DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

IMPLEMENTING AN EMPLOYMENT ALTERNATIVE DISPUTE RESOLUTION (ADR) PROGRAM

by
Richard R. Ross
Senior Associate General Counsel
Anheuser-Busch Companies, Inc.

THE LAW AND THE USE ADR FOR EMPLOYMENT DISPUTES

I. Federal employment litigation is up nearly 300% from 1990-1999

- **Employment litigation filed in 1998 represents nearly 10% of all civil filings in federal court, *Reports of the Administrator of the U.S. Courts***
- **EEOC charges up 72% FY1992 — FY1998**

II. Employment ADR programs take many forms and have been in use by U.S. businesses for many years.

- **Almost 90% of employers that had more than 100 employees and filed EEO reports with the EEOC in 1992 used at least one form of ADR to resolve discrimination complaints:**
- **Fact finding 80%;**
- **Negotiation 74%;**
- **Internal mediation 38%;**
- **Peer review 19.9%;**
- **External mediation 8.6%;**
- **Arbitration 9.9%.**

United States General Accounting Office Report to Congressional

Requesters: Employment Discrimination —" Most Private — Sector Employers Use Alternative Dispute Resolution" July 1995.

III. A. The U.S. Supreme Court established a legal presumption that the Federal Arbitration Act (*9 U.S.C. §§1-16*) could be used to compel the arbitration of statutory claims pursuant to the terms of a mandatory and binding arbitration agreement in a series of decisions beginning with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1985),*

"by agreeing to arbitrate a statutory claim a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an

"by agreeing to arbitrate a statutory claim a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Mitsubishi Motors at 628.

See: Andrea Fitz, "The Debate over Mandatory Arbitration in Employment Disputes," Dispute Resolution Journal, February 1999, pp.38-40.

B. The U.S. Supreme Court opened the possibility that mandatory and binding arbitration agreements could be used to compel the arbitration of employment disputes, including statutory claims (ADEA claims in this case) in *Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20 (1991).*

"So long as the prospective litigant effectively may vindicate [his or her] statutory causes of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function" (Gilmer at 28, citing Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc. 473 U.S. 614, 637 (1985).

1. Most federal courts have followed and expanded the Gilmer decision. See: *Cole v. Burns International Security Services 105 F.3d 1465 (D.C. Cir. 1997)* pre-dispute arbitration agreement signed as condition of employment is enforceable; but see Bailey v. FNMA, 2000 U.S. App. LEXIS 7205 (D.C. Cir. 2000) no binding agreement to use dispute resolution program because there was no "meeting of the minds." *Seus v. John Nuveen & Co., 146 F.3d 175 (3rd Cir. 1998) cert. denied* arbitration clause in U-4 agreement is enforceable; *Patterson v. Tenet Health Care 113 F.3d 832 (8th Cir. 1997)* signed acknowledgement of arbitration clause in employee handbook is enforceable; *Koveleskiev v. SBC Capital Markets, Inc. 167 F.3d 361 (7th Cir. 1999) cert. denied* arbitration clause in U-4 agreement is enforceable as to Title VII claims; *O'Neil v. Hilton Head Hospital 115 F.3d 272 (4th Cir. 1997)* a signed receipt of employee handbook containing explicit agreement to arbitrate employment disputes is enforceable; *Johnson v. Brooks 148* F.3d *373 (4th Cir. 1998)* agreement to arbitrate contained in employment application is enforceable; employer's agreement to be bound by arbitration process is adequate consideration. *See, Fitz, pp. 72-73.*

2. The 9th Circuit has demonstrated a steadfast opposition to the concept of mandatory pre-dispute ADR, see: *Duffield v. Robertson Stephens & Co. 144 F.3d 1182 (9th Cir. 1998), cert. denied 119 S.Ct. 445 (1998)* employee who signed U-4 agreement to arbitrate all employment related disputes cannot be compelled to waive right to trial by jury under Title VII or comparable state law claims;

- **California state courts have not necessarily embraced Duffield as to state law claims. See *Armendariz v. Foundation Health Psychcare Services Inc., (Sp. Ct. Cal. Aug. 24, 2000)* claims under the California Fair Employment and Housing Act are in fact arbitrable if the arbitration permits an employee to vindicate his or her statutory rights.**

See also *Craft v. Campbell Soup Co. 161 F.3d 1199 (9th Cir. 1998), Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999) cert. granted.* FAA does not apply to any employment contract because of the Section 1 exclusion of contracts of employment for "workers engaged in foreign or interstate commerce."

- **Most other federal courts have held that the FAA applies to all employment contracts except for those involving the direct transportation of goods across state lines. See *O'Neil v. Hilton Head Hospital, 115 F.3d 272 (4th Cir. 1997), " If Congress had wished to exempt all employees from the coverage of the FAA it could have said so."***

3. The EEOC has steadfastly opposed all mandatory pre-dispute arbitration agreements as contrary to the fundamental principals of the laws EEOC enforces (*EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment July 1997*).

- **In February 2000 the EEOC filed a retaliation lawsuit in federal court against a California law firm that terminated an individual who refused to sign an agreement to arbitrate employment disputes. California appeals court had ruled earlier that the termination was not a wrongful discharge in**

- **In February 2000 the EEOC filed a retaliation lawsuit in federal court against a California law firm that terminated an individual who refused to sign an agreement to arbitrate employment disputes. California appeals court had ruled earlier that the termination was not a wrongful discharge in violation of public policy. Lagatree v. Luce, Forward, et. al., *74 Cal. App. 4th 1105, 88 Cal. Rptr. 2d 664 (Cal Ct. App. 1999) cert. denied*.**

For a judicial perspective on the future of mandatory employment ADR see Judge Harry Edwards article "*Where We Are Headed with Mandatory Arbitration of Statutory Claims in Employment?"* Georgia State Univ. Law Rev. (Vol. 16, No. 2 Winter 1999).

IMPLEMENTING AN EMPLOYMENT ADR PROGRAM

I. A successful employment ADR program must be carefully thought out before implementation.

A. Identify the need (Why are we doing this?)

- **Reduce litigation costs**
- **Reduce litigation risk**
- **Speedy resolution of disputes**
- **Employee morale**
  - **BEWARE! A program designed strictly to reduce litigation costs and risks is unlikely to be successful.**

B. Design a program with the corporate culture in mind (*See, Designing an ADR program in Resolving Employment Disputes, A Practical Guide. American Arbitration Association brochure 221-10M-10/98)*

- **Don't reinvent the wheel (use what is already in place)**
- **What will the managers embrace?**
- **What will the employees accept?**
- **Types of ADR to consider:**
  - **Mandatory vs. Non-Mandatory**
    - **Binding vs. Non-Binding**

C. Include Mandatory Mediation

- **Both sides can become rigid and entrenched at the first level**
- **External mediators are seen as impartial and without bias**
- **The knowledge that the next step is "final and binding" arbitration helps both sides to assess their positions honestly during the mediation phase**

D. Design an ADR program that is clear and direct

- **Write the program in clear and simple language (i.e. if the lawyers write it, have someone else edit it) . Be prepared to explain and sell the ADR concept and the program to:**
  - **Senior Managers**

- **Senior Managers**

- **Line Managers**
- **Employees**

- **Openly address the fact that <u>both sides</u> make concessions in a mandatory and binding ADR program**

  - **Employees forego a trial before a jury**
  - **Employees are less likely to obtain punitive damages in arbitration**
  - **Employers give up many procedural weapons available to them in state and federal court**

  - **Managers must understand that in arbitration, just like in litigation, you are going to win some you should have lost and lose some you should have won**
  - **Both sides are agreeing that appeal rights are limited.** ***The FAA permits courts to vacate arbitration awards only for fraud, corruption or evident partiality by the arbitrator***

    (9 U.S.C. §10). See <u>Siegel</u> v. <u>Prudential Ins. Co.,</u> 67 Cal. App. 4th 1270 court refused to set aside an arbitration award that included $1million in punitive damages in wrongful discharge arbitration.

II. Employment ADR programs, if run correctly, are fair, fast and cost effective for <u>both</u> sides.

A. Securities industry study of employment related disputes —
February 1992 — May 1998:

<u>Venue</u>	<u>Time to Disposition</u>	<u>Employee Wins</u>
NYSE	**15.6 months**	**38.5%**
NASD	**17.8 months**	**32.6%**
SDNY	**27.5 months**	**22.1%**

From statement of: Stuart J. Kaswell, General Counsel, Securities Industry Association, before Committee on Banking, Housing and Urban Affairs, U.S. Senate Hearing on Mandatory Arbitration Agreements in Securities Industry Association Employment Contracts, July 28, 1998.

B. Summary of trial outcomes of employment suits of New York
Federal Court April 1997 — May 1998. Total of 966 cases:

- **3.5% were actually tried**
- **26.5% resulted in plaintiff's verdicts**
- **74.5% resulted in defense verdicts**
- **Average time to disposition: 25.9 months**
- **Median time to disposition: 21.5 months**

  Survey of outcomes in Federal Court SDNY employment suits in 1998. ***Orrick, Herrington & Sutcliffe LLP (July 1998)***

- **In 1997 Plaintiffs in federal EEO cases won 40.6% of jury trials with a median award of $121,000.** ***Database of Federal Trial Statistics http:\ \teddy.law.cornell.edu.***

III. An employment ADR program must be designed primarily to resolve employment disputes, not just to avoid litigation.

- **Adequate due process and full legal and equitable remedies are essential to convincing employees and the courts that the ADR program should be**

- **Adequate due process and full legal and equitable remedies are essential to convincing employees and the courts that the ADR program should be allowed to work; see *Cole v. Burns International Security Services 105 F.3d 1465 (D.C. Cir. 1997).***
  "We believe that all of the factors addressed in Gilmer are satisfied here. In particular, we note that the arbitration arrangement (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitration fees or expenses as a condition of access to the arbitration forum." Cole at 1482.

  See also: *Shankle v. B-G Maintenance Management 163 F.3d 1230 (10th Cir. 1999)* court refused to enforce mandatory arbitration agreement which required the employee to pay one half of the arbitrator's fee; *Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054, 1062 (11th Cir. 1998)* arbitration clause that "insulates" the employer from Title VII damages and equitable relief makes the clause unenforceable; *Hooters of America, Inc. v. Phillips, 79 FEP Cases 629 (4th Cir. 1999*) "*Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and do so in good faith.*"

  IV. To be successful, an employment ADR program must be embraced by managers and employees alike, and become part of the corporate culture.

- **Managers must:**
- **Fully understand the program and their role in its implementation**
- **Become advocates of the program not just passive participants**
- **Be given adequate training not only in the ADR program, but also in conflict resolution techniques**
  - **Employees must:**
- **Be fully and honestly apprised of the program**
  - **What is covered**
  - **What is given up, if anything**
- **See the program as fair**
  - **The Employer must:**
- **Take every opportunity to communicate the program**
  - **Employment applications and offer letters**
  - **Employee meetings**
  - **New employee orientations**
  - **Brochures, videos, posters, etc.**

V. A successful employment ADR program needs an advocate - someone with the energy and authority to monitor the program and ensure compliance.

- **Without encouragement, managers and employees will slip back into comfortable old habits.**
- **Without constant monitoring, complaints will fall through the cracks and the program will lose credibility with the employees.**
- **Employees need to feel that someone is looking out for their interests**