1991).

⁷⁹ 415 U.S. 36, 57 (1974)

⁸⁰ EEOC MOTIONS ON ALTERNATIVE DISPUTE RESOLUTION, MOTION 4 (adopted Apr. 25, 1995), 80 Daily Lab. Rep. (BNA) E-1 (Apr. 26, 1995).

⁸¹ EEOC NOTICE Number 915.002, July 10, 1997.

⁸² See, e.g., Briefs of the EEOC as Amicus Curiae in *SEUS v. JOHN NUVEEN & CO.*, No. 96-CV-5971 (E.D. Pa.) (Br. filed Jan. 11, 1997); *GIBSON v. NEIGHBORHOOD HEALTH CLINICS, INC.*, No. 96-2652 (7th Cir.) (Br. filed Sept. 23, 1996); *JOHNSON v. HUBBARD BROADCASTING, INC.*, No. 4-96-107 (D. Minn.) (Br. Filed May 17, 1996); *GREAT WESTERN MORTGAGE CORP. v. PEACOCK*, No. 96-5273 (3d Cir.) (Br. filed July 24, 1996).

⁸³ 804 CMR 1.10 (2) MCAD Rules of Procedure (1999).

Commission's right and statutory duty to enforce G.L. c. 151B, G.L. c. 151C, and G.L. c. 272 §98, or to investigate any complaint filed before it.⁸⁴

Even if the decision-maker is neutral, an employer cannot limit the substantive protections of an employment rights statute, such as the remedies available and the statute of limitations, as part of the arbitral process. In *STIRLEN v. SUPERCUTS INC.*,⁸⁵ California's Court of Appeal upheld the denial of an employer's motion to compel arbitration, finding that the agreement was unconscionable because, among other things, the arbitration clause provided that the available remedies were restricted to a money award not to exceed the amount of actual damages for breach of contract, less any proper offset for mitigation of such damages. The parties were not entitled to any other money damages, specific performance or injunctive relief. In addition, the employee was subject to a one-year statute of limitations that could not be tolled, even if a longer period would ordinarily apply in court. The Court found that these provisions deprived employees of significant rights and remedies they would normally enjoy.

This does not mean that every deviation from every remedy designated by a statute will create a blanket refusal to enforce an agreement to arbitrate. In *DEGAETANO v. SMITH-BARNEY INC.*,⁸⁶ the Court compelled arbitration of a discrimination claim although the procedure precluded some remedies, like injunctive relief, attorney fees and punitive damages. According to the Court, the mere fact that some statutory remedies may be unavailable in arbitration does not establish that Title VII claims must be resolved in a court of law.

In *ARMENDARIZ v. FOUNDATION HEALTH PSYCHCARE SERVICES, INC.*⁸⁷, the plaintiffs argued that the agreement to arbitrate disputes with the former employer was forced on them as a condition of employment, restricted their rights to a jury trial and other remedies, and was a violation of public policy. The two employees said they were fired after being sexually harassed and discriminated against because of their sexual orientation. Their claims were based on the state's version of the federal Civil Rights Act. The employer moved for an order to compel arbitration. The clause required the employee to arbitrate any claim of wrongful firing. It limited the remedy to a sum equal to the wages they would have earned from discharge up to the date of an arbitration award. The Court said that in agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute but only submits to their resolution in an arbitral forum. Arbitration agreements that include unwaivable statutory rights must be subject to scrutiny to insure that the process by which the rights are vindicated

⁸⁴ 804 CMR 1.13 (4) MCAD Rules of Procedure (1999).

⁸⁵ 60 Cal.Rptr. 2D 967 (Cal.Ct. App. 1997), review denied (Calif. 1997).

⁸⁶ 95 Civ. 1613, 1996 WL 44226 (S.D.N.Y. 1996).

⁸⁷ *ARMENDARIZ v. FOUNDATION HEALTH PSYCHCARE SERVICES, INC.*, 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000). This court laid out standards for these policies to be enforceable in California. The minimum requirements are: (1) the arbitrator must be neutral; (2) all remedies that would be available in court must be allowed; (3) adequate discovery must be allowed, sufficient to adequately arbitrate statutory claims, including access to essential documents and witnesses, as decided by the arbitrator and subject to limited judicial review; (4) a written arbitration award and judicial review must be provided for and (5) the employee must not have to pay arbitration costs.

is fair. The Court refused to mandate arbitration because, for the agreement to pass muster, all remedies that would be available in court must be allowed.

A federal court in New Mexico refused to order arbitration of an ADEA claim because the arbitration provision said the arbitrator was only authorized to award damages for breach of contract. The Court concluded that by limiting the kind of damages an arbitrator could award, the employer had chosen to exclude statutory claims from the scope of the arbitration provision.

Many courts have held that an arbitration agreement may not prohibit remedies like punitive damages and attorney fees or otherwise be inconsistent with the statutory claim that is the subject of a demand for arbitration. This phenomenon is not limited to employment matters. For example, in *GRAHAM OIL CO. v. ARCO PRODUCTS CO.*,⁸⁸ a case involving an arbitration clause in a franchise agreement, the 9th U.S. Circuit Court of Appeals refused to compel arbitration where the clause eliminated the right to recover punitive or exemplary damages and attorney fees and reduced the statute of limitations from one year to 90 days.

FEES

It has been found that fee splitting can make an arbitration agreement unenforceable where the arbitration fees and costs are so prohibitive as to effectively deny the employee access to the arbitral forum.⁸⁹ The big issue analyzed by the courts on this question is not whether arbitration costs can be so high when imposed on an employee so as to make an arbitration requirement unconscionable. There is practically unanimous agreement that they can. The question has been whether courts should apply a case-by-case basis inquiry in deciding this, or a broad per se rule against all fee-splitting despite the circumstances in each case.

In *COLE v. BURNS INTERNATIONAL SECURITY SERVICES*,⁹⁰ the D.C. Circuit held that when the arbitration process imposes costs not found in the court system, specifically, the cost of arbitrator compensation, an arbitration clause would not be enforceable. The Court found that since the system of mandatory employment arbitration was imposed by the employer, the arbitrator's fees, according to public policy as construed by this court, should be borne solely by the employer.

The Tenth Circuit Court of Appeals, in *SHANKLE v. B-G MAINTENANCE MGMT. OF COLORADO, INC.*⁹¹, relied on the *COLE* decision to hold an arbitration agreement unenforceable because of a mandatory fee-splitting provision. The Court said that the Agreement placed the employee between a rock and a

⁸⁸ 43 F.3d 1244 (9th Cir. 1994), as amended (1995), cert. Denied, 116 S.Ct. 275 (1995)

⁸⁹ See *GREEN TREE FINANCIAL CORP.-ALABAMA v. RANDOLPH*, --- U.S. ---, 121 S.Ct. 513, 522, 148 L.Ed.2d 373 (2000) (the existence of large arbitration costs could preclude a litigant from effectively vindicating federal statutory rights in the arbitral forum). This case was in a consumer - not employment - setting, however, that should not be significant to the analysis.

⁹⁰ 105 F.3d 1465 (D.C. Cir. 1997).

⁹¹ 163 F.3d 1230 (10th Cir.1999).

hard place. It prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost limited use of the arbitral forum.

Several courts have refused to conclude that fee splitting necessarily makes an arbitration provision unenforceable.⁹² For instance, in *BRADFORD v. ROCKWELL SEMICONDUCTOR SYSTEMS, INCORPORATED*⁹³, a former employee filed for arbitration and later sued the employer alleging that the employer discriminated against him because of his age in discharging him from employment. The Court held that a fee-splitting provision which requires an employee to share the costs of arbitration does not per se render a mandatory arbitration agreement unenforceable. All these courts have held that whether a fee-splitting provision makes an arbitration requirement unconscionable depends on the circumstances of each case. Although not totally settled, these decisions, with the Supreme Court's *GREENTREE* decision, make this the leading view.

The courts, however, are not the only word on this issue. The Protocol says that impartiality is best assured by the parties sharing the fees and expenses of the arbitrator. In cases where the economic condition of a party does not allow equal sharing, the parties should make mutually acceptable arrangements to achieve that goal if possible. Without an agreement, the arbitrator should decide the allocation of fees. The designating agency, by negotiating the parties share of costs and collecting such fees, could reduce the bias potential of disparate contributions by forwarding payment to the mediator or arbitrator without revealing the parties' share therein.⁹⁴

On the subject of attorney fees, the Protocol says that the amount and method of payment for representation should be decided between the claimant and the representative. It recommends, however, several existing systems which provide employer reimbursement of at least some of the employee's attorney fee, especially for lower paid employees. The arbitrator should have the authority to provide for fee reimbursement, in whole or in part, as part of the remedy according to applicable law or in the interests of justice.⁹⁵

One published employment arbitration agreement form says that unless precluded by decisional or other law in the jurisdiction where venue lies for the arbitration, the employee will bear part of the

⁹² See *WILLIAMS v. CIGNA FINANCIAL ADVISORS, INC.*, 197 F.3d 752, 763-64 (5th Cir.1999) (upholding an arbitration agreement that required a Title VII claimant to pay half the costs), cert. denied, 529 U.S. 1099, 120 S.Ct. 1833, 146 L.Ed.2d 777 (2000); *ROSENBERG v. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.*, 170 F.3d 1, 15-16 (1st Cir.1999) (refusing to invalidate arbitration scheme because of the possibility that the arbitrator would charge a forum fee as high as \$3,000 per day and tens of thousands of dollars per case); *KOVELESKIE v. SBC CAPITAL MARKETS, INC.*, 167 F.3d 361, 366 (7th Cir.1999), cert. denied, 528 U.S. 811, 120 S.Ct. 44, 145 L.Ed.2d 40 (1999); *ARAKAWA v. JAPAN NETWORK GROUP*, 56 F.Supp.2d 349, 354-55 (S.D.N.Y.1999).

⁹³ 238 F.3d 549, 84 Fair Empl.Prac.Cas. (BNA) 1358 (CA4 2001).

⁹⁴ DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP, American Arbitration Association, Article B (1995).

⁹⁵ DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP, American Arbitration Association, Article B (1995).

reasonable expenses of the arbitration up to the lesser of (a) one-half of the expenses, or (b) an amount equal to two (2) days of the employee's gross annual cash compensation (including bonuses, commissions and related cash compensation) during the twelve (12) months immediately preceding the notice of claim initiating the employment dispute arbitration procedure. The employer bears the remainder of the expenses. The employee may voluntarily elect to bear half of the expenses and the arbitrator is not to be informed whether the employee has made such an election.⁹⁶

ACCESS TO INFORMATION

As with the right to representation issue, there does not appear to be any specific court decision discussing the question of access to information. One reason for this is probably the fact that most of the litigation which occurs on these questions happens before the parties are actually engaged in the arbitration. Another reason is that practically all of the rules issued by the organizations which hear these cases have some level of discovery mechanism in them and those discovery mechanisms are universally mutual, although they may be limited especially when compared to the discovery mechanisms available in court. Finally, given the relative informality of most arbitration proceedings, it is very likely that even where the specific rules in question do not provide for a formal discovery mechanism, the arbitrator hearing the case fashions an informal remedy which all parties find they can live with.

Again, since mandatory employment arbitration provisions are heavily litigated and are generally the product of a contract of adhesion, a mandatory employment arbitration provision which provides that the employee will have no access or very limited access to information is not likely to be enforced. This is especially true since, compounding the contract of adhesion problem, is the fact that most employers generally have more information available to them due to their personnel files and the ability to get more information during a proceeding because they have a staff and the litigating employee or former employee does not.

Here too, the Protocol is not silent. It says that adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to the arbitration of their claims. The employee's representative should also have reasonable pre-hearing and hearing access to all such information and documentation. Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available.⁹⁷

In keeping with the position taken by the Protocol, the AAA Rules provide that the arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.⁹⁸

⁹⁶ CPR Employment Dispute Arbitration Procedure, Statement of Consideration and Joint Agreement, CPR Institute.

⁹⁷ DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP, American Arbitration Association, Article B (1995).

⁹⁸ NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES, American Arbitration Association, R. 7.

The CPR Institute form agreement⁹⁹ covers this subject by providing:

(1) Parties shall cooperate in the voluntary exchange of such documents and information as will serve to expedite the resolution of the dispute in arbitration.

(2) Discovery shall be conducted in the most expeditious and cost-effective manner practicable, and shall be limited to that which is relevant and material to the dispute and for which each party has a substantial, demonstrable need.

(3) Upon request, either party shall be entitled to receive, before the hearing, information and copies of documents which meet the criteria for discovery. Upon request, the employee shall also be entitled to a true copy of his or her personnel records kept in the ordinary course of business (including without limitation all performance evaluations), other than records relating to pre-employment procedures and any reference checks, subject to any condition or limitation imposed by the Arbitrator upon a showing of good cause.¹⁰⁰

(4) Upon request, the employee shall be entitled, at least thirty (30) days before the commencement of the hearing, to take at least one deposition of an employer representative designated by the employee. Upon request, the employer shall be entitled, at least thirty (30) days before the commencement of the hearing, to take the deposition of the employee.

(5) The Arbitrator may grant, upon good cause shown, either Party's request for discovery in addition to or limiting that for which the agreement expressly provides.

REVIEW OF AWARD

The basic rule is that arbitration awards cannot be reviewed for errors in law or fact.¹⁰¹ Even egregious mistakes are not reversible unless they fall into one of several narrow categories allowed for under

⁹⁹ CPR Employment Dispute Arbitration Procedure, Statement of Consideration and Joint Agreement, CPR Institute.

¹⁰⁰ Also note that many states have laws which give employees and former employees access to their personnel records. See, eg., Mass. Gen. L., ch. 149, §52C which defines what a "personnel record" is and provides that any employer receiving a written request from an employee shall provide the employee with an opportunity to review his personnel record within five business days of such request. That statute further provides that an employee shall be given a copy of his personnel record within five business days of submission of a written request for such copy to his employer. An "employee" means both a current and former employee.

¹⁰¹ *MOBIL OIL v. OIL, CHEMICAL AND ATOMIC WORKERS INT'L UNION*, 600 F.2d 322, 326 (1st Cir.1979).

applicable law or procedure. Even mistakes of fact or law are generally not enough to overturn an arbitration award, since the applicable public policy interest is to make the award final.¹⁰²

Echoing this, the Protocol provides that the arbitrator's award should be final and binding and the scope of review should be limited.¹⁰³

There are two principal standards for arbitration award review. The first is the standard under the Uniform Arbitration Act, versions of which have been adopted in a majority of the states.¹⁰⁴ That statute provides that upon application of a party, a court shall vacate an award if:

- (1) The award was obtained by corruption, fraud or other undue means.
- (2) There was evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators, or misconduct prejudicing the rights of any party.
- (3) The arbitrators exceeded their powers.
- (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section five, as to prejudice substantially the rights of a party.
- (5) There was no arbitration agreement and the issue was not adversely decided in proceedings and the party did not participate in the arbitration hearing without objecting; but the fact that the relief was

¹⁰² See, e.g., *HEWLETT-PACKARD, INC. v. BERG*, 867 F.Supp. 1126 (D.Mass., 1994); *MASSACHUSETTS HY. DEPT. v. AMERICAN FEDN. OF STATE, COUNTY & MUN. EMPLOYEES, COUNCIL 93*, 420 Mass. 13, 15-16, 648 N.E.2d 430 (1995); *CONCERNED MINORITY EDUCATORS OF WORCESTER v. SCHOOL COMM. OF WORCESTER*, 392 Mass. 184, 187, 466 N.E.2d 114 (1984); *GREENE v. MARI & SONS FLOORING CO.*, 362 Mass. 560, 563, 289 N.E.2d 860 (1972); *SCHOOL COMM. OF WALTHAM v. WALTHAM EDUCATORS ASSN.*, 398 Mass. 703, 705, 500 N.E.2d 1312 (1986); *E.I. DUPONT DE NEMOURS & CO. v. GRASSELLI EMPLOYEES INDEP. ASSN. OF E. CHICAGO*, 790 F.2d 611, 615 (7th Cir.), cert. denied, 479 U.S. 853, 107 S.Ct. 186, 93 L.Ed.2d 120 (1986); *DELTA AIR LINES, INC. v. AIR LINE PILOTS ASSN., INTL.*, 861 F.2d 665, 670 (11th Cir.1988), cert. denied, 493 U.S. 871, 110 S.Ct. 201, 107 L.Ed.2d 154 (1989); *CAPE COD GAS CO. v. UNITED STEELWORKERS OF AMERICA, LOCAL 13507*, 3 Mass.App.Ct. 258, 261, 327 N.E.2d 748 (1975); *CITY OF LYNN v. THOMPSON*, 50 Mass.App.Ct. 280, 737 N.E.2d 475, 165 L.R.R.M. (BNA) 2744 (Mass.App.Ct., 2000).

¹⁰³ DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP, American Arbitration Association, Article D (1995).

¹⁰⁴ The Act was issued by the National Conference of Commissioners on Uniform State Laws in 1956. A new version was issued in 2000 which has been adopted by one state and is under consideration in about 10 others.

such that it could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award.¹⁰⁵

The other standard, which is much like the standard under the Uniform Arbitration Act, is in the Federal Arbitration Act¹⁰⁶ which says that in any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

- (1) Where the award was obtained by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

CONCLUSION

The war over whether employee handbooks are contracts is over. Employers need to rethink their employment policy strategies to live with this fact. One way to do that is to take control of the cost and exposure of the resulting litigation with an effective ADR program.

¹⁰⁵ This language comes from the version of the Uniform Act adopted in Massachusetts. Mass. Gen. L., ch. 251, §12.

¹⁰⁶ 9 USC §10.

ABOUT THE AUTHOR

PAUL PETER NICOLAI began his concentration in employment law as counsel to Friendly Ice Cream Corporation. He has participated in approximately 550 cases as a mediator or arbitrator.

He maintains professional licensure in Massachusetts, New York and Washington, D.C. and is a member of the Bar of the Supreme Court of the United States, United States Tax Court, United States Court of Appeals for the Federal Circuit, United States Court of Appeals for the First Circuit and the United States District Court for the District of Massachusetts.

A member of the American Arbitration Association, Attorney Nicolai participates there as a member of its National Panels on Commercial Arbitration, Expedited Commercial Arbitration, Employment Arbitration, Commercial Mediation, Employment Mediation and the Prudential Policyholder Appeals Review Panel. His prior nationally published article on arbitration, UNDERSTANDING MASS CLAIMS PANELS, is at 55 Disp. Res. J. 25 (May 2000).

Attorney Nicolai is also a member of the Hampden County Bar Association Panel of Arbitrators & Mediators, Massachusetts Bar Association Fee Arbitration Panel and the Massachusetts Bar Association Commercial & Employment Arbitration Panels. He also participates as a member of the Massachusetts Bar Association Fee Arbitration Board and was the Co-Chair of the Massachusetts Supreme Judicial Court's Hampden County Reinventing Justice Task Force Case Management & ADR Committee in 1995.

He maintains professional affiliations with the American Bar Association where he participates as a member of the Business Law, Labor Law, Intellectual Property, and Alternative Dispute Resolution Sections and as a member of the International, Arbitration & Intellectual Property Committees of the ADR Section; Massachusetts Bar Association where he participates as a member of the Business Law, Civil Litigation and Labor Law Sections; District Of Columbia Bar Association; Boston Bar Association where he has served on numerous committees; Federal Circuit Bar Association and Association of the Bar of the City of New York.

The author of many articles and publications on business law issues, Attorney Nicolai has participated in or presented seminars and lectures before numerous organizations. His most recent appearance was as a Panel Member at the American Bar Association Alternative Dispute Resolution Section Annual Meeting where he spoke on handling the alternative dispute resolution of mass claims.

Attorney Nicolai also has and continues to participate in a number of community activities including the Affiliated Chambers of Commerce of Greater Springfield, American International College where he is a Corporator and has served on the National Board of Directors and as National Vice-President and National President of the Alumni Association; NCCJ where he served as a Regional Officer and a National Trustee; Western Massachusetts Venture Forum; WPI Venture Forum; Springfield Enterprise Center, Volunteer Lawyers for the Arts, Lawyers Clearinghouse on Affordable Housing & Homelessness, Springfield Library & Museums Association Corporator; Society of Everett Barney, Inc. Director & Treasurer; S. E. Barney, Inc., Director, President & Treasurer and the Western Massachusetts Technology Business Council, Director & Treasurer.

He has been honored with the American International College Alumni Association National Alumni Award and listing in WHO'S WHO IN THE WORLD, AMERICA, THE EAST, AMERICAN LAW, FINANCE AND INDUSTRY, EMERGING LEADERS OF AMERICA, and AMONG AMERICAN COLLEGE & UNIVERSITY STUDENTS.