906 Effective Employment Arbitration Agreements

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James E. Baine joined Murphy Oil Corporation's law department over 35 years ago and has served as the company's assistant secretary and general attorney. Some of his primary responsibilities include employment and labor as well as environmental legal matters. At Murphy Oil, he served as a director of great river Grain Corporation and secretary of Deltic Farm & Timber Co, Inc., now Deltic Timber Corporation, for twenty-five years.

Prior to joining Murphy, Mr. Baine was an assistant professor of finance at the University of Southern Mississippi and an Associate with Gillespie & Gillespie in Raymond, Mississippi.

He has served in various capacities including special associate justice, Arkansas Supreme Court; member of the Quorum Court (governing body) of his County; chancellor, Delta Theta Phi Law Fraternity, International; President, American Petroleum Labor Lawyers Association and chairman of the board of trustees of the El Dorado YWCA. He is presently chair, ACC's Employment & Labor Law Committee; chair, subcommittee on environmental & health law of the American Petroleum Institute; member, board of the South Arkansas Community College Foundation; member, University of Georgia Graduate School Advancement Board; and member, Southwest Arkansas Workforce Investment Board.

Mr. Baine received his B.B.A. and M.A. from the University of Georgia and graduated from the University of Mississippi School of Law.

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INTRODUCTION

Alternative Dispute Resolution encompasses a variety of options to litigation. In this presentation, we will concentrate on employment arbitration. We will look at some of the questions that your company should consider if it decides to implement such a program. We will look at the histories of three companies that have used employment arbitration.

We will also look at one company that uses employment arbitration as one of several alternatives to litigation. We will look at one company that is concentrated in one state, one company that has employees in several states and one company that has employees throughout the world.

It is our hope that you will have a good overview of how to draft and implement a good employment arbitration program at the end of the session. We also hope that the materials enclosed will provide you with the tools that will help you "hit the ground running."

DRAFTING EFFECTIVE EMPLOYMENT ARBITRATION AGREEMENTS

A. **PRE-DRAFTING CONSIDERATIONS**: Prior to drafting an Employment Arbitration Agreement, one should consider a number of questions, including but not limited to those below (which are not listed in any priority):

1. Who should be covered by such an agreement?

   a. You may just want to cover a division of the Company where a significant part of the employment litigation is occurring instead of the entire Company. If only the hourly employees are covered, then they can still file suit under many employment statutes against the manager(s) involved, whom the Company will probably indemnify, thus defeating the purpose of employment arbitration. It is recommended that supervisors and others who are part of the decision making process as to acts which may be questioned should also execute employment arbitration agreements. Binding hourly employees but not supervisors or executives can also project an appearance of unfairness.

   b. Do you want to "test market" the program on a state or division before announcing such for a large part of the Company?

   c. Do you wish for the program to be voluntary for existing employees, just limited to new employees, or mandatory for all?

2. Which neutral should you use?

   a. There are a number of service providers including, but not limited to the American Arbitration Association, JAMS, and the National Arbitration Forum. You should do a search of all service providers and determine which is the best suited for your Company.

   b. Some of the questions to ask could include the following: (1) Do they have arbitrators available near all the locations where your Company has facilities and arbitration agreement will be used? (2) Do their arbitrators have the qualifications needed for your program? (3) What is the cost? (4) Have they taken any positions that might be contrary to your Company's program? (5) Is the arbitrator required to apply the law under the neutral's rules? (6) What is their reputation as far as being impartial, etc?

3. Will the employment arbitration agreement be part of a larger ADR program for the Company or not? Some companies use extensive ADR programs with provisions for internal steps (e.g., internal conferences, ombudsmen) and/or mediation prior to arbitration while other companies have a very short employment arbitration agreement that stands alone.

4. Does the Federal Arbitration Act apply as to the employees that will be subject to the employment arbitration agreement? Section 1 of the Act excludes "contracts of employment of transportation workers" such as seamen and railroad workers. If your employers are excluded, then you should investigate relevant state statutes governing arbitration/ employment arbitration.

5. How broad do you want the agreement to be as to coverage of employment disputes? Should it be all "any and all claims arising out of or relating to one's employment, including but not limited to, claims being from the period of application through cessation of employment and any post termination claims" except for those claims which must, by statute or other law, be resolved in other forums? Do you wish for such agreement to be mutual, which would require that all covered claims by both the employee and employer be the subject of arbitration (see below, on Mutuality, if you want to carve-out employer's claims)? Are there specific employee claims that you wish to exclude (e.g., ERISA)?

6. How do you want to implement the arbitration agreement? Do you want each employee to sign an individual employment arbitration agreement? Do you want to place the agreement in the Employee Handbook or in the application for employment? Do you want to send it to each employee by email? regular mail? (See below, Implementation and Formation Issues.) Do you want to draft a cover letter or plain language brochure?

7. Do you want the employee to waive their right to commence, be a party to or member of a class or collective action in any court action or arbitration against the Company relative to employment issues? (See below, on Class and Collective Actions.)

8. Do you want a provision that waives jury trials as to any employment claim found not subject to the agreement and the arbitration procedure?

9. Do you want to provide employees with assistance with their legal fees to retain counsel for the employment arbitration process?

10. Do you want to attempt to modify appellate rights?

B. **ADDITIONAL AREAS OF CONCERN**

1. **Implementation and Formation Issues**: How Will the Company Effectively Notify and Bind Employees?

   a. Notice (Offer). As with the formation of any contract, the employer must make an "offer" of the arbitration agreement. In the at-will employment context, clear unequivocal notice of the adoption of an arbitration program typically constitutes an offer.

      i. E-Mail.

         See, e.g., Campbell v. General Dynamics Gov't Sys. Corp., 407 F.3d 546 (1st Cir. 2005).

      ii. Mail.

         See, e.g., In re Halliburton, 80 S.W. 3d 566 (Tex. 2002).

   b. Clarity of the Program Notice and Employee Comprehension. The employer must also ensure that the notice is clear and unequivocal and adequately informs employees of the impact of the program on their rights.

      See, e.g., Rosenberg v. Merrill Lynch. Pierce, Fenner & Smith Inc., 170 F.3d 1 (1st Cir. 1999) (failure to provide referenced arbitration rules); Campbell v. General Dynamics Gov't Sys. Corp., 407 F.3d 546 (1st Cir. 2005) (inadequacy of e-mailed notice); Buckley v. Nabors Drilling USA, Inc., 190 F. Supp. 2d 958 (S.D. Tex.) (no evidence that employee read or understood arbitration mailing), aff'd, 51 Fed. App'x 928 (5th Cir. 2002); Douglass v. Pflueger Hawaii, Inc., 110 Hawai'i 520, 135 P.3d 129 (Hawai'i 2006) (provision contained in HR manual).

   c. Employee Consent (Acceptance).

      i. Acceptance or Continuation of Employment.

         See, e.g., Berkley v. Dillard's Inc., 450 F.3d 775 (8th Cir. 2006); Caley v. Gulstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005); Marino v. Dillard's, Inc., 413 F.3d 530 (5th Cir. 2005). But see Melena v. Anheuser-Busch, Inc. , 816 N.E. 2d 826 (Ill.App. 2004) (consent to mandatory arbitration agreement not knowing and voluntary).

      ii. Written Agreement.

   d. Consideration.

      i. Continuation of Employment. Sufficiency varies by jurisdiction.

         See, e.g., Tinder v. Pinkerton Security, 305 F.3d 728 (7th Cir. 2002).

      ii. Mutual Agreement to Arbitrate.

See, e.g., Blair v. Scott Specialty Gases, 283 F.3d 595 (3d Cir. 2002); Michalski v. Circuit City Stores, Inc., 177 F.3d 634 (7th Cir. 1999); Johnson v. Circuit City Stores, Inc., 148 F.3d 373 (4th Cir. 1998). But see Douglass v. Pflueger Hawaii, Inc., 110 Hawai'i 520, 135 P.3d 129 (Hawai'i 2006) (HR manual giving employer right to revoke terms).

2. **Is the Agreement Enforceable Under State Contract Law?** Unconscionability of the Agreement or a Specific Clause or Section and Other Contract Defenses (Vary by Jurisdiction)

   a. The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. State scrutiny of such agreements does not allow courts to "single out" arbitration provisions for inferior treatment. Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996). Applying contract law, courts in various jurisdictions have held arbitration agreements or specific provisions therein to be unconscionable or otherwise unenforceable for a variety of reasons, including the following.

   b. Procedural Unconscionability: Duress or Coercion, Contracts of Adhesion. (Note that most jurisdictions require both procedural and substantive unconscionability for an agreement to be unenforceable.)

      See, e.g., Brennan v. Bally Total Fitness, 198 F. Supp. 2d 377 (S.D.N.Y. 2002) (employer's high pressure tactics coerced employees into signing); Prevot v. Philips Petroleum Company, 133 F. Supp. 2d 937 (S.D. Tex. 2001) (agreement invalid where written in English and employee spoke only Spanish); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003) (lack of meaningful choice). But see American Gen. Life & Acc. Ins. Co. v. Wood, 429 F.3d 83 (4th Cir. 2005) (contract of adhesion enforceable).

   c. Lack of Mutuality.

      See, e.g., Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003); Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (9th Cir. 2005); Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370 (6th Cir. 2005); Goins v. Ryan's Family Steak Houses, Inc., 2006 WL 1440687 (5th Cir. May 18, 2006).

   d. Dispute Resolution Process Too Biased and One-sided.

      See, e.g., Hooters of America Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999).

   e. Insufficient Remedies Available, Abridgement of Substantive Rights.

      See, e.g., Armendariz v. Foundation Health Psychcare Services, Inc., 99 Cal.Rptr.2d 745, 6 P.3d 669 (Cal. 2000); Alexander v. Anthony, International, L.P., 341 F.3d 256 (3rd Cir. 2003).

   f. Permitting Employer to Abolish or Modify Any Provision Without Notice to Employees.

      See, e.g., Dumais v. American Golf Corp., 299 F.3d 1216 (10th Cir. 2002); J.M. Davidson, Inc. v Webster 128 S.W.3d 223 (Tex. 2003). But see In re Halliburton, 80 S.W. 3d 566 (Tex. 2002).

   g. Fees to Be Paid By Plaintiff Too High.

      See, e.g., Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000); Cole v. Burns International Security Service, 105 F.3d 1465 (D.C. Cir. 1997); Adler v. Fred Lind Manor, 153 Wash. 2d 331 (2005).

   h. Limiting Statutes of Limitations.

      See, e.g., Alexander v. Anthony International, L.P., 341 F.3d 256 (3d Cir.2003); Adler v. Fred Lind Manor, 153 Wash. 2d 331 (2005).

   i. Limitations on Discovery.

      See, e.g., Fitz v. NCR Corp., 13 Cal. Rptr. 3d 88, 97 (Ct. App. 2004).

3. **Class & Collective Actions**

   a. In Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), the Supreme Court ruled that the arbitrator decides whether arbitration of class claims is permitted under an agreement that does not address class actions.

   b. Courts have been reluctant to interfere with arbitrators' rulings. In Cole v. Long John Silver's Restaurants, Inc., 388 F. Supp. 2d 644 (D.S.C. 2005), the Court denied the motion to vacate the arbitrator's decision certifying a Rule 23 opt-out class in an FLSA claim, rejecting the Company's argument that FLSA Section 16(b) requires that collective actions be certified using opt-in class procedures. The Court failed to find any authority for the

proposition that the FLSA's "consent in writing" requirement applies in arbitration proceedings. See Genus v. Credit Mgmt. Corp. v. Jones, 2006 WL 905936 (D. Md. April 6, 2006) (refusing to interfere with arbitrator's construction of class waiver as permitting class arbitration in consumer dispute).

c. Enforcement of Class "Waivers." While courts have, in the consumer context, both enforced and refused to enforce class waivers, the grounds upon which courts have relied for holding class waivers unenforceable are often distinguishable in the employment context. In 2005, the California Supreme Court held in Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005), that a clause prohibiting class actions in a pre-dispute credit card agreement was unenforceable because, if applied, it would insulate the Bank from any liability due to the small amount of each claim. The Court left the door open for a contrary finding in the employment context. On January 19, 2006, the California Second District Court of Appeals upheld a clause contained in employment arbitration agreement that precluded class arbitration. Gentry v. Superior Court, 37 Cal. Rptr. 3d 790 (Ct. App. 2d Dist.), rev. granted, 135 P.3d 1, 43 Cal.Rptr.3d 748 (2006). See also, e.g., Carter v. Countrywide Credit Inds., Inc., 362 F.3d 294 (5th Cir. 2004); Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005). In contrast, in Skirchak v. Dynamics Research Corporation, Inc., 432 F. Supp. 2d 175 (D. Ma. 2006), the court held that an employment arbitration agreement's waiver of class action rights was substantively unconscionable and unenforceable. See, e.g., Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006); Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (9th Cir. 2005); Walker v. Ryan's Family Steak Houses, Inc., 289 F. Supp. 2d 916, 926 (M.D. Tenn. 2003).

4. **The Positions of Administrative Agencies**

a. **National Labor Relations Board**. The NLRB on June 8, 2006 published U-Haul Company of California and Machinist District Lodge 190, Local Lodge 1173, International Association of Machinists and Aerospace Workers, AFL-CIO, Case 32-Ca-20665-1, 347 NLRB No. 34 (2006), holding, in a 2-1 decision, that a specific employment arbitration agreement prohibited employees from invoking their rights under the NLRA and was therefore unenforceable.

b. **U.S. Equal Employment Opportunity Commission**. The EEOC published its Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment. The Commission opposes the use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment. **U.S. Department of Labor**. On August 9, 2002 after EEOC v. Waffle House, Inc. 122 S. Ct. 754 (2002), the U.S. Department of Labor by memorandum established principles to be considered by attorneys in the Office of the Solicitor in deciding whether to litigate a matter that is subject to an arbitration agreement.

C. **SPECIFIC CLAUSES TO CONSIDER** (Not in order of priority or how they should appear in the document).

1. Coverage as to class and collective actions;

2. Listing of neutral, how to start process, and how to select the arbitrator;

3. Claims/disputes covered and not covered & mandatory submission of such;

4. Defining the covered parties, including the Company (e.g., including all subsidiaries, employees, agents, etc.);

5. Procedures for arbitration and/or incorporation of chosen neutral's rules with a provision that if the agreement conflicts with the agreement's rules, then the agreement prevails;

6. Incorporation of the Federal Arbitration Act;

7. Mutuality;

8. Consideration;

9. Consent of the parties;

10. Statement that the agreement does not modify employment at-will;

11. How are the costs of the process divided;

12. Binding as to successors & assigns as well as heirs, executors and administrators;

13. Time for filing of claims;

14. If a claim is found not to be subject to the agreement, then waiver of jury trial and decided by a judge;

15. Amendment and termination;

16. Self-amending & severability;

17. Non-interference with federal administrative proceedings (NLRB, EEOC);

18. Applicability of substantive law, including preservation of substantive rights, remedies, defenses;

19. Available discovery;

20. Form of the award;

21. Large lettering for heading explaining that it is a binding arbitration and waiver of jury trial agreement;

22. Paragraph in large bold print explaining that one waives their opportunity to a jury trial by executing the agreement;

23. Questions of arbitrability left to arbitrator; and

24. Confidentiality.

D. The California Supreme Court in Armendariz v. Foundation Health Psychare Services, Inc., 99 Cal.Rptr.2d 745, 759 (Cal. 2000), listed five "minimum requirements for a mandatory arbitration agreement": (1) arbitrator neutrality; (2) more than minimal discovery; (3) written awards; (4) all relief that would be available in court; and (5) no unreasonable costs or fees as a condition of access to the arbitral forum. See also Ingle v. Circuit City Stores, Inc., 328 F. 3d 1165 (9th Cir. 2003) (finding multiple provisions of arbitration agreement to be unconscionable).

ALTERNATIVE DISPUTE RESOLUTION:
THE HALLIBURTON EXPERIENCE

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BACKGROUND

As Halliburton's in-house labor counsel for the last 30 years, I have had the benefit of experiencing many changes in the workplace and in employment law. Halliburton is an energy services company which serves primarily the petrochemical industry on a global basis. In addition to the most comprehensive array of oilfield services, its operations include engineering, project management, construction, and logistical services for diverse customers ranging from the British Royal Navy to the meat packing industry. Accordingly, our employees and their employment relationships with the Company are the organization's most important assets.

Beginning in 1992, it became clear to me that there was something inherently wrong with the litigation process as it was applied to employment cases. Like most major companies, Halliburton won most of the employment cases filed against it or settled the claims for modest amounts. The amounts we spent on outside lawyers exceeded several times what we paid out in settlements. However, the money Halliburton spent for the privilege of winning most of its cases had little tangible impact on the Company or its employees. Most of the cases were litigated years after the events giving rise to the cases occurred. By that time, the terminated employee was usually working somewhere else, many of the managers and co-employees were gone and there was little institutional value in the events that transpired in the litigation.

What brought about the real need for change in the process was a sexual harassment and tort claim trial which took place in 1992. The facts arose from the Brown & Root business group of Halliburton (now Kellogg-Brown & Root). The case had been around as an EEOC charge or lawsuit for almost five years by the time it reached trial. The Company obtained favorable verdicts for the sexual harassment and state tort claims. However, the case cost almost $450,000 in legal fees, and permanently altered the careers of several employees and former employees including the plaintiff. Apparently, she believed she would be hitting the lottery right up until the time the jury came back and gave her nothing. The financial and human cost associated with that kind of litigation was so high that we

began a concerted effort to examine alternatives to the litigation system for resolving employment matters.

At that time, we did have some prior ADR experience; in 1990 we had implemented a binding arbitration program for some of our ERISA benefit plans which was also tied to a more formalized appeals process. One thing that was observed after we adopted this arbitration program, was that the incidence of litigation dropped close to zero. More matters were actually being brought to and resolved in the internal administrative process than previously, largely because the employees were now aware that there was a more formal structure in place for their complaints.

Building on this experience, in the summer of 1992, a series of task forces were established to study and evaluate existing systems within one Brown & Root group for handling employment problems. These task forces were given the responsibility of reviewing options and concepts which ranged from no change to radical change. The task forces included senior operations management, representatives of the Legal and Employee Relations Departments, outside legal experts, representatives from the American Arbitration Association, outside consultants in conflict management design (Chorda Conflict Management, Austin, Texas), and experts in employee relations communications (Sheppard Associates, Glendale, California). As part of the development process, about three hundred Halliburton employees from all levels of the Company were interviewed individually and in focus groups to determine their opinions and impressions of the existing company attitude on conflict in the workplace. Additionally, their reactions to different design concepts were catalogued.

The final approval of the Program occurred in February, 1993 with formal implementation in June, 1993. The program is a comprehensive employment dispute resolution program for all employees in the United States from the Brown & Root chief executive officer to the entry level employee. The key features of the Dispute Resolution Program are:

> The DRP was designed with input from employees at all levels - from field employees to senior management.
>
> The DRP is a four-option program - it provides multiple processes, both inside and outside the company, for resolving disputes.
>
> In keeping with employee input and expert opinion, the DRP encourages collaborative approaches to dispute resolution by offering multiple channels for direct talk, or negotiation, and for both informal and formal mediation.
>
> The DRP promotes the resolution of disputes at the lowest possible level through in-house options. This is in keeping with the views of those we surveyed. Most disputes are resolved within a month through in-house options.
>
> The DRP provides some options that offer very high standards of confidentiality, and prohibits retaliation for use of the system.
>
> As an employee benefit designed to ensure fairness, the DRP offers to each employee access to legal counsel of the employee's choosing.
>
> To ensure its independence, the DRP reports to a Dispute Resolution Policy Committee composed of senior executives, rather than to a department or a single individual.
>
> The DRP routinely collects and analyzes data in order to evaluate utilization, cost benefit and employee satisfaction.

DEVELOPMENT OF THE PRESENT LITIGATION-BASED SYSTEM FOR EMPLOYMENT DISPUTE RESOLUTION

In the process of developing the Dispute Resolution Program, we spent some time trying to understand how the present system evolved and what are the main factors causing its inefficiency and negative effects when it is applied to employment matters.

The present heavy dependence on the judicial system to resolve employment disputes is probably the result of convergence of a number of factors. These factors include the civil rights movement and the expansion of tort law.

Before World War One, the principal use of the legal system in employment matters seems to have been the trial of personal injury actions related to the workplace. Then, as now, a consensus developed that the costs, delays and inefficiencies of the judicial system made it unsuitable for employment matters. With the widespread adoption of workers' compensation systems in the early decades of this century, this practice died out.

The period between the two World Wars, particularly the New Deal period, was characterized by active distaste for the judicial system in employment matters. The Norris-LaGuardia Act of 1932 went perhaps as far as constitutionally permissible in withdrawing federal court jurisdiction over "labor disputes". The National Labor Relations Act of 1935 created an administrative body, the National Labor Relations Board, to resolve the most significant labor issues of the time. Even the Fair Labor Standards Act of 1938, which does provide for private enforcement through the court system, delegated significant enforcement powers to the Department of Labor.

Finally, growing labor organizations increasingly pressed for private, nonjudicial dispute resolution as an alternative to contract litigation. Labor organizations had split over support for the Federal Arbitration Act of 1925. However, by the 1950s, organized labor heavily promoted nonjudicial remedies. This effort culminated in the Supreme Court's "Steelworkers Trilogy" of 1960, in which the Court ceded widespread authority to labor arbitrators. This trilogy consists of Steelworkers v. American Mgf. Co., 363 U.S. 564, 46 LRRM 2414 (1960), Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960), and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960).

On the other hand, beginning in the 1940s, the civil rights movement pioneered the use of the federal courts to overcome discriminatory practices. This effort was increasingly successful during the 1950s and early 1960s. Thus, when the Civil Rights Act of 1964 was adopted, it seemed natural to turn to the federal courts for enforcement of these individual employment rights. This use of the courts was enormously productive, particularly during the late 1960s and throughout the 1970s.

Because of the success of the 1964 Act, with its emphasis on individually litigated employment rights, subsequent labor legislation adopted the same model. That is, federal labor policy began to be implemented in terms of individual rights against "discrimination", designed to be enforced primarily by individual plaintiffs in federal court. Examples include the Age Discrimination in Employment Act and the Americans With Disabilities Act. Not surprisingly, state employment legislation since the 1970s has followed the federal model.

It is widely believed that the designers of the 1964 Civil Rights Act feared that the legislation would be undone by hostile local juries. Accordingly, litigation under the Act was designed to be tried without a jury. This feature limited the damages recoverable to traditional equitable remedies. In the meantime, however, tort law -- and tort damages -- were expanding rapidly in state courts. These cases were tried to state court juries which, by the 1980s, could no longer be perceived as being hostile to discrimination claims. Thus, employees increasingly began to bring cases under state law, using tort concepts to avoid federal limits. The Civil Rights Act of 1991 reflected the shift to this paradigm of employment dispute resolution, expanding the remedial options to include tort-like damages and introducing trial by jury.

DISADVANTAGES OF THE CURRENT EMPHASIS ON LITIGATION

What the preceding discussion demonstrates is that the present reliance on tort-like litigation to resolve individual employment disputes is not a matter of logical necessity. Rather, it is the result of legal and historical forces which developed outside the employment context. However, American employees, lawyers and managers have become so used to this mechanism that we seldom appreciate that this is a fundamental design characteristic, one that separates American practice from most other national systems of employment regulation.

Most of the world manages employment by direct government regulation of management, direct political involvement of trade unions as political parties, and specialized, quasi-political labor tribunals. In this model, resolution of employment disputes is part of the political and legislative process. By contrast, the American model requires individuals to vindicate broad, rights-based policies through litigation, usually in independent courts of general jurisdiction. American labor regulation is thus made part of the judicial process and, more specifically, the tort law aspect of that process.

Recent statutes, such as the Americans with Disabilities Act and the Family and Medical Leave Act operate in a similar fashion.[1] Not only does such legislation suit our history and national character; it is undeniably inexpensive for the government to impose. Rather than creating expensive bureaucratic controls paid for in tax dollars, the system places the cost of regulation on employers and employees. Further, these costs are imposed by a court system with little political accountability to the legislature. This system does, however, have the virtue of allowing thorough investigation and individualized determinations.

The problem is that the labor litigation system and federal agencies set up to assist in the investigation and adjudication of labor matters are becoming unmanageably slow, expensive and cumbersome. The Equal Employment Opportunity Commission now has the highest backlog it has had in many years. The creation of new rights and the passage of federal legislation has done nothing to ease this burden. A simple employment dispute, involving no more than $5,000 in lost wages and benefits, can easily cost several times this much to resolve -- no matter who prevails. Furthermore, administrative investigation and litigation may take years to complete. By the time of trial, the perceptions of the parties and witnesses have been irreversibly colored and polarized by years of conflict. Relatively cost-free remedies, such as reinstatement, have often become impossible. Emotional and economic damages which did not exist at the time of the dispute have accumulated, compounded, and assumed an importance far out of proportion to the nature of the dispute.

To a significant degree, these economic and emotional costs are products of the system itself. An employee who has recently been terminated may be shocked and depressed. These conditions are directly related to the termination. However, these difficulties are normally neither devastating nor permanent. But, a former employee who has spent several years in the litigation system is in an altogether different position. This individual has spent years building mistrust and suspicion, locked in conflict and absorbing the financial and emotional impacts of litigation. Quite often, because of the long-term alienation from former co-workers, he or she has lost an important part of the network of acquaintances that support any career. Further, he or she may become strongly focused on past wrongs, at the expense of present and future career. Naturally, the larger the potential damage award, the more this is likely to occur[2]. Inevitably, earning capacity and employment skills suffer.

Such economic losses are not a natural result of the wrong suffered. They are a natural result of a litigation-based dispute resolution system. What converts this from a highly arbitrary tax on employers to an economic tragedy is that employees do not obtain substantial recoveries with any great frequency. Reliable statistics are not readily available, but practical experience shows that, in the great majority of cases, the employees lose or must settle for far less than what they think they are entitled to receive. Actual large recoveries are quite rare. This is not a defect in law or procedure. It simply reflects a fact of life: the judicial system does not provide ordinary employees who must work for a living any real hope of obtaining significant economic relief in any time period that is realistic from the employee's standpoint.

In short, litigation, as a system of employment dispute resolution, is highly inefficient, both economically and morally. It wastes time, money and careers. This is true even if, as assumed here, the end result is always correct[3]. To the extent that the results through litigation are wrong, the social loss can only be greater.

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[1] Both the Americans with Disabilities Act and the Civil Rights Act of 1991 specifically encourage the use of mediation.

[2] Given a high potential legal recovery and a low present stream of earnings, this is rational economic behavior. However, in the economic terms, this behavior is self-reinforcing. The more the employees are distracted from their career, the lower their earning capacity, which in turn increases the relative value of their potential legal recovery, which results in a further investment in litigation and disinvestment from a career. The economics of employment litigation thus seem to bear a close relationship to the economics of both "repeat offender" criminal activity and state lottery systems.

[3] This may or may not approximate reality. Of the Appellate employment discrimination decisions reported in Employment Practices Decisions (CCH), vol. 67, 58 decisions or 47% resulted in at least a partial reversal or vacation of the trial court's judgment. This sampling, while certainly unscientific, is at least sufficient to justify questioning any claims of unique accuracy for litigated results at the trial level.

These observations do not prove that contractually resolved disputes are better decided, or even that contractual dispute resolution is more efficient. However, this discussion should dispel any illusion that private litigation has any automatic claim to historical, legal, moral or economic merit.

Before turning to existing alternatives in detail, including Halliburton's experience, the following two sections discuss the state of the law with regard to the enforceability of arbitration agreements in the employment context and the policy framework for other types of dispute resolution.

ENFORCEMENT OF MANDATORY ARBITRATION PROGRAMS IN THE EMPLOYMENT CONTEXT

Federal law, as well as the common law of most of these states, embraces the principle that arbitration of disputes should be encouraged. As a general proposition, this policy favoring arbitration applies equally in the employment context. See Circuit City v. Adams, 532 U.S. 105 (2001). Thus, where the agreement satisfies basic principles of contract formation, *e.g.*, consideration, and is not subject to any contract defense, *e.g.*, duress or unconscionability, most courts will enforce the agreement. For example, the Texas Supreme Court has enforced Halliburton's Dispute Resolution Program in a dispute brought by an employee alleging violation of state discrimination laws. In re Halliburton Co., 80 S.W. 3d 566 (Tex. 2002). The Court rejected attacks on the formation of the agreement, holding that the employee had received notice of the implementation of the program and accepted it by his continuing employment and that Halliburton's agreement to arbitrate was not illusory consideration in the at-will context. The Court further rejected challenges to both the procedural and substantive unconscionability of the program, noting the many characteristics of the program which evidenced its fairness.

The final resistance to the enforcement of well-designed arbitration agreements in the context of civil rights claims, by the Ninth Circuit, which encompasses among other states California, Arizona, Oregon, and Washington, finally gave way in EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003) (en banc). The court, which had been isolated amongst the federal appeals courts[4] in holding that arbitration agreements signed as a condition of employment are not enforceable with respect to either Title VII or analogous state law claims, see Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1187 (9th Cir.), cert. denied, 119 S. Ct. 465 (1998), reversed itself in an en banc decision. As a result, federal courts within the Ninth Circuit should join the other federal courts in enforcing arbitration agreements with regard to claims arising under federal civil rights statutes,[5] as long as they comply with state law. The California Supreme Court previously rejected the holding in Duffield and refused to apply its analysis to arbitration agreements encompassing state civil rights claims sought to be enforced in California state courts.[6] See Armendariz v. Foundation Health Psychcare Servs., Inc., 99 Cal.Rptr.2d 745 (Cal. 2000). A California appellate court has already held that Brown & Root's DRP complies with state law requirements and is therefore enforceable. Craig v. Brown & Root, Inc., 100 Cal.Rptr.2d 818 (Cal. Ct. App. 2000).

CURRENT LEGAL ISSUES IN THE ENFORCEMENT OF ARBITRATION AGREEMENTS

Although most courts have recognized the enforceability of arbitration agreements in the employment context, challenges to both the formation of agreements and to various provisions continue to evolve. These developments highlight various issues that employers should be aware of in designing their programs, drafting notices to employees and implementing arbitration plans.

Since the Ninth Circuit's retreat from Duffield, it has continued to find ways to invalidate mandatory arbitration agreements in the employment context, relying

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[4] At least one state court has taken an approach similar to that of the Ninth Circuit in Duffield. In Copley v. NCR Corp., 183 W. Va. 152, 157, 394 S.E.2d 751, 756 (1990), the West Virginia Supreme Court held that the West Virginia legislature intended to preclude arbitration of claims brought under the West Virginia Human Rights Act, the state analog to Title VII. The Fourth Circuit has criticized this ruling in light of the Supreme Court's Gilmer and Adams decisions. Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002).

[5] The federal courts have also recognized the availability of arbitration in the context of other federal statutory employment claims, such as the Fair Labor Standards Act. See Carter v. Countrywide Credit Inds., Inc., 362 F.3d 294 (5th Cir. 2004) (granting employer's motion to compel arbitration of employees' claims, where they sought collective action treatment under the FLSA).

[6] Although the case involved only state civil rights claims, there is no reason why the court's analysis would not apply equally to federal civil rights claims brought in California state court. Moreover, the California Arbitration Act specifically applies to agreements to arbitrate between employer and employee, and permit arbitration of state or federal civil rights claims.

now on its interpretation of state contract law and, principally, notions of unconscionability. The Ninth Circuit's decision, following the California Supreme Court, in Ingle v. Circuit City Stores, Inc., is instructive in the care that must be taken in designing programs, particularly in that jurisdiction. There, the Ninth Circuit first held that requiring employees to agree to arbitration as a condition of employment, without giving them the opportunity to negotiate terms or opt-out, is procedurally unconscionable. Ingle, 328 F.3d 1165 (9th Cir. 2003) (following Armendariz, 99 Cal.Rptr.2d 745). Further, the Ingle court found that all arbitration agreements between an employer and employee lack mutuality, based on its view that the possibility that the employer would initiate an action against an employee is remote, and thereby raised a rebuttable presumption of substantive unconscionability. The court also took aim at a number of specific provisions. The agreement's provision permitting the employer to terminate or modify the agreement after notice to employees -- a type of provision that has been challenged in a number of cases outside the Ninth Circuit-- was found to be substantively unconscionable. Compare id.; Cheek v. United Healthcare of the Mid-Atlantic, Inc., 378 Md. 139 (2003) (finding employer's promise to arbitrate illusory where it could alter or revoke arbitration provision at its discretion, without notice); Dumais v. American Golf Corp., 299 F.3d 1216 (10th Cir. 2002) (holding unilateral termination provision requiring no notice rendered agreement illusory), with In re Halliburton, 80 S.W. 3d 566 (Tex. 2002) (holding Halliburton's promise to arbitrate, where it could alter or terminate arbitration provisions prospectively, after 10 days notice, was not illusory).[7] The court also held that the agreement's one-year time limit for initiating arbitration, prohibition of class actions (see infra), non-waiveable filing fee payable to the employer, cost-splitting provision, and limitation on available remedies were each substantively unconscionable. See also Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (9th Cir. 2005) (following Ingle and finding multiple provisions unconscionable under Washington law).

While the Ninth Circuit appears to be relatively isolated in its antagonism towards arbitration agreements, with its presumption of unenforceability in the employment context, other courts join the Ninth Circuit in scrutinizing the enforceability of arbitration programs under general principles of contract law and occasionally refuse to enforce one-sided agreements or sever unconscionable provisions before compelling arbitration.

In the few years since the Supreme Court deferred the availability of class arbitration to arbitrators where the agreement was silent, see Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003),[8] courts have weighed in on the enforceability of explicit class arbitration waivers. Compare Ingle (class action prohibition substantively unconscionable because it denies a procedural benefit that only one side would employ); Al-Safin, 394 F.3d 1254 (9th Cir. 2005) (class prohibition unconscionable under Washington law); Walker v. Ryan's Family Steak Houses, Inc., 289 F. Supp. 2d 916, 926 (M.D. Tenn. 2003) (arbitral forum's removal of class action procedures from arbitration rules contributed to finding that agreement unconscionable and forum biased) with Carter v. Countrywide Credit Inds., Inc., 362 F.3d 294 (5th Cir. 2004) (rejecting argument that inability to proceed collectively deprives employees of substantive rights under the FLSA); Caley v.

[7] Several federal district courts have similarly held that Halliburton's promise to arbitrate is not rendered illusory by the provision allowing the employer to alter or terminate the program after notice and for prospective claims only.

[8] The implications of Bazzle are being litigated before the courts, but should raise concerns for employers. The plurality refused to infer from the agreement's silence that class proceedings were forbidden, explaining that the answer to the question was "not completely obvious." In so doing, it failed even to acknowledge a line of federal appellate cases holding that an agreement's silence on the availability of class proceedings could be construed as forbidding them. Where an agreement is silent, Bazzle puts into an arbitrator's hands the decision as to whether class proceedings are available as well as, in the event of a positive finding, the subsequent decisions of whether to certify and grant class-wide relief. See Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Personnel of Tex., Inc., 343 F.3d 355 (5th Cir. 2003) (reading Bazzle's holding, that the arbitrator should decide whether an agreement forbids or allows arbitration, as making it unnecessary for the court to decide initially whether an arbitration agreement clearly forbids class arbitration); Johnson v. Long John Silver's Restaurants, Inc., 320 F. Supp. 2d 656, 668 (M.D. Tenn. 2004) (refusing to consider whether a prohibition on class arbitration would effectively vindicate rights under the FLSA because, under Bazzle, the court did not have authority to decide whether the contract permits class arbitration); Cole v. Long John Silver's Rest., 388 F. Supp. 2d 644 (D.S.C. 2005) (holding it had no jurisdiction to review AAA arbitrator's construction of silent/ambiguous agreement as permitting class arbitration). Where an agreement explicitly forbids class arbitration, however, many courts have concluded that there is no question of interpretation for the arbitrator and have themselves decided the enforceability of that provision. See Gipson v. Cross Country Bank, 354 F. Supp.2d 1278 (M.D. Ala. 2005) (extensive analysis) ("The only issue is whether such a clear prohibition is valid and enforceable, and this court has held that it is."); Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005) (Bazzle did not address the question of whether a state can hold a class action waiver unconscionable, consistent with the FAA, or whether that determination should be made by the court or an arbitrator; under California law, whether grounds exist to revoke an agreement is for the courts to decide, not the arbitrator).

Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005) (rejecting argument that precluding class actions renders DRP unconscionable). While most cases addressing class provisions have arisen in the consumer context, the reasoning of courts that have refused to enforce class waivers, such as de minimus individual recovery and the absence of statutory attorneys' fees for prevailing plaintiffs, is often distinguishable in the employment context. Although the Ninth Circuit has expressly found class action prohibitions to be substantively unconscionable, the California Supreme Court has left the door open to finding some waivers acceptable, see Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005) (consumer arbitration agreement); and has recently agreed to consider the question of the enforceability of a provision prohibiting class arbitration in the context of alleged violations of California wage and hour laws. See Gentry v. Superior Court, 37 Cal. Rptr. 3d 790 (Ct. App. 2d Dist.) (holding class action waiver not unconscionable because agreement allowed opt-out within 30 days and individual's claim involved potentially substantial damages), rev. granted, 135 P.3d 1, 43 Cal.Rptr.3d 748 (2006). To avoid the uncertainty associated with a silent agreement, employers will want to consider explicitly addressing the availability of class-wide proceedings in their arbitration agreements and closely follow decisions addressing the enforceability of class prohibitions in this developing area of the law.

Often courts have been amenable to severing unenforceable provisions, although some agreements have been found to be so permeated with illegality as to render severance inappropriate. Compare Jackson v. Cintas Corp., 425 F.3d 1313 (11th Cir. 2005) (severing invalid limitations provision); Booker v. Robert Half Int'l, Inc., 413 F.3d 77 (D.C. Cir. 2005) (severing unenforceable punitive damages limitation and discussing approaches to severance by other circuits) with Ingle.

Contract formation principles have likewise been the subject of challenge, particularly where notice is minimal, and is denied by the employee. In perhaps the first circuit-level case addressing formation principles in the context of electronic mail, the First Circuit refused to enforce an arbitration agreement announced in a company-wide e-mail, holding that the e-mail communication was not an appropriate medium for contract formation in the absence of any past practice by the company or any acknowledgment requirement. Campbell v. General Dynamics Gov't Sys. Corp., 407 F.3d 546 (1st Cir. 2005). It also found a one-page letter, without consideration of the content of the embedded links to the program itself, did not provide fair warning that the continuation of employment would waive employees' rights to access the judicial forum. _The court did, however, outline steps an employer could take to ensure that e-mailed notice of the implementation of an arbitration program was sufficient to create a binding contract. Id.

Courts have continued to recognize that an employee "accepts" the arbitration agreement by continuing her employment after receiving notice of its implementation. See Marino v. Dillard's, Inc., 413 F.3d 530 (5th Cir. 2005) (holding that Louisiana law does not require written consent to arbitration agreement, but recognizes acceptance by continued employment). Recently, for instance, the Eighth Circuit held that an employee's refusal to sign an agreement does not preclude its binding effect where her employer notified her that her continued employment constituted assent. Berkley v. Dillard's Inc., 450 F.3d 775 (8th Cir. 2006).

Despite the latest challenges, well-designed and implemented arbitration programs, particularly outside the Ninth Circuit, should continue to avoid obstacles to enforcement.[9] See, e.g., American Gen. Life & Acc. Ins. Co. v. Wood, 429 F.3d 83 (4th Cir. 2005); Caley v. Gulstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005).

Not only have most federal courts been willing to enforce well-designed arbitration agreements, the Supreme Court has in the last few years recognized that the courts' role, when faced with arbitration agreements, was limited to resolving threshold questions of the arbitrability of a particular dispute while leaving gateway procedural questions and issues of contract interpretation to arbitrators. In Bazzle, 539 U.S. 444 (2003), a plurality of the Supreme Court held that where an arbitration agreement was silent as to whether class arbitration was permissible, the arbitrator rather than the court was to make that determination. Similarly, in Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002), the Court confirmed that the interpretation and application of a NASD rule imposing a time-limit for arbitration was a matter for the arbitrator, not for the courts, where the parties' contract did not call for judicial determination of whether arbitration was time-

[9] In a recent case that should be helpful in the management of merits litigation during the arbitration enforcement proceedings in some courts. the Eighth Circuit has joined the Eleventh and Seventh Circuits in holding that an interlocutory appeal from the denial of a motion to compel arbitration divested the district court of jurisdiction to proceed on the merits of the underlying claim while the appeal was pending. See McCauley v. Halliburton Energy Servs., Inc., 413 F.3d 1158 (10th Cir. 2005). The Second and Ninth Circuit have refused to stay such proceedings pending appeal.

barred. See Marie v. Allied Home Mortgage Corp., 402 F.3d 1 (1st Cir. 2005) (holding that question of whether plaintiff complied with contractual time limit for filing claim had to be addressed by arbitrator in the first instance, but that waiver of right to arbitrate by litigation activity was for court to decide).

POLICY IMPLICATIONS OF NONLITIGATION DISPUTE RESOLUTION PROCEDURES

The Federal Arbitration Act ("FAA") has carved out a relatively litigation-free zone around arbitration that has, particularly in recent years, allowed arbitration to develop and flourish. The "halo effect" of the FAA has also tended to protect other forms of dispute resolution, which are probably not "arbitration" under the FAA. This trend has been hastened by recent, strong state legislative and judicial initiatives toward alternative dispute resolution of litigated matters. The United States Supreme Court has also weighed in on the desirability of arbitration agreements in the employment context, most recently in Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001). In Circuit City, the Supreme Court noted that arbitration of employment disputes reduces litigation costs for both parties, which is particularly beneficial because of the smaller damages at issue in employment litigation. The post-Circuit City commentary confirms that the case likely has encouraged many of the nation's employers to consider implementing arbitration programs.

The trend toward arbitration has also been reinforced by experience with the EEOC and analogous state agencies, whose principal function has been to attempt to "conciliate" (mediate) employment disputes. Indeed, this is one of the ironies of the resistance to employer-initiated dispute resolution procedures. If the case is litigated, one of the first steps the court or agency is likely to take is to pressure the parties to undertake an alternative means of resolution. This procedure, typically mediation, is likely to be less well adapted to the particular employment environment than the system the employer would have adopted if left to its own devices.[10]

[10] Even if an employer has adopted an alternative dispute resolution program, however, the EEOC need not respect the agreement of the parties. The Supreme Court held in EEOC v. Waffle House, 534 U.S. 279 (2002), that the EEOC is not foreclosed from seeking victim-specific relief in court on behalf of an employee where that employee has agreed to arbitrate and would be precluded. The Court left open the possibility that the EEOC's recovery would be limited by the employee's conduct, such as failing to mitigate damages or accepting a monetary settlement from the employer.

This versatility is one of the principal advantages of a private dispute resolution mechanism. The particular method adopted can be adapted to fit each individual corporate structure. Indeed, Halliburton's DRP looks unlike other systems, although many of them share common features.

In addition to avoiding the one-size-fits-all approach typical of litigation (and perhaps required by Due Process), private mechanisms avoid most of the other inherent problems with the litigation system. Even the most complex private dispute resolution systems are usually substantially faster than litigation, and are almost always cheaper, at least for the employee. Because the principal social costs of litigation derive from its delay and expense, private systems offer a greater advantage.

Litigation is, or at least is assumed to be, extremely good at finding the truth. However, important as this function may be to resolving disputes, it is also a weakness. Litigation's single-minded search for complete disclosure and legal correctness short-changes other, equally valid goals of a dispute resolution system.

One of these objectives is reconciliation, which is best achieved by early mediation where each party retains some level of credibility with the other. Another is the opportunity to "tell one's story" to an outside decision-maker. Many social scientists believe that this is an important act of catharsis, even if the teller loses. In litigation, the opportunity comes only years later and is hemmed in by elaborate and expensive trial procedures. The litigation process is also largely inscrutable to the average citizen. Americans have always felt that even a confessed criminal is entitled to understand what is happening to him and why he is being punished. Yet, litigated employment matters are governed by procedural and substantive rules which are rarely understood by the parties, other than the most sophisticated employers and litigants. Arbitration cannot completely avoid substantive complexity, but it can radically simplify the procedural rules of the road.

Despite these advantages, arbitration and other dispute resolution mechanisms are sometimes criticized for denying employees important substantive rights. We believe these criticisms to be unfounded as applied to a properly designed and managed dispute resolution system which preserves the substantive employment rights of the employees, while providing increased procedural benefits through expedited resolution and cost efficiency. This allows the parties

to reach closure on the matter while the events are fresh and the employee can still pursue his career. By a properly designed and managed system, we mean one that includes such features as the key characteristics of our system listed above. It is critical to note that under a system with such characteristics, few disputes reach adjudicatory mechanisms such as arbitration or the courts; the vast majority are resolved by the mutual agreement of the parties, achieved through collaborative processes.

Ultimately, the greatest beneficiary of a private employment dispute resolution system, if it is allowed to flourish, may be the court system itself. Many federal courts are today awash in paper generated by relatively small cases. The Southern Districts of New York, Florida, Texas and California are cases in point. The greatest contributors to the problem are federal drug cases and prisoner habeas petitions. However, federal employment cases probably run a close third. The courts have responded to this crisis by restricting and formalizing discovery, pressuring settlements, placing arbitrary limits on trial time, and developing ever more rigid and complex procedures designed to increase paper flow and decrease the time judges (but not lawyers) spend on each case.

In short, the court system, with regard to employment cases, is being stifled by overload. Its primary virtue, careful and deliberate reconstruction of the past, is becoming a casualty of the pressing need for judicial efficiency. Yet, unlike private dispute resolution, the sacrifice is not offset by any substantial progress toward other legitimate objectives of the litigants, for example, reconciliation, catharsis, closure or comprehension. Certainly there are more settlements of litigated cases than in times past. But these settlements are not driven by reconciliation. They are, as often as not, driven by the litigants' dawning realization that one's day in court may be too long in coming, too short to tell the story, too expensive to afford, and too hard to understand.

HALLIBURTON'S EXPERIENCE UNDER ITS FOUR-OPTION SYSTEM

Private employment dispute resolution has enormous promise. There is every reason to believe that it will deliver superior justice, superior speed and reduced cost. Yet the field is quite new. Not only are employers just beginning to implement ambitious, sophisticated systems of dispute resolution, but dispute resolution, as a field of serious academic study, is in its infancy. The hard data have yet to be gathered, and perhaps the hard questions have yet to be asked -- about both litigation and private methods.

A few observations can be made with a high degree of certainty. First, the litigation system has no special claim to delivering justice, or even truth. Second, the litigation system is, even assuming perfect efficiency in achieving the "right" result, an extremely slow, expensive device imposing heavy monetary and non-monetary costs on the participants. If another system is available, it ought to be given a chance to succeed. Third, as stated above, we have little concrete information on the vast array of alternatives. The existing studies do not contain sufficient statistical data from which to draw reliable conclusions.

In its first seven years, over 4,000 employees utilized some aspect of the DRP Program. Of these 4,000 matters, over 75% were resolved within 8 weeks of the employee's initial contact. The vast majority were resolved within the Company. The overwhelming majority of these cases were resolved through collaborative, in-house processes such as informal or formal mediation. About 400 have gone to mediation, both internal and external, and about 100 have gone to final outside arbitration. While the Company has not prevailed in all the arbitrations, its win/loss record is similar to its previous experience in the litigation forum with similar cases.

Even with an employee benefit plan which compensates employees for their legal expenses, fewer than 400 employees have requested the assistance of counsel over the first five years. In many of the arbitrations which have occurred, the employees have elected to proceed without the use of legal counsel.

While the total cost of this Program is still being analyzed, it is clear that the annual expense for this type of Program is substantially less than what a large, litigated employment case can cost both the company and the employee in legal expenses, while doing a much better job of delivering justice in the workplace to the average employee.

The Halliburton DRP provides the employee four options for the resolution of a dispute. These options may be employed or bypassed for another option at the employee's discretion. The options are:

A. The Company's Open Door Policy -Under this option, the employee may speak to his or her immediate supervisor or to a higher level manager in the chain of command.

B. A Conference -Under this option, the employee meets with a company representative from the DRP office to talk about their dispute and to choose a method for resolving it. One method available is an internal, informal mediation involving the use of a Halliburton advisor.

C. A Formal Mediation -This option involves the use of a neutral third party using an AAA mediator.

D. A Formal Arbitration -This option involves the use of the AAA's arbitration program.

One of the most utilized and cost-effective parts of the Halliburton's DRP is the Ombudsman Program. The program is generally structured to provide a confidential outlet for current and former employees who have employment-related problems, primarily through informal mediation.

The actual task the ombudsmen perform varies greatly from one case to the other. They may act as mediators, as fact-finders, or both, or may practice collaborative techniques -- all in an effort to obtain resolution at the earliest phase of the dispute. In some cases they may give advice to the employee as to what avenues may be opened within the organization to assist them. They never serve as an advocate for the employee, and in many situations never actually contact anyone within the company.

Along with the Ombudsman Program, the DRP places a heavy emphasis on mediation. In the first four years, the resolution rate of mediated disputes exceeded 75%. Resolutions reached in the mediations ranged from a simple apology to reinstatement and substantial monetary damages. The mediators' common link is confidentiality, consistent with the expectations of the parties. Furthermore, the resolutions come very rapidly when compared to either litigated determinations, or even mediated resolutions after matters go to litigation.

The timely resolution of the disputed matter is one of the most powerful attributes of the advisor and mediation functions of the Halliburton Dispute Resolution Program.

CONCLUSION

Even though the Halliburton Program has been in effect for over five years, it still remains somewhat unique because of its comprehensive scope in applying to virtually all employment disputes (except workers' compensation and unemployment claims), and binding all employees from senior executives to entry level employees. We have also developed several training programs for supervisors which provide them with conflict management skills to try to handle employment problems at the lowest possible level. We believe that the equitable and uniform nature of our Program, together with reinforcement of its conflict management purpose through comprehensive and consistent management training are keys to the long term success and viability of any dispute resolution program. Additionally, the DRP Program was developed largely by employees of the company with appropriate external help, but the principle focus was to integrate a new system into the existing processes while maintaining organizational cultural values and norms. By most measurement parameters, the Program has succeeded in both bringing quicker resolution to problems and substantially reducing the Company's transaction expenses and legal fees while preserving employment relationships.

These must be basic and fundamental goals of any dispute resolution program.

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Blue Cross and Blue Shield of Michigan's Experience with Non Union Employment Arbitration

by Frank Westley Jackson III
Assistant General Counsel

Blue Cross and Blue Shield of Michigan (BCBSM) is a non profit corporation that provides health insurance products to companies that are headquartered in Michigan. It has approximately 6,000 employees scattered throughout the State of Michigan. Half of these employees are represented by the UAW and have just cause protection, with the right of arbitration over employment disputes. The rest of the employees are at will employees.

BCBSM has a human resources division, with a strong will senior vice president, who insists upon a "fair" investigation of employee complaints. Very few complaints about treatment of its non unionized workforce are ever taken to an outside agency, such as the EEOC or the Michigan Department of Civil Rights, with the notable exception, of discharge. Almost all complaints are resolved internally.

However, in 1994, a rising number of lawsuits, EEOC charges and MDCR charges, involving discharges filed against BCBSM caused me to look at ADR as a way of reducing our exposure. I had an additional impetus because BCBSM has its headquarters in Wayne County. Wayne County juries traditionally award extremely high jury awards in employment cases. At one point in the 1990s, Wayne County jury awards, for employment cases, were the highest, on average, in the entire country. Also, it seemed to make no difference where in the state of Michigan, the discharge took place, the lawsuit was nearly always filed in Wayne County.

In 1994, with the help of the law firm, Kienbaum, Opperwall, Hardy & Pelton, LLC, we put into place an arbitration procedure that has withstood legal challenge, lowered the number of complaints about discharge, resolved the claims filed in less than one half the time normally spent in litigation in the courts and lowered the exposure to the company. With the implementation of the arbitration procedure, the number of lawsuits over termination has dropped significantly. Since January 1, 1995, the effective date of implementation of the arbitration program, there has also been a drop in the number of administrative charges filed with the EEOC and the MDCR. We consider the program a success.

Unlike many other programs, the BCBSM model is narrowly focused. It provides for arbitration in discharge cases only in which a complainant would normally file a law suit involving a civil rights statue. It was our view that people are less likely to file lawsuits over assignments, raises, promotions than they are about discharges. It was also our view that our internal process was successful in addressing the vast majority of those disputes. We based these reviews on an analysis of our history. We found that people will almost always seek a legal remedy, when fired.

Given the at will nature of the employment relationship between BCBSM and its non union employees, an individual could only get to a jury if he or she alleged something akin to race, sexual discrimination or sexual harassment or age discrimination or some other statutory protected activity, which trumped the at will nature of the employment relationship. It was also our view that even if the jury members thought there was no discrimination or other statutory violation, they would find against the BCBSM, if they did not like the manager or supervisor or if they thought the company's actions were unfair, but not illegal.

We also found that the litigation process took no less than 2 years to reach resolution. Civil litigation requires a tremendous amount of attorney time. We thought that our money could be better spent.

We developed the arbitration program with two principle goals in mind. We wanted to get away from run away juries, who sometimes would ignore the law and rendered "street justice." And we wanted the process to reach resolution in less than a year, from the date of the filing of the request for arbitration. We also wanted to survive legal challenge to the process.

Towards that end, we chose not to force our current employees to participate in the arbitration process. For all new employees, it was a condition of employment that the prospective employee had to agree to before being hired. We adopted the statue of limitation, encased in each of the civil rights statues. We gave the arbitrator the authority to give the same type of remedies given to courts and juries by statute or by case law. We allow extensive discovery, upon request to the arbitrator. We acknowledge that the complainant may file a complaint with the EEOC and the MDCR and that those agencies have independent rights to carry out their legislative mandates.

After more than 11 years, we have never had a request for arbitration filed later than 90 days after termination. Almost all of the requests for arbitration have been resolved in less than one year after the filing for arbitration. We have far fewer requests for arbitration than we had law suits.

As to those individuals hired prior to 1995, we offer, but do not mandate arbitration. Some have taken the offer. Most have not. In 1994, we made a business decision that we would incur greater wrath from our entrenched workforce than it was worth it to change the "rules" on how to address claims of discrimination. We also believed (in 1994) that our state judiciary was hostile to the general notion of civil rights claims. We chose to not give our courts an additional motive to invalidate the program.

Dispute Resolution Plan and Rules

THE HALLIBURTON DISPUTE RESOLUTION PLAN

1. Purpose and Construction

The Plan is designed to provide a program for the quick, fair, accessible, and inexpensive resolution of Disputes between the Company and the Company's present and former Employees and Applicants for employment, related to or arising out of a current, former or potential employment relationship with the Company. The Plan is intended to create an exclusive procedural mechanism for the final resolution of all Disputes falling within its terms. It is not intended either to abridge or enlarge substantive rights available under applicable law. The Plan contractually modifies the "at-will" employment relationship between the Company and its Employees, but only to the extent expressly stated in this Plan. The Plan should be interpreted in accordance with these purposes.

2. Definitions

A. "AAA" means the American Arbitration Association.

B. "JAMS" means Judicial Arbitration and Mediation Services.

C. "CPR" means the Center for Public Resources.

D. The "Act" means the Federal Arbitration Act, 9 U.S.C. § 1, et seq., as amended from time to time.

E. "Company" means Sponsor and every subsidiary (first tier and downstream) of Sponsor, any Electing Entity, any entity or person alleged to have joint and several liability concerning any Dispute, and all of their directors, officers, employees, and agents, every plan of benefits, whether or not tax-exempt, established or maintained by any such entity, the fiduciaries, agents and employees of all such plans, and the successors and assigns of all such entities, plans and persons; provided, however, that in the case of an Electing Entity, "Company" shall include the Electing Entity only to the extent provided in the Electing Entity's agreement to be bound by the Plan.

F. "Dispute" means all legal and equitable claims, demands, and controversies, of whatever nature or kind, whether in contract, tort, under statute or regulation, or some other law, between persons bound by the Plan or by an agreement to resolve Disputes under the Plan, or between a person bound by the Plan and a person or entity otherwise entitled to its benefits, including, but not limited to, any matters with respect to:

1. this Plan;

2. the employment or potential reemployment of an Employee, including the terms, conditions, or termination of such employment with the Company;

3. employee benefits or incidents of employment with the Company;

4. any other matter related to or concerning the relationship between the Employee and the Company including, by way of example and without limitation, allegations of: discrimination based on race, sex, religion, national origin, age, veteran status or disability; sexual or other kinds of harassment; workers' compensation retaliation; defamation; infliction of emotional distress; or status, claim or membership with regard to any employee benefit plan;

5. an Applicant's application for employment and the Company's actions and decisions regarding such application; and

6. any personal injury allegedly incurred in or about a Company workplace.

"Dispute" includes all such matters regardless of when the events on which they are based occurred, including matters based on events occurring before the Employee became subject to this Plan (so long as such disputes were not previously asserted in a judicial forum) or after termination of the employment relationship.

G. "Electing Entity" means any legal entity which has agreed to be bound by the Plan as provided herein.

H. "Employee" means any person who is or has been in the employment of the Company on or after the effective date of this Plan, whether or not employed at the time a claim is brought with respect to a Dispute, residing in the United States, or otherwise subject to the laws of the United States or any state, municipality, or other political subdivision of the United States.

I. "Applicant" means any person who is seeking or has sought employment with the Company after the effective date of this Plan.

J. "Party" means, with respect to a particular Dispute, affected persons and / or entities bound by this Plan.

K. "Plan" means this Halliburton Dispute Resolution Plan, as amended from time to time.

L. "Rules" means the Halliburton Dispute Resolution Rules, as amended from time to time, which are applicable to mediation and arbitration.

M. "Sponsor" means The Halliburton Company, a Delaware Corporation.

3. Name, Application and Coverage

A. The Plan shall be referred to as the "Halliburton Dispute Resolution Plan." Alternatively, it may be referred to as the "Halliburton Dispute Resolution Program" or the "Dispute Resolution Program. "

B. Until revoked by Sponsor pursuant to this Plan, this Plan applies to and binds the Company, each Employee and Applicant and the heirs, beneficiaries and assigns of any such person or entity; provided, however, that this Plan shall not apply to any Employee in a unit of Employees represented by a labor organization, or to the Company with respect to such employees, except to the extent permitted in an applicable collective bargaining agreement or lawfully imposed by the Company when no collective bargaining agreement is in effect.

C. Except as provided for herein, this Plan applies to any Dispute.

D. Notwithstanding anything to the contrary in this Plan, the Plan does not apply to claims for workers' compensation benefits or unemployment compensation benefits.

E. Mediation and arbitration are only available for Disputes involving legally protected rights.

F. Notwithstanding any other provision hereof, any court with jurisdiction over the Parties may issue any injunctive orders (including preliminary injunctions) if the necessary legal and equitable requirements under applicable law are met pending the institution of proceedings under the Plan.

4. Resolution of Disputes

All Disputes not otherwise settled by the Parties shall be finally and conclusively resolved under this Plan and the Rules.

5. Confidentiality

A. The Dispute Resolution Program ("Program"), its Administrator, any subordinate administrators, the staff of the Program and any other person conducting conferences or serving as an impartial third party on behalf of the Program in any in-house dispute resolution process conducted under the auspices of the Program, will hold matters reported under the Program and related communications in confidence, in keeping with the Standards of Practice and the Code of Ethics of The Ombudsman Association. The Code of Ethics and the Standards of Practice of The Ombudsman Association are incorporated into this plan by reference and appended.

For purposes of requests by or subpoenas from any party that the Program Administrator or any subordinate administrators, or any member of the staff of the Program or person conducting conferences or serving as an impartial third party on behalf of the Program in any in-house dispute resolution process conducted under the auspices of the Program, provide testimony in any internal or external investigation, administrative hearing, or arbitration or litigation proceeding, the confidentiality standards described in this section attach to the Dispute Resolution Program, rather than any individual disputant. This means that only the Program, rather than any individual disputant, may waive confidentiality, and the Program may only waive confidentiality, even upon request or subpoena by a disputant, under circumstances consistent with The Ombudsman Association Code of Ethics and Standards of Practice.

B. No employee shall be subject to any form of discipline or retaliation for initiating or participating in good faith in any process or proceeding under this Plan.

6. Amendment

A. This Plan may be amended by Sponsor at any time by giving at least 10 days notice to current Employees. However, no amendment shall apply to a Dispute for which a proceeding has been initiated pursuant to the Rules.

B. Sponsor may amend the Rules at any time by serving notice of the amendments on AAA, JAMS, and CPR. However, no amendment of the Rules shall apply to a Dispute for which a proceeding has been initiated pursuant to the Rules.

7. Termination

This Plan may be terminated by Sponsor at any time by giving at least 10 days notice of termination to current Employees. However, termination shall not be effective as to Disputes for which a proceeding has been initiated pursuant to the Rules prior to the date of termination.

8. Applicable Law

A. The Act shall apply to this Plan, the Rules, and any proceedings under the Plan or the Rules, including any actions to compel, enforce, vacate or confirm proceedings, awards, orders of an arbitrator, or settlements under the Plan or the Rules.

B. Other than as expressly provided herein, or in the Rules, the substantive legal rights, remedies, and defenses of all Parties are preserved. In the case of arbitration, the arbitrator shall have the authority to determine the applicable law and to order any and all relief, legal or equitable, including punitive damages, which a Party could obtain from a court of competent jurisdiction on the basis of the claims made in the proceeding.

C. Other than as expressly provided herein, or in the Rules, the Plan shall not be construed to grant additional substantive, legal, or contractual rights, remedies or defenses which would not be applied by a court of competent jurisdiction in the absence of the Plan.

D. Notwithstanding the provisions of the preceding subsection, in any proceeding before an arbitrator, the arbitrator, in his discretion, may allow a prevailing Employee or Applicant a reasonable attorney's fee as part of the award. The discretion to allow an award of fees under this subsection is in addition to any discretion, right or power which the arbitrator may have under applicable law. However, any award of fees shall be reduced by any amounts which have been or will be paid by the Halliburton Employee Legal Assistance Plan.

9. Administrative Proceedings

A. This Plan shall apply to a Dispute pending before any local, state or federal administrative body or court unless prohibited by law.

B. Participation in any administrative or judicial proceeding by the Company shall not affect the applicability of the Plan to any such Dispute upon termination of the administrative or judicial proceedings. A finding, recommendation or decision by an administrative body on the merits of a Dispute shall have the same legal weight or effect under the Plan as it would in a court of competent jurisdiction.

10. Exclusive Remedy

Proceedings under the Plan shall be the exclusive, final and binding method by which Disputes are resolved.

11. Electing Corporations

A. Corporations or other legal entities, not otherwise Parties, may elect to be bound by this Plan by written agreement with Sponsor.

B. Election may be made only as to some types of Disputes, or only as to some persons, in the discretion of Electing Entity.

12. Effective Date

The effective date of this Plan shall be June 15, 1993, as amended as of August 15, 1999.

13. Severability

The terms of this Plan and the Rules are severable. The invalidity or unenforceability of any provision therein shall not affect the application of any other provision. Where possible, consistent with the purposes of the Plan, any otherwise invalid provision of the Plan or the Rules may be reformed and, as reformed, enforced.

14. Administration

Sponsor shall appoint one or more persons to administer the Plan who shall be known as the "Dispute Resolution Plan Administrator." The Dispute Resolution Plan Administrator shall be responsible for the management and administration of the Plan.

15. Assent

Employment or continued employment after the Effective Date of this Plan constitutes consent by both the Employee and the Company to be bound by this Plan, both during the employment and after termination of employment. Submission of an application, regardless of form, for employment constitutes consent by both the Applicant and the Company to be bound by this Plan.

HALLIBURTON DISPUTE RESOLUTION RULES

1. Definitions

All definitions included in the Halliburton Dispute Resolution Plan apply to these Rules.

2. Application

A. If different rules are applicable to a specific class of Disputes, and have been adopted by Sponsor and served on AAA, JAMS, or CPR, these Rules shall not apply to such class of Disputes.

B. These Rules apply in the form existing at the time proceedings are initiated under them.

C. To the extent consistent with these Rules, the Employment Dispute Resolution Rules of AAA, JAMS, or CPR also apply to all proceedings governed by these Rules.

3. Initiation of the Process

A. A party may initiate proceedings under these Rules at any time, subject to any defenses including those applicable to the timeliness of the claim, including limitations and laches.

B. A party may initiate proceedings by serving a written request to initiate proceedings on AAA, JAMS, or CPR and tendering the appropriate administrative fee.

C. Copies of the request shall be served on all other parties to the Dispute by AAA, JAMS, or CPR. The request shall describe the nature of the Dispute, the amount involved, if any, the remedy sought, and the proceeding locale requested.

D. Proceedings may also be initiated by an Employee or Applicant by serving a written request to initiate proceedings on the Company's Dispute Resolution Plan Administrator. In such a case, the Company shall promptly forward any properly served request it has received to AAA, JAMS, or CPR.

E. Parties against whom a claim is asserted shall file an answering statement within 21 days of receiving notice of intent to arbitrate or a specification of claims, which shall include any counterclaims and any request that the arbitrator (if any) prepare a statement of reasons for the award.

4. Administrative Conference

AAA, JAMS, or CPR shall convene an administrative conference as soon as possible after receipt of the answering statement or after expiration of the time for filing an answering statement if one has not been filed. The conference may be held in person or by telephone. At the conference, AAA, JAMS, or CPR will determine whether the Parties are in agreement on a method to resolve the Dispute. If the Parties are in agreement, AAA, JAMS, or CPR will implement the procedure in accordance with their rules upon payment of any applicable fee. If the Parties cannot agree, or if the Parties have previously attempted and failed to resolve the Dispute by mediation or another nonbinding mechanism, the Dispute shall be arbitrated under these Rules.

5. Appointment of Arbitrator

Immediately after payment of the arbitration fee, AAA, JAMS, or CPR shall simultaneously send each party an identical list of names of persons chosen from a panel of qualified arbitrators which AAA, JAMS, or CPR shall select and maintain. Each Party to the Dispute shall have fourteen (14) days from the transmittal date to strike any names objected to, number the remaining names in order of preference, and return the list to AAA, JAMS, or CPR. If a party does not return the list within the time specified, all persons therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the order of mutual preference, AAA, JAMS, or CPR shall invite the acceptance of the arbitrator to serve. Any party shall have the right to strike one list of arbitrators in its entirety. When a party exercises this right, AAA, JAMS, or CPR shall issue a new list of arbitrators consistent with the above procedures.

6. Qualifications of the Arbitrator

No person shall serve as an arbitrator in any matter in which that person has any financial or personal interest. Prior to accepting appointment, the prospective arbitrator shall disclose any circumstance likely to prevent a prompt hearing or create a presumption of bias. Upon receipt of such information from the arbitrator or any other source, AAA, JAMS, or CPR will either replace that person or communicate the information to the Parties for comment. Thereafter, AAA, JAMS, or CPR may disqualify that person, and its decision shall be conclusive.

7. Vacancies

If a vacancy occurs for any reason or if an appointed arbitrator is unable to serve promptly, the appointment procedure in Section 5 shall apply to the selection of a substitute arbitrator.

8. Date, Time and Place of Hearings

A. The arbitrator shall set the date, time and place of any proceeding.

B. Notice of any hearing shall be given at least ten (10) days in advance, unless the arbitrator determines or the Parties agree that a shorter time is necessary.

C. The arbitrator shall make every effort, without unduly incurring expense, to accommodate the Employee or Applicant in the selection of a proceeding location.

9. Conferences

At the request of AAA, JAMS, or CPR or of a Party or on the initiative of the arbitrator, the arbitrator or AAA, JAMS, or CPR may notice and hold conferences for the discussion and determination of any matter which will expedite the proceeding, including:

A. venue,

B. clarification of issues,

C. determination of preliminary issues, including summary determination of dispositive legal issues,

D. discovery,

E. the time and location of proceedings or conferences,

F. interim legal or equitable relief authorized by applicable law,

G. pre- or post-hearing memoranda,

H. stipulations; and / or

I. any other matter of substance or procedure.

10. Mode of Hearings and Conferences

In the discretion of the arbitrator or by agreement of the Parties, conferences and hearings may be conducted by telephone or by written submission, as well as in person.

11. Pre-hearing Discovery

A. On any schedule determined by the arbitrator, each Party shall submit in advance, the names and addresses of the witnesses it intends to produce and any documents it intends to present.

B. The arbitrator shall have discretion to determine the form, amount and frequency of discovery by the Parties.

C. Discovery may take any form permitted by the Federal Rules of Civil Procedure, as amended from time to time, subject to any restrictions imposed by the arbitrator.

12. Representation

Any party may be represented by counsel or by any other authorized representative.

13. Attendance at Hearings

The arbitrator shall maintain the privacy of the proceedings to the extent permitted by law. Any person having a direct interest in the matter is entitled to attend the proceedings.

The arbitrator shall otherwise have the power to exclude any witness, other than a Party or other essential person, during the testimony of any other witness. The arbitrator shall determine whether any other person may attend the proceeding. Upon the request of any Party, the arbitrator shall exclude any witness during the testimony of any other witness.

14. Postponement

A. The arbitrator, for good cause shown by a Party, or on agreement of the Parties, may postpone any proceeding or conference.

B. The tendency of court proceedings related to the same matter is not good cause for postponement.

15. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath

administered by any duly qualified person and, if required by law or requested by any Party, shall do so.

16. Record of Proceedings

There shall be no stenographic, audio, or video record of the proceedings unless either requested by one of the Parties or specified by the arbitrator. The Party requesting the record shall bear the entire cost of producing the same. Copies of the record shall be furnished to all other Parties upon request and upon payment of the cost of reproduction.

17. Procedure

The proceedings shall be conducted by the arbitrator in whatever order and manner will most expeditiously permit full presentation of the evidence and arguments of the Parties.

18. Arbitration in the Absence of a Party

The arbitrator may proceed in the absence of Parties or representatives who, after due notice, fail to be present or fail to obtain a postponement. An award shall not be made solely on the default of a Party. The arbitrator shall require any Party who is present to submit such evidence as the arbitrator may require for the making of an award.

19. Evidence

A. The arbitrator shall be the sole judge of the relevancy, materiality, and admissibility of evidence offered. Conformity to legal rules of evidence shall not be necessary.

B. The arbitrator may subpoena witnesses or documents at the request of a Party or on the arbitrator's own initiative.

C. The arbitrator may consider the evidence of witnesses by affidavit or declaration, but shall give it only such weight as the arbitrator deems appropriate after consideration of any objection made to its admission.

20. Post-Hearing Submissions

All documentary evidence to be considered by the arbitrator shall be filed at the hearing unless the arbitrator finds good cause to permit a post-hearing submission. All Parties shall be afforded an opportunity to examine and comment on any post-hearing evidence. The arbitrator shall permit the filing of post-hearing briefs at the request of a Party and shall determine the procedure and timing of such filings.

21. Closing and Reopening of Proceedings

A. When the arbitrator is satisfied that the record is complete, including the submission of any post-hearing briefs or documents permitted by the arbitrator, the arbitrator shall declare the proceeding closed.

B. The proceeding may be reopened on the arbitrator's initiative or upon application of a Party at any time before the award is made.

22. Waiver of Procedures

Any Party who fails to object in writing, after knowledge that any provision or requirements of these procedures and Rules have not been complied with, shall be deemed to have waived the right to object.

23. Service of Notices and Papers

Any papers, notices, or process necessary or proper for the initiation or continuation of any proceeding under these Rules (including the award of the arbitrator, any court action in connection therewith, or the entry of judgment on an award made under these procedures) may be served on a Party by mail addressed to the Party or his or her representative at the last known address or by personal service. AAA, JAMS, CPR, the Parties, and the arbitrator may also use facsimile transmission, telex, telegram, or other written forms of electronic communication to give any notices required by these Rules.

24. Communications with the AAA, JAMS, CPR and the Company

A. Any Party may notice, serve or communicate with AAA by contacting:

Regional Administrator
American Arbitration Association
1750 Two Galleria Tower
13455 Noel Road
Dallas, Texas 77520
(972) 774-6958 or (800) 804-8865
Fax: (972) 490-9008

B. Any Party may notice, serve or communicate with JAMS by contacting:

JAMS
8401 North Central Expressway Suite 610
Dallas, TX 75225
(214) 744-5267 or (800) 352-5267
Fax: (214) 720-6010

C. Any Party may notice, serve or communicate with CPR by contacting:

Center for Public Resources
366 Madison Avenue
New York, NY 10017-3122
(212) 949-6490
Fax: (212) 949-8859

Any Party may notice, serve or communicate with the Company by contacting:

Dispute Resolution Program

Administrator
The Halliburton Company
4100 Clinton Drive
Houston, Texas 77020-6299
(713) 676-5383
Fax: (713) 676-4470

25. Communication with the Arbitrator

There shall be no communication between the Parties and the arbitrator other than at any oral hearings or conferences. Any other oral or written communications from the Parties to the arbitrator shall be directed to the AAA, JAMS, or CPR (and copied to the Parties) for transmission to the arbitrator, unless the Parties and the arbitrator agree otherwise.

26. Time of Award

The award shall be promptly made by the arbitrator, unless otherwise agreed by the Parties or specified by applicable law, no later than thirty (30) days from the date of the closing of the proceeding or, if applicable, the closing of a reopened proceeding.

27. Form of Award

The award shall be in writing and shall be signed by the arbitrator. The arbitrator shall write a statement of reasons for the award if requested to do so in the request to initiate proceedings or in the answering statement. The award shall be executed in any manner required by applicable law.

28. Modification of Award

On order of a court of competent jurisdiction, or on agreement of the Parties, the arbitrator shall modify any award. The arbitrator may modify an award on the motion of a Party if the arbitrator finds that the award, as rendered, is ambiguous or defective in form, or if the award requires an illegal or impossible act. These are the only circumstances under which an arbitrator shall have jurisdiction to withdraw or modify an award.

29. Settlement

If the parties settle their Dispute during the course of the arbitration, the arbitrator may set out the terms of the settlement in a consent award.

30. Scope of Arbitrator's Authority

The arbitrator's authority shall be limited to the resolution of legal Disputes between the Parties. As such, the arbitrator shall be bound by and shall apply applicable law including that related to the allocation of the burden of proof as well as substantive law. The arbitrator shall not have the authority either to abridge or enlarge substantive rights available under applicable law. The arbitrator may also grant emergency or temporary relief which is or would be authorized by applicable law. The arbitrator shall be bound by and shall comply with the provisions of the Plan and Rules.

31. Judicial Proceedings and Exclusion of Liability

A. Neither AAA, JAMS, CPR, nor any arbitrator is a necessary party in any judicial proceedings relating to proceedings under these Rules.

B. Neither AAA, JAMS, CPR, nor any arbitrator shall be liable to any Party for any act or omission in connection with any proceedings within the scope of these Rules.

C. Any court with jurisdiction over the Parties may compel a Party to proceed under these Rules at any place and may enforce any award made.

D. Parties to these Rules shall be deemed to have consented that judgment upon the award of the arbitrator may be entered and enforced in any federal or state court having jurisdiction of the Parties.

E. Initiation of, participation in, or removal of a legal proceeding shall not constitute waiver of the right to proceed under these Rules.

F. Any court with jurisdiction over the Parties may issue any injunctive orders (including preliminary injunctions) if the necessary legal and equitable requirements under applicable law are met pending the institution of proceedings under these Rules.

32. Fees and Expenses

A. The expenses of witnesses shall be borne by the Party producing such witnesses, except as otherwise provided by law or in the award of the arbitrator.

B. All attorney's fees shall be borne by the Party incurring them except as otherwise provided by law, by the Plan, or in the award of the arbitrator.

C. Discovery costs (e.g., court reporter fees for original transcripts) shall be borne by the Party initiating the discovery. The cost of copies of deposition transcripts or other discovery shall be borne by the Party ordering the copy.

D. The fees and expenses of experts, consultants and others retained or consulted by a Party shall be borne by the Party utilizing those services.

E. The Employee or Applicant shall pay a $50 fee if he or she initiates arbitration or mediation. Otherwise, Employee/Applicant Parties shall not be responsible for payment of fees and expenses of proceedings under these Rules including required travel of an arbitrator or a mediator, expenses of an arbitrator, mediator, AAA, JAMS, or CPR, and the cost of any proof produced at the discretion of an arbitrator.

F. If the demand for mediation or arbitration is initiated by the Company, such fees will be paid by the Company.

G. Except as otherwise provided by law or in the award of the arbitrator, all other expenses, fees and costs of proceedings under these Rules shall be borne equally by the Parties who are not Employees/Applicants.

33. Interpretation and Application of These Rules

The arbitrator shall interpret and apply these Rules insofar as they relate to the arbitrator's powers and duties. All other rules shall be interpreted and applied by the AAA, JAMS, or CPR.

34. Applicable Law

A. Proceedings under these Rules and any judicial review of awards shall be governed by the Act.

B. Except where otherwise expressly provided in these Rules, the substantive law applied shall be state or federal substantive law which would be applied by a United States District Court sitting at the place of the proceeding.

35. Mediation

At any time before the proceeding is closed, the Parties may agree to mediate their dispute by notifying AAA, JAMS, or CPR. AAA, JAMS, or CPR shall determine what procedures apply to any such mediation.

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APPENDIX

THE OMBUDSMAN ASSOCIATION

Code of Ethics

The ombudsman, as a designated neutral, has the responsibility of maintaining strict confidentiality concerning matters that are brought to his/her attention unless given permission to do otherwise. The only exceptions, at the sole discretion of the ombudsman, are where there appears to be imminent threat of serious harm.

The ombudsman must take all reasonable steps to protect any records and files pertaining to confidential discussions from inspection by all other persons, including management.

The ombudsman should not testify in any formal judicial or administrative hearing about concerns brought to his/her attention.

When making recommendations, the ombudsman has the responsibility to suggest actions or policies that will be equitable to all parties.

*The Ombudsman Association

THE OMBUDSMAN ASSOCIATION

STANDARDS OF PRACTICE

The mission of the organizational ombudsman is to provide a confidential, neutral and informal process which facilitates fair and equitable resolutions to concerns that arise in the organization. In performing this mission, the ombudsman serves as an information and communication resource, upward feedback channel, advisor, dispute resolution expert and change agent.

While serving in this role:

1. **We adhere to The Ombudsman Association Code of Ethics.**

2. **We base our practice on confidentiality.**

2.1 **An ombudsman should not use the names of individuals or mention their employers without express permission.**

2.2 **During the problem-solving process an ombudsman may make known information as long as the identity of the individual contacting the office is not compromised.**

2.3 **Any data that we prepare should be scrutinized carefully to safeguard the identity of each individual whose concerns are represented.**

2.4 **Publicity about our office conveys the confidential nature of our work.**

3. **We assert that there is a privilege with respect to communications with the ombudsman and we resist testifying in any formal process inside or outside the organization.**

3.1 **Communications between an ombudsman and others (made while the ombudsman is serving in that capacity) are considered privileged. Others cannot waive this privilege.**

3.2 **We do not serve in any additional function in the organization which would undermine the privileged nature of our work (such as compliance of officer, arbitrator, etc.)**

3.3 **An ombudsman keeps no case records on behalf of the organization. If an ombudsman finds case notes necessary to manage the work, the ombudsman should establish and follow a consistent and standard practice for the destruction of any such**

written notes.

3.4 **When necessary, the ombudsman's office will seek judicial protection for staff and records of the office. It may be necessary to seek representation by separate legal counsel to protect the privilege of the office.**

4. **We exercise discretion whether to act upon a concern of an individual contacting the office. An ombudsman may initiate action on a problem he or she perceives directly.**

5. **We are designated neutrals and remain independent of ordinary line and staff structures. We serve no additional role (within an organization where we serve as ombudsman) which would compromise this neutrality.**

5.1 **An ombudsman strives for objectivity and impartiality.**

5.2 **The ombudsman has a responsibility to consider the concerns of all parties known to be involved in a dispute.**

5.3 **We do not serve as advocates for any person in a dispute within an organization; however, we do advocate for fair processes and their fair administration.**

5.4 **We help develop a range of responsible options to resolve problems and facilitate discussion to identify the best options. When possible, we help people develop new ways to solve problems themselves.**

5.5 **An ombudsman should exercise discretion before entering into any additional affiliations, roles or actions that may impact the neutrality of the function within the organization.**

5.6 **We do not make binding decisions, mandate policies or adjudicate issues for the organization.**

6. **We remain an informal and off-the-record resource. Formal investigations - for the purpose of adjudication - should be done by others. In the event that an ombudsman accepts a request to conduct a formal investigation, a memo should be written to file noting this action as an exception to the ombudsman role. Such investigations should not be considered privileged.**

6.1 **We do not act as agent for the organization and we do not accept notice on behalf of the organization We do always refer individuals to the appropriate place where formal notice can be made.**

6.2 **Individuals should not be required to meet with an ombudsman. All interactions with the ombudsman should be voluntary.**

7. **We foster communication about the philosophy and function of the ombudsman's office with the people we serve.**

8. **We provide feedback on trends, issues, policies and practices without breaching confidentiality or anonymity. We identify new problems and we provide support for responsible systems change.**

9. **We keep professionally current and competent by pursuing continuing education and training relevant to the ombudsman profession.**

10. **We will endeavor to be worthy of the trust placed in us.**

Una versión en español de este folleto está a su disposición si la solicita. Póngase en contacto con el oficial del Dispute Resolution Program o marque la línea abierta al (800) 947-7658.

THE HALLIBURTON COMPANY
DISPUTE RESOLUTION PROGRAM

WHAT YOU'LL FIND IN THIS BROCHURE

This booklet is intended as a summary of the major features of the Dispute Resolution Program. The formal Dispute Resolution Program Plan and Rules contains the controlling terms and conditions. In the event of any variation between this booklet and the Plan and Rules, the Plan and Rules will control.

"I thought the DRP was my last resort. In the future, it'll be my first."
Pipefitter Helper

What's in the DRP for All of Us

"Seeing is believing. Before I used the program, I didn't think you guys were neutral. Now I know you are."

Process Analyst

If you have a work-related problem you can't resolve on your own, or if you're responsible for handling or responding to employee concerns and would like assistance, we have a program that will help. It's called the Dispute Resolution Program (DRP). Its purpose is to give you an improved process and flexible options for airing and settling almost every kind of workplace conflict … from minor, everyday misunderstandings to violations of legally protected rights. The Program offers many advantages. It allows you and the Company to resolve differences, in ways that are:

- **Constructive** — protecting careers, relationships and reputations;
- **Swift** — taking days, weeks or months, instead of years;
- **Confidential** — respecting your privacy and the privacy of others;
- **Simple** — resolving problems at the lowest possible level of involvement;
- **Realistic** — recognizing that different people and different problems require different solutions;
- **Inexpensive** — avoiding or holding down any attorneys' fees or legal expenses; and
- **Equitable** — providing many options for resolving problems objectively, using an independent neutral third party — a trained mediator or arbitrator — if one is needed.

When we deal with conflicts appropriately, we can increase understanding among everyone involved, reduce workplace tension, open up communication and enhance teamwork. Our goal is to resolve disagreements when they first occur, or as soon as possible after that. We've used this Program since 1993, and it's proven to be a useful and valuable tool for employees and the Company. We believe the benefits of our Dispute Resolution Program are outstanding, and we believe you will too.

Please read this brochure carefully and keep it as a ready reference.

Why We Have the DRP

"It's important our employees know that the DRP is a place where they can go for assistance with disputes in the workplace."

Dave Lesar, President and Chief Operating Officer, Halliburton

A Better Way to Handle Disputes

We held focus groups and interviews with employees to find out exactly what their concerns were about our methods of resolving workplace disputes. Trust in the system, protection against retaliation, protection of legal rights, and personal control over ways to resolve disputes were major issues for all. We listened to these concerns and designed the DRP to address them. We also established program features to make the resolution processes cost-effective and timely for employees and the Company.

One Problem-Solving Program

Employees also told us they want a sense of stability at work in light of all the upheavals and transitions that result from continuous change. One way to provide this stability is to have a consistent, easy-to-use problem-solving program that applies to all the companies in the Halliburton system.

"No Retaliation"

It's good business to have an environment where people can resolve problems, and it's the only way the DRP can be truly effective. Therefore, if you use the DRP, retaliation isn't allowed. You have every right to be heard and to expect that your dispute will be resolved. To help ensure this, some options within the DRP are strictly confidential. Also, senior management fully supports the policy of "No Retaliation." This policy protects your job, your relationships and your reputation.

Protection of Your Legal Rights

The program provides protection of your legal rights — such as prohibitions against discrimination and sexual harassment — and protection of all other rights covered by federal or state law. We take complaints about violations of your rights very seriously, so we designed the DRP to allow such complaints to be resolved more quickly and at less expense than if you were to take them through the judicial system.

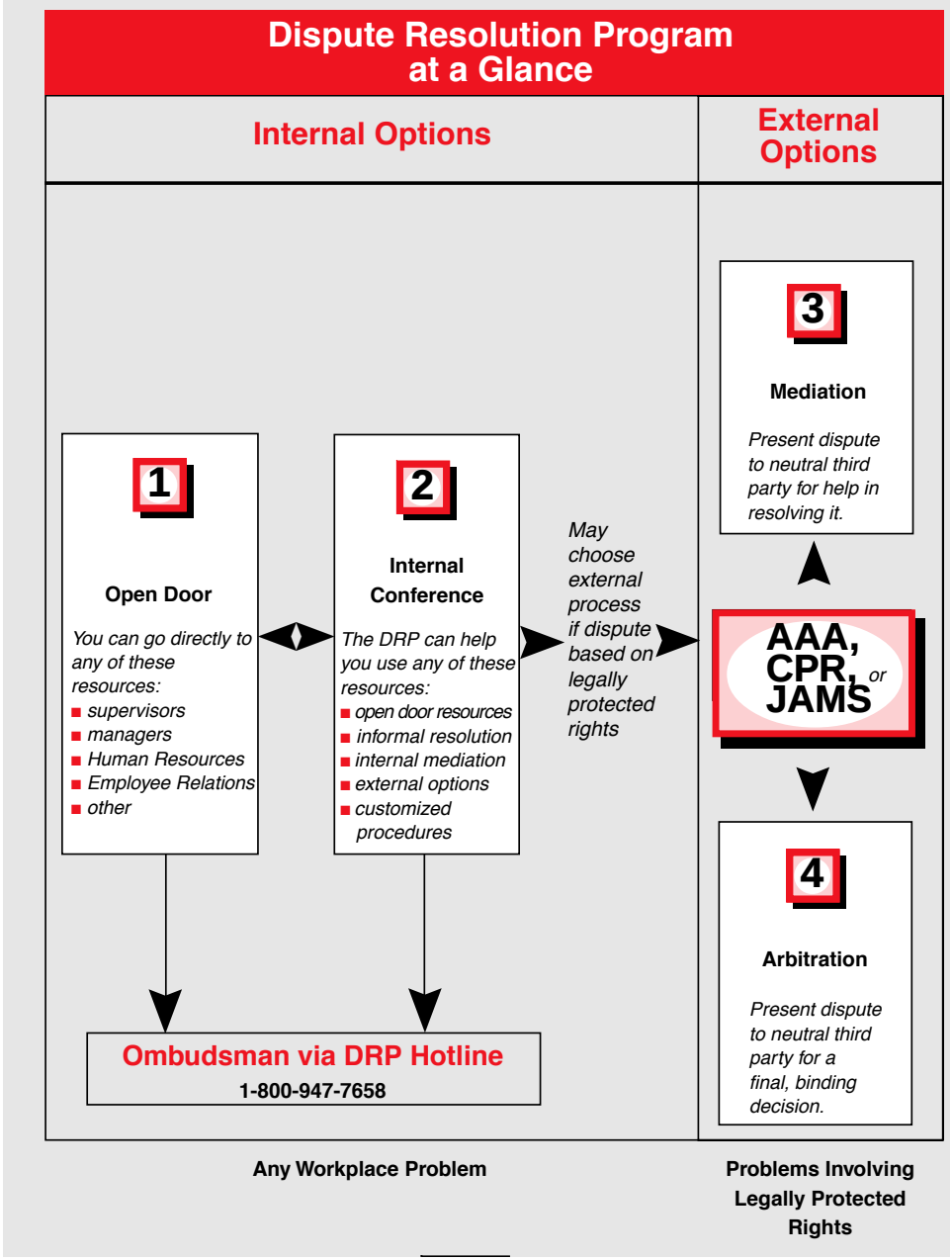
How It Works

"The DRP puts the responsibility for solutions to issues where it belongs — with opposing parties, not the lawyers. It's quicker and cheaper than traditional legal channels."

Gary Morris, Executive Vice President and Chief Financial Officer, Halliburton

The DRP has four options that range from internal, quick ways to resolve issues to external methods that are more formal and take more time. ***You can use these options in any order, depending on the nature of your dispute.*** Brief descriptions of the options are provided here, and more detailed explanations begin on page 7.

- *The Open Door Option* is the option we encourage people to use first, because it's fast and close to the problem. It provides immediate access to the chain of command — beginning with your supervisor and going up through the organization. You also may call the DRP Hotline for advice from an Ombudsman, or contact your Human Resources department or Corporate Employee Relations department for advice or to request an investigation.
- *The Internal Conference Option* provides a setting for you to discuss your concerns with an Ombudsman and a Company representative. You might resolve the issue at this level, or you may choose to go back to the Open Door. You and the other person(s) involved might decide you want a neutral person to help you find a mutually agreeable solution through an internal mediation process inside the Company. An Ombudsman can arrange the internal mediation for you. Many people prefer internal mediation to a formal outside process. However, you can still go directly outside to Mediation or Arbitration, if your dispute concerns your legally protected rights.
- *The Mediation Option* gives you the opportunity to resolve your problem with assistance from a trained, independent mediator from *outside* the Company. The mediator makes suggestions for resolution, but doesn't decide how you'll resolve the dispute … that's up to you and the Company. The DRP uses three organizations that provide professional mediators. (See page 14.) For some people, just presenting their case to someone outside the Company is all that's needed to break a stalemate. We offer internal and external mediation so that you and the Company have a choice of methods and resources.
- *The Arbitration Option* is a process in which you and the Company present your dispute to a neutral third party, an arbitrator, for a *final and binding decision*. If your dispute concerns a legally protected right, you may go directly to arbitration. The arbitrator makes a decision after both sides present their arguments. The arbitrator can award *any remedy you might receive in a court of law*. The same three organizations that provide the services of a mediator also provide the services of an arbitrator. Very few cases, less than 2%, require arbitration to resolve the dispute.
- *Program Features* include the DRP Hotline, Legal Consultation Plan, and the Ombudsman staff. Specifics about each of these features are on page 15.



Who Is Covered

"Perhaps the greatest benefit of the program is that in many cases, it salvages good employees and keeps them working for us, as they are assured of confidential, straight and equitable treatment. In today's world of mistrust of management and constant change, this is a breakthrough program for better employee relations. I see this as a win/win all the way."

Frank Yancey, Senior VP – Construction and Maintenance, KBR, Inc.

Most of the people working for Halliburton companies *are covered* by the Dispute Resolution Program. The *only ones not covered* are:

- Those working outside the United States, and not governed by U.S. laws; and
- Those who are covered by a collective bargaining agreement that does not include the Dispute Resolution Program.

Unless the specific exceptions noted above apply to you, you're automatically covered (no signature is required) if you:

- Accept employment;
- Continue your current employment after the effective date of the DRP's adoption by your business group; or
- Have been covered under a previous version of the DRP.

Halliburton has adopted this four-option program as the exclusive means of resolving workplace disputes for legally protected rights. In adopting the program, Halliburton agrees also to use the program to resolve *all* workplace disputes. Similarly, an employee who accepts or continues employment at Halliburton, by accepting compensation for employment, agrees to resolve all legal claims against Halliburton or any other Halliburton entity, employee, client, customer, or joint employer through this process rather than through the court system. If an employee files a lawsuit against Halliburton or any of the parties listed above, Halliburton will ask the court to dismiss the lawsuit and refer it to the Dispute Resolution Program. This provision applies to any workplace dispute, regardless of when it arises, including disputes that arise after an employee leaves Halliburton.

The Open Door Option

"The system really works, and it's more fair than I gave it credit for being."

Boilermaker

When difficult situations develop at work, you, as an employee, may feel there is no place to go to resolve them. How can you go to your supervisor if your supervisor is the problem? Where can you take your dispute that won't be a threat to your job? You talk to your friends and family, who may offer sympathy and advice, but no real answers. Tensions build at work, and the problem gets bigger.

If you're a manager or supervisor, you may want help responding to a workplace dispute that comes to your attention — a place to go for coaching or assistance in resolving the conflict.

Working out problems when they're small prevents communications from breaking down. When people stop talking to each other, they focus on their anger and what they imagine to be true, instead of on the facts. You and the Company stand the best chance of resolving problems by tackling them together through the Open Door Option … before they become crises.

What Is the Open Door Option?

The Open Door Option guarantees that *all doors are open to you* within the Company. It offers you a variety of ways in which you can solve your problem, including the DRP Hotline and The Legal Consultation Plan. The Open Door Option is a voluntary process that allows you to talk to your immediate supervisor or to a higher level of management — without fear of retaliation. Although you're encouraged to solve your problem at the lowest possible level, you may take it *as far up* the chain of command as needed.

The Open Door Option Is Easy to Use

This option is one of the options used most often. It's encouraged because it's so easy to use, it promotes faster resolution than more formal options, and it reduces the risk of damaged relationships. Most businesses prefer to resolve disputes this way — at the lowest possible level. We've just given it a formal name. Many of the companies that have joined Halliburton have used this kind of process before and want to continue solving problems this way.

How It Works

You're free to raise a concern with any level of management. That's the Open Door tradition. Supervisors and managers understand:

- The four options of the Dispute Resolution Program;
- That it's part of their job to help you solve workplace problems through the Open Door Option; and
- That Halliburton forbids any retaliation against you for trying to solve a workplace dispute within the terms of the Dispute Resolution Program.

Here's where to take your concerns:

Immediate Supervisor — Halliburton encourages attempting to resolve any problems at work with your immediate supervisor whenever possible. Because this person is close to your situation, he or she may already be aware of the problem, or may be in a position to offer a new perspective or some new facts that may be helpful to you.

Higher Level of Supervision — Unfortunately, sometimes your supervisor is part of the problem. If you're unsatisfied with your immediate supervisor's response or you need to talk to someone other than your supervisor, you may take your problem to the next higher level of supervision, or any level of supervision as needed to solve the problem.

Business Unit Human Resources or Employee Relations — At any time, you may also choose to contact your Human Resources department or the Corporate Employee Relations department for advice or assistance, or to conduct an investigation. These departments have many years of experience in helping employees deal with a variety of workplace problems.

Key Advantages of the Open Door Option

- Management is committed to it and expected to honor it.
- It makes early on-site problem solving more likely.
- It encourages you to give feedback to management.
- You get your questions answered and learn about your options.
- You have instant support through the DRP Hotline and the program's Ombudsman.
- It's free.
- It's flexible.
- You can contact an Ombudsman in confidence.
- Retaliation is forbidden.
- It helps you help yourself.

The Mediation Option

If your dispute is based on legally protected rights, you may believe an external mediation process is necessary to resolve it. For many people, just presenting their case to someone outside the Company who isn't involved in the problem is all that's needed to break a stalemate. All external dispute resolution processes in this program use neutral parties provided through the American Arbitration Association (AAA), the Center for Public Resources (CPR), or Judicial Arbitration and Mediation Services (JAMS).

What Is Mediation?

Mediation is often the most straightforward and cost-effective formal method of examining and resolving disputes. It's a meeting at which a neutral third party, called a mediator, helps you and the Company come to an agreement of your own, based on the needs and interests of all concerned. Mediation helps primarily by opening up communication and by coming up with options. In mediation, there is no resolution unless all of the parties agree upon a solution. The mediator can make suggestions, but you and the other party are responsible for actually resolving your dispute. *In some cases involving legally protected rights, both parties may agree to bypass this option and move directly from the Internal Conference to the Arbitration Option for a final decision.*

Requesting Mediation

To request mediation, simply contact AAA, CPR, or JAMS. You will be charged a processing fee of $50. The contact information is on page 14.

How Successful Is Mediation?

While external mediation is used far less frequently than the Open Door or Internal Conference, it's highly successful when it's used. Over 80% of the cases that go to external mediation are resolved there.

"After an internal mediation, our group has never worked better together."

Director

Typical Mediation Steps

1. When you or the Company requests mediation, AAA, CPR, or JAMS will assign a professional mediator who is located close to your home.
2. The first meeting is arranged after the mediator is selected.
3. You and a Company representative will meet with the mediator, who will guide your discussion and help you work out your differences.
4. The mediator may meet separately and confidentially with you and with the Company representative to develop a better understanding of the problem and help you resolve it.

Mediation is usually successful in helping you reach a settlement. If it isn't successful, you or the Company may wish to take your dispute to arbitration for a final and binding decision.

Key Advantages of Mediation

Because mediation has proven highly successful in the majority of cases, it's generally the external resolution process of choice. It offers the following advantages:

- Provides the opportunity for both sides to share their views.
- Lets both sides have a third-party perspective.
- Helps manage feelings of hostility.
- Helps separate emotions from facts.
- Promotes discussion of creative solutions.
- Helps people work things out themselves.
- Gives everyone a say in picking the mediator.
- Offers an opportunity for win-win solutions — a solution that is good for both you and the Company.

The Arbitration Option

If the dispute involves a legally protected right — such as protection against age, race or sex discrimination, or protection against sexual harassment — and has not been resolved in the Open Door, Internal Conference or Mediation Options, you or the Company may request arbitration. While you don't have to proceed through each of the options in a specific order, the Program is designed with multiple options to maximize the possibility of resolution prior to the Arbitration Option. In fact, arbitration is the least-used option in the program. All external dispute resolution processes in this program use neutral parties provided through the American Arbitration Association (AAA), the Center for Public Resources (CPR), or Judicial Arbitration and Mediation Services (JAMS).

What Is Arbitration?

Arbitration is a process in which a dispute is presented to a neutral third party, the arbitrator, for a final and binding decision. The arbitrator makes this decision after both sides present their evidence and arguments at the arbitration hearing. There is no jury. If the decision is in your favor, you can be awarded anything you might seek through a court of law. The neutral party runs the proceedings, which are held privately. Though arbitration is much less formal than a court trial, it is an orderly proceeding, governed by rules of procedure and legal standards of conduct.

Requesting Arbitration

To request arbitration, simply contact AAA, CPR, or JAMS. The contact information is on page 14. If you have already participated in mediation and paid a processing fee of $50, you will not have to pay any additional costs to initiate arbitration. If you haven't, a $50 fee will be required.

You may move to the Arbitration Option directly from the Internal Conference or if mediation through AAA, CPR, or JAMS proves unsuccessful — as long as your dispute involves a legally protected right.

The Role of Lawyers

The Company has access to legal advice through its law department and outside lawyers. You may consult with a lawyer or any other advisor of your choice. Upon approval of the Plan Administrator, the Company will pay the major part of your legal fees through the Legal Consultation Plan, up to a maximum of $2,500. (See page 15.) Call the Plan Administrator for details of this program.

Your aren't required, however, to hire a lawyer to participate in arbitration. If you choose not to bring a lawyer to arbitration, in most cases the Company will also participate without a lawyer.

Typical Arbitration Steps

1. Either you or the Company files a demand for arbitration with AAA, CPR, or JAMS.
2. Any other parties involved are notified.
3. AAA, CPR, or JAMS offers a list of qualified arbitrator candidates.
4. Both you and the Company number the list of candidates in order of preference.
5. An arbitrator is selected, based on mutual preferences.
6. AAA, CPR, or JAMS arranges a hearing date at a convenient location.
7. At the hearing, testimony is given and documents are exchanged.
8. Witnesses are questioned and cross-examined.
9. The arbitrator issues a final and binding decision.
10. Copies of this decision are sent to both you and the Company.

Key Advantages of Arbitration

- *Quick Resolution* — You can expect a quick resolution of your problem. That means months instead of years in the legal system.
- *Independent Third Party* — You can benefit from the objectivity and experience of an external, neutral arbitrator.
- *Restore What You've Lost* — Under the terms of the Program, an arbitrator can award you anything you might seek through a court of law.
- *Preserve Work Relationships* — A quick and impartial resolution through arbitration, rather than years of costly, frustrating court battles, may make it easier for you to stay on the job.

Who Are the Mediators and Arbitrators?

Sometimes, the best way to solve a problem is to seek outside help. If that's best for your dispute, you can use the services of a trained mediator or arbitrator. These people are highly skilled, professional third parties who are neutral and whose services are confidential. The DRP uses three different professional organizations that provide mediators and arbitrators.

You must pay a $50 processing fee to use an external resolution process. The Company pays all additional fees of the mediation or arbitration agency over the $50 fee. Once you have made your request and paid your fee, the Company will participate in the process. Keep in mind that if the process uses more than one neutral party, there may be additional cost to you. If you participate in mediation and pay the $50 fee, you will not have to pay any additional costs to initiate arbitration. Of course, you are responsible for expenses you elect to incur during the mediation or arbitration process,such as attorney fees exceeding the maximum under the Legal Consultation Plan, discovery costs, etc. The three organizations the DRP uses are:

- The *American Arbitration Association (AAA)* is a nonprofit organization that offers a wide range of dispute resolution services to private individuals, businesses, associations, and all levels of government. It handles approximately 60,000 cases each year and has access to over 50,000 neutral experts who can hear and decide cases. You can call either (800) 804-8865 or (972) 774-6958, or fax (972) 490-9008 or write the AAA at 1750 Two Galleria Tower, 13455 Noel Road, Dallas, TX 77520 or www.adr.org.
- The *Center for Public Resources (CPR)* is a leading nonprofit alliance of global corporations, law firms,legal academics and selected public institutions, which focuses on new uses of alternative dispute resolution for business and public disputes. CPR's mediation model is widely used by Fortune 500 companies. You can call (212) 949-6490, or write the CPR at 366 Madison Avenue, New York,NY 10017-3122 or www.cpradr.org
- *Judicial Arbitration and Mediation Services (JAMS)* is an independent company with offices across the country which specializes in helping individuals and companies resolve all types of work-related disputes and claims. You can call either 1-800-352-5267 or 214-744-5267 or fax (214) 720-6010 or write JAMS at 8401 North Central Expressway, Suite 610, Dallas, Texas 75225, or www.jamsadr.com

Program Features in Detail

"The DRP gives employees assurance that their account of on-the-job-situations will be taken seriously. It provides process and stability in the organization."

Celeste Colgan, Vice President – Administration, Halliburton

- *DRP Hotline* — You may call the DRP Hotline at (800) 947-7658 to receive free, expert and confidential advice. A DRP Ombudsman can explain how to solve problems informally within the Company or formally with the external options of mediation or arbitration. You don't need to give your name in order to get help. You may remain anonymous and just ask questions. Or, you may wish to give your name, discuss all the details of your situation and be coached through the Open Door process. *If and how* you use the DRP Hotline is entirely up to you.

  Ombudsmen are trained professionals, skilled in dealing with complaints, who help guide you through the DRP process. They operate under The Code of Ethics and Standards of Practice of The Ombudsman Association, designed to ensure the independence, confidentiality and neutrality of the Ombudsman. The Ombudsman can help you by answering your questions, acting as a go-between, reviewing your options, getting the facts, helping you "open doors," referring you to other resources and helping you help yourself.

- *Legal Consultation Plan* — This Plan may help cover the cost of consulting with an attorney of your choice to obtain valuable information about your legal rights. You may apply to the Plan Administrator for this benefit if your dispute involves a legally protected right. The maximum annual benefit is $2,500. The annual benefit is based on a rolling year, beginning with the date you first use the LCP. In other words, if you first use the LCP in April, the effective year for your LCP benefit runs from April of that year through March of the next year. You pay a deductible of $25 and 10% of the balance, while Halliburton pays the remainder. For example:

  > You may choose any licensed attorney you want. If the legal consultation costs $500, you would pay a deductible of $25 and then 10% of $475, or $47.50. The Company would pay $427.50. The Plan Administrator must approve all payments from the Legal Consultation Plan.

- *Ongoing Skills Training* — We provide ongoing skills training for supervisors and managers, to improve our ability as an organization to resolve disputes at the lowest-possible level.

Questions and Answers

Q1. Why does the Company have the Dispute Resolution Program (DRP)?

A1. Mainly, the Company uses the DRP because it provides a cost-effective and timely process for maintaining employment relationships. This process is good for employees and the Company. The more traditional approach of a lawsuit is expensive, time consuming, adversarial and destructive. Typically, lawsuits take years to run their course, and they often create unwanted publicity that embarrasses everyone. The DRP saves everyone time and money, and is more likely to respect everyone's privacy.

Q2. If the Company pays the fees of the mediators and arbitrators, how independent and impartial can these third parties be?

A2. Mediators and arbitrators are typically retired judges, human resources or employee relations professionals, attorneys, or professors of labor law or a similar discipline. They take pride in their neutrality and are trained to be impartial. Also, you participate in choosing your mediator and arbitrator.

Q3. Who uses the DRP and for what kinds of problems?

A3. Helpers, administrative assistants, clerical workers, professionals, technicians, managers and senior executives alike may use the DRP. Assistance is available to resolve concerns about termination, conflicts with a co-worker, retaliation for raising a concern or complaint, disciplinary or supervisory issues, safety concerns, discrimination, racial or sexual harassment, unfair treatment and morale on the job. The Program is designed for use by employees at every level of the Company, for almost any workplace-related conflict.

Q4. Does having this Program mean I can't sue Halliburton?

A4. If you're covered by the Program and you file a lawsuit, Halliburton attorneys will go before the judge, tell the judge of the Halliburton Dispute Resolution Program, and ask that the case be dismissed and sent back to the Program.

Q5. What if my dispute concerns a benefit plan, or I'm injured on the job or laid off by Halliburton? Can I use the Program then?

A5. First, you can use the DRP for concerns about benefit plans. However, there are methods in place within each benefit plan to address your concerns, and you should use those methods prior to contacting the DRP.

Second, the Workers' Compensation Claims Department handles claims for Workers' Compensation. However, if you feel you've been unfairly treated because you filed a Workers' Compensation claim, you should contact the DRP.

Third, if you feel you were laid off without a good reason, you should contact the DRP.

Q6. What if my supervisor makes work difficult for me after I bring my dispute to the Program?

A6. The Company forbids retaliation for using the DRP. If you feel someone is retaliating against you for using any of the options of the Program, contact a higher level in the Chain of Command, the DRP Hotline or an Ombudsman for independent and confidential assistance.

Q7. Will I still be able to go to the Equal Employment Opportunity Commission (EEOC) or the National Labor Relations Board?

A7. *Yes.* The DRP applies to relief you may seek *personally through the courts* for a workplace dispute. You are still free to consult the appropriate state Human Rights Commission, the EEOC, the National Labor Relations Board or any other government regulatory agency regarding your workplace problem. Of course, we hope you'll feel the DRP is so effective you won't need to go anywhere else.

Q8. What's the difference between mediation and arbitration?

A8. In mediation, there is a neutral person who acts as a go-between for you and the Company. This person works to keep communication open and tries to help everyone involved find a solution. In arbitration, there is a neutral person who listens to both parties and then makes a final decision that binds both parties to a solution.

Q9. How is arbitration different from a court trial?

A9. With arbitration, the decision is final; except in rare circumstances, it may not be reversed by subsequent proceedings. With a trial court decision, an appeal may be filed, causing lengthy delays. Also, an arbitration proceeding is usually much more informal than a case in court. The arbitrator is usually a lawyer or a person with employee relations or legal background, who serves as a neutral on a part-time basis. The proceeding is held in private offices instead of in a public courthouse. The biggest difference, however, lies in the reasonable cost of arbitration. Because arbitration is faster and less formal, it ends up costing much less to prepare the case.

Q10. Does that mean I'm limited in what I can get through arbitration?

A10. No. The arbitrator has the same authority as a judge in making awards to employees. That means, in arbitration, it's possible for you to seek or receive any award you might seek through the court system.

Q11. What can I do to seek relief if I believe my legally protected rights have been violated?

A11. If you believe your legally protected rights have been violated, you may request a legal consultation through the Legal Consultation Plan, using any attorney you choose. If you aren't able to resolve the issue internally, you may request an external proceeding. You will need to pay $50 to use an arbitrator. The arbitrator will determine if a legally protected right has been violated, and if so, the amount you'll recover.

Q12. How can I be sure of confidentiality if I call the DRP Hotline?

A12. First of all, you decide whether or not to tell the person at the DRP Hotline who you are. Then, if you do decide to give your name, you are speaking with trained professionals who operate under The Code of Ethics and Standards of Practice of The Ombudsman Association. You'll receive independent and confidential advice and assistance to help you, and you'll be able to discuss the options available to you. If you request assistance such as an Internal Conference, you'll need to give permission to contact other people about your problem.

Please note, however, that in certain rare instances, such as in the event of a serious threat of imminent harm, the Ombudsman may have to bring some information forward.

Q13. Halliburton has some employees in organized bargaining units. Does the DRP apply to them?

A13. No. The DRP doesn't automatically apply to unionized employees; they're covered by dispute resolution or grievance procedures agreed to during the collective bargaining process. The procedures for unionized employees vary from bargaining unit to bargaining unit, depending on the terms of the collective bargaining agreement. In fact, some employees have been covered by the DRP through the collective bargaining process.

Q14. Why has Halliburton implemented the DRP in every newly acquired company?

A14. We want a program that operates for the benefit of all — the employees and the Company. We want a program that reflects best practices in dispute resolution as well as the needs of our employees. Through our benchmarking research and the comments employees have shared with us in focus groups and interviews, we have created our DRP. The DRP has become a national model followed by other companies, and we believe it only makes sense to offer this successful program to eligible Halliburton employees.

Q15. Doesn't Halliburton fund the DRP and pay the salaries of the Program's staff? How can the Program or its staff, including the Ombudsmen, truly be impartial?

A15. The Company does fund the DRP and pay the salaries of the Program's staff. The entire Program, however, is designed to operate independently and to protect confidentiality. Here's how it works:

A committee of senior executives is responsible for overseeing the Program. This committee includes senior line managers, as well as representatives of the Legal department, Human Resources and the Dispute Resolution Program. As a result, no one manager or department can exert improper influence over the Program, and the Program operates independently, for the good of every employee and the entire Company.

In addition, the Program operates under the strict Code of Ethics and Standards of Practice of The Ombudsman Association. The Company has included those standards in the legal documents that authorize the creation of the Program, meaning that the Company is committing itself to operate the Program in keeping with those standards.

Moreover, since the Program was created in 1993, the Company has brought in outside experts on three occasions to provide an independent evaluation of the Program. It's actually in the Company's interest to make sure the Program provides independent and confidential assistance — otherwise, you won't use it, and the Company won't have the chance to catch problems early and resolve them.

"The DRP provides a mechanism for timely and cost-effective resolution of disputes. It's a benefit to employee and employer. It has saved jobs that might otherwise have been lost."

Peter Arbour, Vice President and Associate General Counsel, Halliburton

BINDING ARBITRATION AGREEMENT
AND
WAIVER OF JURY TRIAL (APPLICANT)

This Agreement is entered into between Murphy Oil USA, Inc. ("Company") and the undersigned applicant (hereinafter "Individual"). Excluding claims which must, by statute or other law, be resolved in other forums, Company and Individual agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to Individual's employment, including but not limited to, all claims beginning from the period of application through cessation of employment at Company and any post-termination claims and all related claims against managers, by binding arbitration pursuant to the National Rules for the Resolution of Employment Disputes ("Rules") of the American Arbitration Association (hereinafter "AAA"). Disputes related to employment include, but are not limited to, claims or charges based upon federal or state statutes, including, but not limited to, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, and any other civil rights statute, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act or other wage statutes, the WARN Act, claims based upon tort or contract laws or common law or any other federal or state or local law affecting employment in any manner whatsoever. In the event that arbitration is brought pursuant to any law or statute which provides for allocation of attorneys' fees and costs, the arbitrator shall have the authority to allocate costs and/or attorneys' fees pursuant to the applicable law or statute.

This Agreement mutually binds Individual and Company to arbitrate any and all disputes between them as set forth herein. Individual also is bound to arbitrate any related claims he/she individually may have arising out of or in the context of their employment relationship against any manager of the Company. Conversely, managers have signed similar arbitration agreement and thereby are bound to arbitrate any related claims they individually may have against Individual arising out of or in the context of their employment relationship.

Individual understands that he/she will not be considered for employment by the Company unless he/she signs this Agreement. Individual further understands that, as additional consideration for signing this Agreement, the Company agrees to pay all costs of arbitration charged by AAA, other than filing fees, and to be bound by the arbitration procedure set forth in this Agreement. In the event Individual is unable to pay the applicable filing fee for arbitration due to extreme hardship, Individual may apply to AAA for deferral or reduction of the fees. AAA shall determine whether the Individual qualifies for a waiver, deferral or reduction of its filing fee. To invoke the arbitration process, Individual or Company must contact the American Arbitration Association at 2200 Century Parkway, Suite 300, Atlanta, Georgia 30345-3202, 404-325-0101, direct toll free: 1-800-925-0155, facsimile 404-325-8034, or the nearest regional office of AAA. Individual also must provide written notification that he/she is invoking the arbitration process to the Law Department, Murphy Oil USA, Inc., 200 Peach Street, El Dorado, Arkansas 71730, facsimile: 870-864-6489.

Arbitrations pursuant to this Agreement shall be conducted in accordance with the Rules of AAA except where those Rules conflict with the terms of this Agreement, in which event the terms of this Agreement shall control.

Company and Individual expressly agree that the Federal Arbitration Act governs the enforceability of any and all of the arbitration provisions of this Agreement, and judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof. Questions of arbitrability (that is whether an issue is subject to arbitration under this Agreement) shall be decided by the arbitrator. Likewise, procedural questions which arise out of the dispute and bear on its final disposition are matters for the arbitrator to decide.

_____
Individual's Initials

This Agreement shall be binding upon and inure to the benefit of any successor or assignee of the Company and as to the Individual's heirs, executors and administrators.

This Agreement is an agreement as to choice of forum and is not intended to extend any applicable statute of limitation. Individual and Company understand and agree that any claim for arbitration will be timely only if brought within the time in which an administrative charge or a complaint could have been filed with the administrative agency or the court. If the arbitration claim raises an issue which could not have been timely filed with the appropriate administrative agency or court, then the claim must be treated as the administrative agency or court would have treated it. Claims must be filed within the time set by the appropriate statute of limitation.

By signing this Agreement, Individual and the Company waive their right to commence, be a party to, or class member or collective action in any court action against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class or collective action claim in arbitration or any other forum. The parties agree that any claim by or against Individual or the Company shall be heard without consolidation of such claim with any other person or entity's claim.

If any claim is found not to be subject to this Agreement and the arbitration procedure, it must be brought in the federal or state court which is closest to the site at which Individual was employed by the Company and which has jurisdiction over the matter. Both Individual and Company expressly agree to waive any right to seek or demand a jury trial and agree to have any dispute decided solely by a judge of the court.

If any provision of this Agreement is determined to be invalid or unenforceable, it is agreed that the remainder of this Agreement shall remain in full force and effect. The parties agree that this Agreement may be interpreted or modified to the extent necessary for it to be enforceable and to give effect to the parties' expressed intent to create a valid and binding arbitration procedure to resolve all disputes not expressly excluded. In the event any provision of this Agreement is found unlawful or unenforceable and an arbitrator (or court) declines to modify this Agreement to give effect to the parties' intent, then the parties agree that this Agreement shall be self-amending, meaning it automatically, immediately and retroactively shall be amended, modified, and/or altered to achieve the intent of this Agreement to the maximum extent allowed by law. If the parties cannot agree upon the appropriate amendment or modification, an arbitrator shall make that determination. Other than as set forth in the above provision, all other modifications of this Agreement must be in writing and signed by a Vice President of the Company and Individual.

INDIVIDUAL AND COMPANY UNDERSTAND THAT, ABSENT THIS AGREEMENT, THEY WOULD HAVE THE RIGHT TO SUE EACH OTHER IN COURT, TO INITIATE OR BE A PARTY TO A GROUP OR CLASS ACTION CLAIM, AND THE RIGHT TO A JURY TRIAL, BUT, BY EXECUTING THIS AGREEMENT, BOTH PARTIES GIVE UP THOSE RIGHTS AND AGREE TO HAVE ALL EMPLOYMENT DISPUTES BETWEEN THEM RESOLVED BY MANDATORY, FINAL AND BINDING ARBITRATION. ANY EMPLOYMENT RELATIONSHIP BETWEEN INDIVIDUAL AND COMPANY IS TERMINABLE AT-WILL, AND NO OTHER INFERENCE IS TO BE DRAWN FROM THIS AGREEMENT.

_____ _____
Date Individual's Signature
Murphy Oil USA, Inc.

_____
Individual's Name (Please Print)

_____ _____
By Henry K. Heithaus, Vice President Individual's Social Security Number

BINDING ARBITRATION AGREEMENT
AND
WAIVER OF JURY TRIAL (MANAGER)

This Agreement is entered into between Murphy Oil USA, Inc. ("Company") and the undersigned manager (hereinafter "Manager"). Excluding claims which must, by statute or other law, be resolved in other forums, Manager agrees to resolve any and all disputes or claims filed by an employee or applicant of Company (hereinafter "Individual") against Manager and/or Company, which relate in any manner whatsoever as to Individual's employment with Company, including but not limited to, all claims beginning from the period of application through cessation of employment at Company and any post-termination claims and all related claims by Individuals, by binding arbitration pursuant to the National Rules for the Resolution of Employment Disputes ("Rules") of the American Arbitration Association (hereinafter "AAA"). Disputes related to employment include, but are not limited to, claims or charges based upon federal or state statutes, including, but not limited to, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, and any other civil rights statute, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act or other wage statutes, the WARN Act, claims based upon tort or contract laws or common law or any other federal or state or local law affecting employment in any manner whatsoever. In the event that arbitration is brought pursuant to any law or statute which provides for allocation of attorneys' fees and costs, the arbitrator shall have the authority to allocate costs and/or attorneys' fees pursuant to the applicable law or statute.

The Company and Manager agree that any and all disputes or claims between them (including a dispute or claim between Manager and Individual which arises out of the workplace relationship, whether or not the conduct of Individual was ratified by and/or within the scope of his/her employment) shall be subject to arbitration under the terms of this Agreement. Manager understands that he/she would not continue to be employed by the Company unless he/she signs this Agreement.

Manager also agrees to resolve any and all employment-related disputes or claims against any Individual who has executed an arbitration agreement by binding arbitration and/or Company pursuant to the National Rules for the Resolution of Employment Disputes ("Rules") of the AAA. Manager further understands that, as additional consideration for signing this Agreement, the Company agrees to pay all costs of arbitration charged by AAA, other than filing fees, and to be bound by the arbitration procedure set forth in this Agreement. In the event Manager is unable to pay the applicable filing fee for arbitration due to extreme hardship, Manager may apply to AAA for deferral or reduction of the fees. AAA shall determine whether the Manager qualifies for a waiver, deferral or reduction of its filing fee. To invoke the arbitration process, Manager or Company must contact the American Arbitration Association at 2200 Century Parkway, Suite 300, Atlanta, Georgia 30345-3202, 404-325-0101, direct toll free: 1-800-925-0155, facsimile 404-325-8034, or the nearest regional office of AAA. Manager also must provide written notification that he/she is invoking the arbitration process to Company's Legal Department, Murphy Oil USA, Inc., 200 Peach Street, El Dorado, Arkansas 71730, facsimile: 870-864-6489.

Arbitrations pursuant to this Agreement shall be conducted in accordance with the Rules of AAA except where those Rules conflict with the terms of this Agreement, in which event the terms of this Agreement shall control.

Company and Manager expressly agree that the Federal Arbitration Act governs the enforceability of any and all of the arbitration provisions of this Agreement, and judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof. Questions of arbitrability (that is whether an issue is subject to arbitration under this Agreement) shall be decided by the arbitrator. Likewise, procedural questions which arise out of the dispute and bear on its final disposition are matters for the arbitrator to decide.

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Manager's Initials

This Agreement shall be binding upon and inure to the benefit of any successor or assignee of the Company and as to the Manager's heirs, executors and administrators.

This Agreement is an agreement as to choice of forum and is not intended to extend any applicable statute of limitation. Manager and Company understand and agree that any claim for arbitration will be timely only if brought within the time in which an administrative charge or a complaint could have been filed with the administrative agency or the court. If the arbitration claim raises an issue which could not have been timely filed with the appropriate administrative agency or court, then the claim must be treated as the administrative agency or court would have treated it. Claims must be filed within the time set by the appropriate statute of limitation.

By signing this Agreement, Manager and the Company waive their right to commence, be a party to, or class member in any court or collective action against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class, or collective action claim in arbitration or any other forum. The parties agree that any claim by, against, or among Manager, Individual and/or Company shall be heard without consolidation of such claim with any other person or entity's claim.

If any claim is found not to be subject to this Agreement and the arbitration procedure, it must be brought in the federal or state court which is closest to Manager's residence at the time such claim is filed and which has jurisdiction over the matter. Both Manager and the Company expressly agree to waive any right to seek or demand a jury trial and agree to have any dispute decided solely by a judge of the court.

If any provision of this Agreement is determined to be invalid or unenforceable, it is agreed that the remainder of this Agreement shall remain in full force and effect. The parties agree that this Agreement may be interpreted or modified to the extent necessary for it to be enforceable and to give effect to the parties' expressed intent to create a valid and binding arbitration procedure to resolve all disputes not expressly excluded. In the event any provision of this Agreement is found unlawful or unenforceable and an arbitrator (or court) declines to modify this Agreement to give effect to the parties' intent, then the parties agree that this Agreement shall be self-amending, meaning it automatically, immediately and retroactively shall be amended, modified, and/or altered to achieve the intent of this Agreement to the maximum extent allowed by law. If the parties cannot agree upon the appropriate amendment or modification, an arbitrator shall make that determination. Other than as set forth in the above provision, all other modifications of this Agreement must be in writing and signed by a Vice President of the Company and Manager.

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Manager's Initials

MANAGER AND COMPANY UNDERSTAND THAT, ABSENT THIS AGREEMENT, THEY AND INDIVIDUAL WOULD HAVE THE RIGHT TO SUE EACH OTHER IN COURT, TO INITIATE OR BE A PARTY TO A GROUP, CLASS, OR COLLECTIVE ACTION CLAIM, AND THE RIGHT TO A JURY TRIAL, BUT, BY EXECUTING THIS AGREEMENT, BOTH PARTIES GIVE UP THOSE RIGHTS AND AGREE TO HAVE ALL EMPLOYMENT DISPUTES AS DESCRIBED ABOVE RESOLVED BY MANDATORY, FINAL AND BINDING ARBITRATION. ANY EMPLOYMENT RELATIONSHIP BETWEEN MANAGER AND COMPANY IS AT-WILL, AND NO OTHER INFERENCE IS TO BE DRAWN FROM THIS AGREEMENT.

Date	Manager's Signature
Murphy Oil USA, Inc.	Manager's Name (Please Print)
By Henry K. Heithaus, Vice President	Manager's Social Security Number

Manager's Initials

Blue Cross Blue Shield of Michigan

Termination Arbitration Procedure for Non-Bargaining Unit Employees

Blue Cross Blue Shield of Michigan (BCBS4 is an at will employer. As a result, either the employee or BCBSM may terminate the employment relationship in their discretion at any time. This Arbitration Procedure does not detract from the at will nature of the relationship. Termination decisions can accordingly be made and carried out by BCBSM or the employee without challenge under a theory that an express or implied contract of employment was breached.

BCBSM is committed to the concept of equal employment opportunity, and wishes to ensure that termination decisions are not influenced to any degree by discrimination or retaliation that would violate state or federal civil rights laws.

To that end, BCBSM has certain internal review mechanisms in connection with a decision to terminate an employee. Additionally, BCBSM has established this Arbitration Procedure through which a terminated employee (referred to here as a "claimant") may obtain review before an impartial arbitrator of BCBSM's decision to terminate the claimant's employment.

This Arbitration Procedure is intended to be exclusive, final, and binding. It provides the sole mechanism for a terminated employee to assert a legal claim against BCBSM, thereby displacing time consuming and expensive litigation.

Termination Arbitration Procedure for Non-Bargaining Unit Employees (All BCBSM Employees Except Those Precluded By Specific Language Contained In A Contract Or Labor Agreement)

Scope of Arbitration Procedure

This Arbitration Procedure applies only to employee terminations, including claims of constructive termination, and not to lesser forms of discipline or other disputes concerning an employee's terms or conditions of employment. Constructive termination is defined, for purposes of this Arbitration Procedure, as a claim by an employee (hereinafter referred to as a "claimant") that he or she was forced to resign or quit involuntarily because his or her working conditions had deliberately been made so intolerable by BCBSM that a reasonable person would have felt compelled to resign or quit.

The scope of this Arbitration Procedure extends to all termination-related legal claims or theories including discrimination, retaliation, violation of public policy, and tort claims, including any claims that could be made under any state or federal civil rights laws such as the Michigan Elliott-Larsen Civil Rights Act, the Michigan Person's With Disabilities Civil Rights Act, the Michigan Whistle Blower's Protection Act, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Americans with Disabilities Act, 42 U.S.C. §1981, the Equal Pay Act, or under any other employment-related statute or legal theory. This Arbitration Procedure is applicable to all BCBSM employees except those precluded by specific language contained in a contract or labor agreement.

Any legal claim or theory that a claimant's termination breached an express or implied contract of employment also comes within the scope of this Arbitration Procedure. However, because any such claim is almost certainly inconsistent with and precluded by BCBSM's at will employment policy, such a claim will be subject to pre-hearing disposition by the arbitrator if raised in the Request for Arbitration.

Initiating the Arbitration Procedure

Any terminated claimant, who believes that the termination decision by BCBSM was discriminatory, retaliatory, tortious, violative of public policy or any federal or state civil rights law, or improper in any other way that comes within the scope of this Arbitration Procedure, may request arbitration by writing to the American Arbitration Association (AAA), American Center Building, 27777 Franklin Road, Suite 1150, Southfield, Michigan 48034-8208 and asking AAA to appoint an arbitrator in accordance with its rules governing the resolution of employment disputes.

BCBSM has prepared the attached "Request for Arbitration" form that may be utilized for this purpose. Copies of the form are available through BCBSM's Human Resources and Administration Division. A copy of the Request shall, at the same time it is submitted to AAA, be sent to BCBSM's Human Resources and Administration Division Regional Center. AAA's rules governing the resolution of employment disputes may be obtained by request from AAA, or may be obtained from BCBSM's Human Resources and Administration Division.

The claimant shall, to the best of his or her ability, specify in the Request for Arbitration; (a) the factual basis on which the claim is made; (b) the statutory provision or legal theory under which the claim is made; and (c) the nature and extent of any remedy or relief sought by claimant. If the Request for Arbitration does not adequately specify these things, the arbitrator shall, upon request, direct the claimant to provide further detail.

The Request for Arbitration shall also include the claimant's (or his or her attorney's) address where mail or notices are to be sent by AAA and BCBSM during the arbitration proceeding. The claimant shall be responsible for notifying AAA and BCBSM of any change of address during the proceeding.

After the Arbitration Procedure has been initiated, AAA shall administer the arbitration proceeding in accordance with its rules governing the resolution of employment disputes, except as otherwise provided in this Arbitration Procedure.

Time Limits

To request arbitration under this Arbitration Procedure, a claimant's written request for arbitration must be received by AAA within the limitation period for filing that would apply to the claimant's claim if it were asserted in a court of law.

NOTE: THIS TIME LIMIT MUST BE ADHERED TO AND WILL BE STRICTLY ENFORCED.

A claimant's failure to act within the required time will constitute a failure to exhaust the Arbitration Procedure and will be deemed an acceptance of BCBSM's termination decision with respect to any claim within the scope of the Arbitration Procedure.

Arbitrators Jurisdiction And Authority

The Arbitrator shall act as adjudicator of any claim that comes within the scope of this Arbitration Procedure. To the extent not inconsistent with this Arbitration Procedure, the arbitrator shall have powers and authority as provided for by the rules of AAA governing employee disputes and the statutes or laws under which a claim is made. For example, if A statutory provision under which a claim is made allows for a particular remedy, such as back pay, front pay, other forms of damages, interest, costs, actual attorney's fees, or reinstatement, the arbitrator shall have the power and authority to include that remedy in the award. In addition, the arbitrator shall apply the elements of proof, burden of proof formulation, mitigation duty, interim earnings offsets, and other legal rules or requirements under the statutory provision under which a claim is made. The arbitrator shall also have the power to issue subpoenas.

The arbitrator shall not have power or authority to change BCBSM's lawful personnel policies, or to substitute his or her own business judgment for the lawful business judgment of BCBSM.

Pre-Hearing Discovery

The claimant and BCBSM shall be entitled to reasonable discovery as part of the arbitration proceeding. In this regard, the claimant and BCBSM will attempt to agree to pre-hearing discovery that will provide fair access to relevant information and, at the same time, maintain the inexpensive and expeditious character of the arbitration proceeding. As a general matter, the claimant and BCBSM shall each be entitled, without special permission of the arbitrator, to conduct two discovery depositions of persons identified by them. Upon written application to the arbitrator and a showing of compelling justification, the arbitrator may grant special permission for one or more additional limited depositions, or may specially direct that additional information be provided to the other party.

Pre-Hearing Disposition

The arbitrator is authorized, following his or her appointment and prior to a hearing, to render a special opinion and award summarily disposing of a claim or claims. The arbitrator shall do so only if, after considering either party's request for summary disposition and any response submitted by the opposing party, the arbitrator determines that there are no factual issues requiring a hearing and that the requesting party is clearly entitled to an award in its favor. For example, if a claimant makes a claim that his or her termination breached an express or implied contract of employment, that claim may be subject to summary pre-hearing disposition because it is almost certainly inconsistent with and precluded by BCBSM's at will employment policy.

Arbitration Costs and Fees

The administration costs charged by AAA shall be borne by BCBSM. However, if the arbitrator finds that a claim was frivolous, the arbitrator may award reimbursement of these costs and fees to BCBSM if such reimbursement is authorized by the statutory provision (if any) under which the claim is made.

The claimant and BCBSM may be represented by counsel of their choosing at their own expense. Counsel fees may be awarded to the claimant after an arbitration award in his or her favor if such an award is authorized by the statutory provision under which the claim is made.

Award and Available Relief

Within 30 days following the conclusion of the hearing and submission of the case, or as soon thereafter as practicable, the arbitrator shall issue a written opinion and award, signed by the arbitrator, which shall include findings of fact and conclusions of law.

If the arbitrator finds in the claimant's favor, the arbitrator shall fashion a remedy that is consistent with his or her authority under the statutory provision under which the claim is made and takes into account the best interests of the parties and other potentially affected individuals. In this regard, the arbitrator shall have the discretion to render an award of front pay damages in lieu of reinstatement in the event the arbitrator determines that such alternative relief is appropriate and objectively warranted under all of the circumstances. However, an award of front pay damages in excess of one year shall not be rendered by the arbitrator without first scheduling a supplemental hearing before the arbitrator with respect to front pay damages and mitigation issues and permitting limited additional pre-hearing discovery. The decision of the arbitrator shall be final and binding; provided, however, that limited judicial review may be obtained in a court of competent jurisdiction; (a) in accordance with the standards for review of arbitration awards established bylaw, or (b) on the ground that the arbitrator committed an error of law.

If any monetary award is made, the arbitrator shall specify the elements and factual basis for calculating the amount. In no event shall the arbitrator award monetary relief greater than that sought by the claimant.

The arbitrator's award and the relief determined therein shall be final and binding upon the claimant and BCBSM, subject only to the limited judicial review described below.

Judicial Enforcement and Review

This Arbitration Procedure and proceedings hereunder shall be governed by the Federal Arbitration Act, 9 U.S.C. §1 et seq., as well as the Michigan Arbitration Act, 27 MSA §5001 et seq. An arbitrator's award rendered pursuant to this Arbitration Procedure shall be enforceable, and a judgment may be entered thereon, in a court of competent jurisdiction sitting in Michigan.

The decision of the arbitrator shall be final and binding; provided, however, that limited judicial review may be obtained in a court of competent jurisdiction; (a) in accordance with the standards for review of arbitration awards established bylaw, or (b) on the ground that the arbitrator committed an error of law.

Exclusivity of Arbitration Procedure

This Arbitration Procedure is intended to be the sole and exclusive forum and remedy for all claims that fall within its scope, inasmuch as the inexpensive and expeditious character of arbitration makes it preferable to litigation in a judicial or administrative forum.

NOTE: **By opting to submit to arbitration, the claimant is waiving the right to adjudicate all legal and equitable claims and theories, including claims of discrimination, retaliation, and violation of public policy, in a judicial forum. However, the claimant maintains the right to file a claim or charge with any state or federal agency, including the U.S. Equal Employment Opportunity Commission and The Michigan Department Of Civil Rights.**

Exhaustion of this Arbitration Procedure is mandatory. In the event a court were to determine that this Arbitration Procedure is not the sole and exclusive forum and remedy, or that an arbitration award rendered under this Arbitration Procedure is not final and binding between the parties, it is nevertheless intended that exhaustion of this Arbitration Procedure be a condition precedent to the institution of any judicial or administrative litigation by a claimant with respect to claims that come within the scope of the Arbitration Procedure.

Request For Arbitration

Request arbitration by writing to the American Arbitration Association (AAA), American Center Building, 27777 Franklin Road, Suite 1150, Southfield, Michigan 48034-8208 with a request that AAA appoint an arbitrator in accordance with its rules governing employee disputes. The claimant may obtain a "Request for Arbitration" form from a Human Resources Regional Center.

Submission of Request for Arbitration

Submit one copy of the Request for Arbitration form to:

American Arbitration Association (AAA)
American Center Building
27777 Franklin Road, Suite 1150
Southfield, Michigan 48034-8208

and one copy to the BCBSM Human Resources Regional Center where your job was located:

Human Resources Regional Center - Detroit
Mail Code #0111
600 Lafayette East
Detroit, Michigan 48226

Human Resources Regional Center - G.R.
Mail Code #G102
86 Monroe Center
Grand Rapids, Michigan 49503

Human Resources Regional Center - Southfield
Mail Code #B401
27000 W. 11 Mile Road
Southfield, Michigan 48034

Human Resources Regional Center - Lansing
Mail Code #B133
1403 South Creyts
Lansing, Michigan 48917

DF 5377 FEB 06

REQUEST FOR ARBITRATION
BLUE CROSS AND BLUE SHIELD OF MICHIGAN
TERMINATION ARBITRATION FOR NON-BARGAINING UNIT EMPLOYEES

Note carefully: You are required to submit a copy of the Request for Arbitration to both American Arbitration Association (AAA) and the BCBSM Regional Center which your job was located, at the address on the reverse side of this form and to notify both AAA and BCBSM of any change of address for you or your attorney during the arbitration proceeding.

I request arbitration under the BCBSM Termination Arbitration Procedure for Non-Bargaining Unit Employees. I acknowledge receiving a copy of BCBSM's Arbitration Procedure and that any termination-related claims I may have will be decided under it. I understand that the arbitration will be administered by the American Arbitration Association in accordance with its rules governing the resolution of employment disputes, except as otherwise provided in BCBSM's Arbitration Procedure; that I may be represented by an attorney of my choosing; that I am entitled to reasonable discovery as part of the arbitration process; that I may be responsible for certain costs and fees; and that the arbitrator's award will be exclusive, final and binding, subject to standards of review established by law or if the arbitrator has committed an error of law. I further understand that by submitting to arbitration, I am waiving the right to adjudicate all legal and equitable claims and theories, including claims of discrimination, retaliation, and violation of public policy, in a judicial forum. However, I understand that I have the right to file a claim or charge with any state or federal agency, including the U.S. Equal Employment Opportunity Commission and the Michigan Department of Civil Rights.

EMPLOYEE'S NAME:		
ADDRESS:		TELEPHONE NUMBER:
SOCIAL SECURITY NUMBER:	LAST POSITION AND MAIL CODE OR REGION:	TERMINATION DATE:

PLEASE ATTACH ADDITIONAL PAGES, IF NECESSARY, IN RESPONSE TO THE FOLLOWING THREE QUESTIONS:

DESCRIBE IN DETAIL, AND TO THE BEST OF YOUR ABILITY, THE FACTUAL BASIS ON WHICH YOUR CLAIM IS MADE:

DESCRIBE IN DETAIL, AND TO THE BEST OF YOUR ABILITY, THE STATUTORY PROVISION OR LEGAL THEORY UNDER WHICH YOUR CLAIM IS MADE:

DESCRIBE IN DETAIL, THE NATURE AND EXTENT OF ANY REMEDY OR RELIEF YOU BELIEVE SHOULD BE AWARDED TO YOU:

IF YOU INTEND TO HAVE AN ATTORNEY REPRESENT YOU, PLEASE PROVIDE THE FOLLOWING INFORMATION:

ATTORNEY'S NAME:	
ADDRESS:	TELEPHONE NUMBER:
SIGNATURE:	DATE:

DN 3443 FEB 04

White Ply: AAA Canary Ply: BCBSM Regional Center Pink Ply: Claimant

TERMINATION ARBITRATION PROCEDURE FOR NON-BARGAINING UNIT EMPLOYEES

SCOPE: ***All employees except as precluded by specific contracts or labor agreements.***

GENERAL POLICY

Our company is an at will employer. As a result, either the employee or BCBSM may terminate the employment relationship in their discretion at any time. This Arbitration Procedure does not detract from that at will status. Termination decisions can accordingly be made and carried out by BCBSM or the employee without challenge under a theory that an express or implied contract of employment was breached. BCBSM is committed to the concept of equal employment opportunity, and wishes to ensure that termination decisions are not influenced to any degree by discrimination or retaliation that would violate state or federal civil rights laws.

To that end, BCBSM has certain internal review mechanisms in connection with a decision to terminate an employee. Additionally, BCBSM hereby establishes an Arbitration Procedure through which a terminated employee (referred to here as a "claimant") may challenge, on various grounds, before an impartial arbitrator, the decision to terminate the claimant's employment. This Arbitration Procedure is intended to be exclusive, final, and binding. It provides the sole mechanism for a terminated employee to assert a legal claim against BCBSM, thereby displacing time-consuming and expensive litigation.

PRACTICES AND PROCEDURES

Scope of Arbitration Procedure
This Arbitration Procedure applies only to employee terminations, including claims of constructive termination, and not to lesser forms of discipline or other disputes concerning an employee's terms or conditions of employment. Constructive termination is defined, for purposes of this Arbitration Procedure, as a claim by an employee (hereinafter referred to as a "claimant") that he or she was forced to resign or quit involuntarily because his or her working conditions had deliberately been made so intolerable by BCBSM that a reasonable person would have felt compelled to resign or quit.

The scope of this Arbitration Procedure extends to all termination-related legal claims or theories including discrimination, retaliation, violation of public policy, and tort claims, including any claims that could be made under any state or federal civil rights laws such as the Michigan Elliott-Larsen Civil Rights Act, the Michigan Person's With Disabilities Civil Rights Act, the Michigan Whistle Blower's Protection Act, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Americans with Disabilities Act, 42 U.S.C. §1981, the Equal Pay Act, or under any other employment-related statute or legal theory. This Arbitration Procedure is applicable to all BCBSM employees except those precluded by specific language contained in a contract or labor agreement.

Any legal claim or theory that a claimant's termination breached an express or implied contract of employment also comes within the scope of this Arbitration Procedure. However, because any such claim is almost certainly inconsistent with and precluded by BCBSM's at will employment policy, such a claim will be subject to pre-hearing disposition by the arbitrator if raised in the Request for Arbitration.

Initiating the Arbitration Procedure
Any terminated claimant, who believes that the termination decision by BCBSM was discriminatory, retaliatory, tortious, violative of public policy or any federal or state civil rights law, or improper in any other way that comes within the scope of this Arbitration Procedure, may request arbitration by writing to the American Arbitration Association (AAA), 27777 Franklin Road, Suite 1150, Southfield , Michigan 48034-8208 and asking AAA to appoint an arbitrator in accordance with its rules governing the resolution of employment disputes.

BCBSM has prepared the attached "Request for Arbitration" form that may be utilized for this purpose. Copies of the form are available at BCBSM's Human Resources and Administration Division. A copy of the Request shall, at the same time it is submitted to AAA, be sent to BCBSM's Human Resources and Administration Division Regional Center. AAA's rules governing the resolution of employment disputes may be obtained by request from AAA, or may be obtained from BCBSM's Human Resources and Administration Division.

The claimant shall, to the best of his or her ability, specify in the Request for Arbitration; (a) the factual basis on which the claim is made; (b) the statutory provision or legal theory under which the claim is made; and (c) the nature and extent of any remedy or relief sought by claimant. If the Request for Arbitration does not adequately specify these things, the arbitrator shall, upon request, direct the claimant to provide further detail.

The Request for Arbitration shall also include the claimant's (or his or her attorney's) address where mail or notices are to be sent by AAA and BCBSM during the arbitration proceeding. The claimant shall be responsible for notifying AAA and BCBSM of any change of address during the proceeding.

After the Arbitration Procedure has been initiated, AAA shall administer the arbitration proceeding in accordance with its rules governing the resolution of employment disputes, except as otherwise provided in this Arbitration Procedure.

Time Limits
To request arbitration under this Arbitration Procedure, a claimant's written request for arbitration must be received by AAA within the limitation period for filing that would apply to the claimant's claim if it were asserted in a court of law.

NOTE: THIS TIME LIMIT MUST BE ADHERED TO AND WILL BE STRICTLY ENFORCED.

A claimant's failure to act within the required time will constitute a failure to exhaust the Arbitration Procedure and will be deemed an acceptance of BCBSM's termination decision with respect to any claim within the scope of the Arbitration Procedure.

Arbitrator's Jurisdiction and Authority
The Arbitrator shall act as adjudicator of any claim that comes within the scope of this Arbitration Procedure. To the extent not inconsistent with this Arbitration Procedure, the arbitrator shall have powers and authority as provided for by the rules of AAA governing employee disputes and the statutes or laws under which a claim is made. For example, if a statutory provision under which a claim is made allows for a particular remedy, such as back pay, front pay, other forms of damages, interest, costs, actual attorney's fees, or reinstatement, the arbitrator shall have the power and authority to include that remedy in the award. In addition, the arbitrator shall apply the elements of proof, burden of proof formulation, mitigation duty, interim earnings offsets, and other legal rules or requirements under the statutory provision under which a claim is made. The arbitrator shall also have the power to issue subpoenas.

The arbitrator shall not have power or authority to change BCBSM's lawful personnel policies, or to substitute his or her own business judgment for the lawful business judgment of BCBSM.

Pre-Hearing Discovery
The claimant and BCBSM shall be entitled to reasonable discovery as part of the arbitration proceeding. In this regard, the claimant and BCBSM will attempt to agree to pre-hearing discovery that will provide fair access to relevant information and, at the same time, maintain the inexpensive and expeditious character of the arbitration proceeding. As a general matter, the claimant and BCBSM shall each be entitled, without special permission of the arbitrator, to conduct two discovery depositions of persons identified by them. Upon written application to the arbitrator and a showing of compelling justification, the arbitrator may grant special permission for one or more additional limited depositions, or may specially direct that additional information be provided to the other party.

Pre-Hearing Disposition
The arbitrator is authorized, following his or her appointment and prior to a hearing, to render a special opinion and award summarily disposing of a claim or claims. The arbitrator shall do so only if, after considering either party's request for summary disposition and any response submitted by the opposing party, the arbitrator determines that there are no factual issues requiring a hearing and that the requesting party is clearly entitled to an award in its favor. For example, if a claimant makes a claim that his or her termination breached an express or implied contract of employment, that claim may be subject to summary pre-hearing disposition because it is almost certainly inconsistent with and precluded by BCBSM's at will employment policy.

Arbitration Costs and Fees
The administration costs charged by AAA and the fees of the arbitrator shall be borne by BCBSM. However, if the arbitrator finds that a claim was frivolous, the arbitrator may award reimbursement of these costs and fees to BCBSM if such reimbursement is authorized by the statutory provision (if any) under which the claim is made.

The claimant and BCBSM may be represented by counsel of their choosing at their own expense. Counsel fees may be awarded to the claimant after an arbitration award in his or her favor if such an award is authorized by the statutory provision under which the claim is made.

Award and Available Relief
Within 30 days following the conclusion of the hearing and submission of the case, or as soon thereafter as practicable, the arbitrator shall issue a written opinion and award, signed by the arbitrator, which shall include findings of fact and conclusions of law.

If the arbitrator finds in the claimant's favor, the arbitrator shall fashion a remedy that is consistent with his or her authority under the statutory provision under which the claim is made and takes into account the best interests of the parties and other potentially affected individuals. In this regard, the arbitrator shall have the discretion to render an award of front pay damages in lieu of reinstatement in the event the arbitrator determines that such alternative relief is appropriate and objectively warranted under all of the circumstances. However, an award of front pay damages in excess of one year shall not be rendered by the arbitrator without first scheduling a supplemental hearing before the arbitrator with respect to front pay damages and mitigation issues and permitting limited additional pre-hearing discovery. The decision of the arbitrator shall be final and binding; provided, however, that limited judicial review may be obtained in a court of competent jurisdiction; (a) in accordance with the standards for review of arbitration awards established by law; or (b) on the ground that the arbitrator committed an error of law.

If any monetary award is made, the arbitrator shall specify the elements and factual basis for calculating the amount. In no event shall the arbitrator award monetary relief greater than that sought by the claimant.

The arbitrator's award and the relief determined therein shall be final and binding upon the claimant and BCBSM, subject only to the limited judicial review described below.

Judicial Enforcement and Review
This Arbitration Procedure and proceedings hereunder shall be governed by the Federal Arbitration Act, 9 U.S.C. §1 et seq., as well as the Michigan Arbitration Act, 27 MSA §5001 et seq. An arbitrator's award rendered pursuant to this Arbitration Procedure shall be enforceable, and a judgment may be entered thereon, in a court of competent jurisdiction sitting in Michigan.

The decision of the arbitrator shall be final and binding; provided, however, that limited judicial review may be obtained in a court of competent jurisdiction; (a) in accordance with the standards for review of arbitration awards established by law; or (b) on the ground that the arbitrator committed an error of law.

Exclusivity of Arbitration Procedure
This Arbitration Procedure is intended to be the sole and exclusive forum and remedy for all claims that fall within its scope, inasmuch as the inexpensive and expeditious character of arbitration makes it preferable to litigation in a judicial or administrative forum.

NOTE: By opting to submit to arbitration, the claimant is waiving the right to adjudicate all legal and equitable claims and theories, including claims of discrimination, retaliation, and violation of public policy, in a judicial forum. However, the claimant maintains the right to file a claim or

charge with any state or federal agency, including the U.S. Equal Employment Opportunity Commission and The Michigan Department Of Civil Rights.

Exhaustion of this Arbitration Procedure is mandatory. In the event a court were to determine that this Arbitration Procedure is not the sole and exclusive forum and remedy, or that an arbitration award rendered under this Arbitration Procedure is not final and binding between the parties, it is nevertheless intended that exhaustion of this Arbitration Procedure be a condition precedent to the institution of any judicial or administrative litigation by a claimant with respect to claims that come within the scope of the Arbitration Procedure.

Request For Arbitration
Request arbitration by writing to the American Arbitration Association (AAA), 27777 Franklin Road, Suite 1150, Southfield , Michigan 48034-8208 with a request that AAA appoint an arbitrator in accordance with its rules governing employee disputes. The claimant may obtain a "Request for Arbitration" form from Human Resources Regional Center.

Submission of Request for Arbitration
Submit one copy of the Request for Arbitration form to:

American Arbitration Association (AAA)
27777 Franklin Road, Suite 1150
Southfield, Michigan 48034-8208

and one copy to the BCBSM Human Resources Regional Center where your job was located:

Human Resources Regional Center – Detroit
Mail Code #0111
600 Lafayette East
Detroit, Michigan 48226

Human Resources Regional Center – G.R.
Mail Code #G102
86 Monroe Center
Grand Rapids, Michigan 49503

Human Resources Regional Center – Metro
Mail Code #B401
27000 W. 11 Mile Road
Southfield, Michigan 48034

Human Resources Regional Center - Lansing
Mail Code #B133
1403 South Creyts
Lansing, Michigan 48917

RESPONSIBILITY

BCBSM
- Make copies of Request for Arbitration form available in Human Resources offices.
- Attempt, along with claimant, to agree to pre-hearing discovery.
- Entitled to conduct two pre-hearing discovery depositions.
- Share administration costs charged by AAA equally with claimant.
- Pay fees of the arbitrator, in the first instance.
- Entitled to representation by an attorney of BCBSM's choosing at the company's expense.

Arbitrator
- Administer the arbitration proceeding in accordance with its rules governing labor arbitrations, except as otherwise provided in this Arbitration Procedure.
- Act as adjudicator of any claim that comes within the scope of this Arbitration Procedure. To the extent not inconsistent with this Arbitration Procedure, the arbitrator shall have powers and authority provided for by the rules of AAA governing labor arbitrations and the statutes or laws under which a claim is made
- Apply the elements of proof, burden of proof, formulation, mitigation, duty, interim earnings offsets and other legal rules or requirements under the statutory provision under which a claim is made.
- Has the power to issue subpoenas.
- Shall not have power or authority to change BCBSM's lawful personnel policies or to substitute his or her own business judgment for the lawful business judgment of BCBSM.
- May grant special permission for one or more additional limited depositions or may specially direct that additional information be provided to the other party -- if written application has been made to the arbitrator and there has been a showing of compelling justification.
- Authorized, following his or her appointment and prior to a hearing, to render a special opinion and award summarily disposing of a claim or claims. (This provision shall apply in instances where the arbitrator determines that there are no factual issues requiring a hearing and that BCBSM is clearly entitled to an award in its favor.)
- If the arbitrator finds that a claim was frivolous, he or she may award reimbursement of arbitration costs and fees to BCBSM if authorized by the statutory provision under which the claim is made.
- Within 30 days following the conclusion of the hearing and submission of the case, the arbitrator shall issue a written opinion and award, signed by the arbitrator, which shall include findings of fact and conclusions of law.
- If finding is in the claimant's favor, the arbitrator shall fashion a remedy which is consistent with his or her authority under the statutory provision under which the claim is made and takes into account the best interests of the parties and other potentially affected individuals.
- Has the discretion to render an award of front pay damages in lieu of reinstatement in the event the arbitrator determines that such alternative relief is appropriate and objectively warranted under all of the circumstances.
- Shall not issue an award of front pay damages in excess of one year without first scheduling a supplemental hearing before the arbitrator with respect to front pay damages and mitigation issues and permitting limited additional pre-hearing discovery.
- If any monetary award is made, the arbitrator shall specify the elements and factual basis for calculating the amount. In no event shall the arbitrator award monetary relief greater than that sought by the claimant.
- Has authority to make decisions that are final and binding upon the claimant and BCBSM, subject only to the limited judicial review described herein this policy.

Claimant
- Request arbitration by writing to the American Arbitration Association (AAA), 27777 Franklin Road, Suite 1150, Southfield , Michigan 48034-8208 with a request that AAA appoint an arbitrator in accordance with its rules governing labor arbitrations. Or the

claimant may obtain a "Request for Arbitration" form from the Human Resources Department.

- Submit a copy of the "Request for Arbitration" form to BCBSM's Human Resources offices and AAA. Upon request, AAA will provide a copy of its rules governing labor arbitrations, or claimant may pick up a copy of the AAA rules at BCBSM's Human Resources offices.
- Specify in the Request for Arbitration: the factual basis on which the claim is made; the statutory provision or legal theory under which the claim is made; the nature and extent of any remedy or relief sought; the address of the claimant's attorney (The claimant is responsible for notifying AAA and BCBSM of a change of address during the proceeding.) NOTE: If the Request for Arbitration does not adequately specify these things, the arbitrator shall, upon request, direct that the claimant provide further detail.
- Ensure "Request for Arbitration" is made in writing and received by AAA within the time limitations identified in this policy. Failure to act within the required time will constitute a failure to exhaust the Arbitration Procedure and determined as an acceptance of BCBSM's termination decision with respect to any claim within the scope of the Arbitration Procedure.
- Shall attempt, along with BCBSM, to agree to pre-hearing discovery.
- Recognize that claimant is entitled to conduct two pre-hearing discoveries. Identify persons deemed relevant to claimant's case to participate in pre-hearings.
- Share administration costs charged by AAA equally with BCBSM.
- Entitled to representation by an attorney of claimant's choosing at claimant's expense. (An arbitrator may award counsel fees to claimant after an arbitration award in his or her favor if authorized by the statutory provision under which the claim is made.)

Revised March 2006

U.S. Department of Labor
Office of the Solicitor

Office of the Solicitor

August 9, 2002

MEMORANDUM FOR REGIONAL SOLICITORS
ASSOCIATE SOLICITORS

FROM: EUGENE SCALIA
Solicitor of Labor

SUBJECT: Consideration of Employment Arbitration Agreements

The Supreme Court's decision earlier this year in *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754 (2002), affirms the government's ability to proceed with litigation on behalf of individual employees even when the employees have agreed to arbitrate employment disputes with their employer. *Waffle House* is a welcome affirmation of the government's litigation authority and its unique role in enforcing the law. The Department must balance this authority, however, with what the Supreme Court has called our "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'Mosesl Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1, 24 (1983).

Arbitration has a rich history of resolving employment disputes. It has been a principal means of resolving disputes in unionized workplaces for decades. In recent years, it has caught on rapidly in non-union companies. The courts have promoted a variety of forms of alternative dispute resolution for more than a decade, binding arbitration among them. Arbitration offers "simplicity, informality, and expeditio[us] resolution of disputes," the Supreme Court has said. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The Court "ha[s] been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991)). The Report of the Dunlop Commission on the Future of Worker-Management Relations spoke at length about the value of arbitration, and stated that "development of private arbitration alternatives for workplace disputes must be encouraged. High-quality alternatives to litigation hold the promise of expanding access to public law rights for lower-wage workers. Private arbitration may also allow even the most contentious disputes to be resolved in a manner which permits the complaining employee to raise the

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dispute without permanently fracturing the employee's working relationship with the employer." COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, REPORT AND RECOMMENDATIONS 30 (1994).

Although government agencies are justifiably wary of mandatory arbitration of statutory claims in some instances, there is a tradition of federal employment agencies deferring to arbitration in appropriate circumstances. The National Labor Relations Board has highly-developed principles of deferral under its *Spielberg* doctrine - providing for deferral to arbitral awards that already have been rendered and have resolved the facts in a manner determinative of the pending Board charge - and the related *Collyer* doctrine, which provides for deferral to arbitration machinery pending the arbitration's outcome, which may then be reviewed under the *Spielberg* standard. See 1 THE DEVELOPING LABOR LAW 1376 ff. (Patrick Hardin et al. eds., 4th ed. 2002). The Department of Labor and the Solicitor's Office also have a history of deferring to arbitration on occasion. For instance, OSHA regulations under section 11(c) of the OSH Act and the Surface Transportation Assistance Act (STAA) provide for deferral to arbitration under circumstances similar to those considered by the NLRB. 29 C.F.R. § 1977.18; 29 C.F.R. § 1978.112 (2000).

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This memorandum is intended to put in more concrete form principles to be considered by attorneys in the Office of the Solicitor in deciding whether to litigate a matter that is subject to an arbitration agreement. Most of the factors apply equally to disputes that (i) already have been arbitrated and (ii) have not yet been arbitrated but are subject to an arbitration process that one or both of the parties is prepared to initiate. (Factors that apply only pre- or post-arbitration are identified accordingly.) Many of the factors are based on the American Arbitration Association's "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship," which has been endorsed by the American Bar Association.

Under this memorandum, deferral should be considered not only when the arbitration agreement covers the same statutory claim that would be brought by the Department, but also when arbitration of a different legal claim is substantially likely to resolve the factual dispute in a way that would dispose of the statutory claim. For example, if an arbitrator determines that a complainant was terminated for legitimate performance reasons and not because of national origin, that award may also resolve the complainant's whistleblower claim, if other pertinent factors are satisfied. Deferral will be most appropriate in matters involving individual claims for relief in the form of back pay and reinstatement: matters under section 11(c) of the OSH Act, for example, STAA, other whistleblower statutes, the Family and Medical Leave Act (FMLA), and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). The Department's wage-hour cases, by contrast, typically involve numerous employees and as consequence may have been the subject of time-consuming investigations and may be unwieldy for private parties to arbitrate; in those cases, moreover, court-ordered prospective compliance with the law often is an important Departmental objective. Accordingly, deferral to arbitration often will not be appropriate in wage-hour matters. It should also be noted that in programs where the Department is able to seek immediate provisional relief - such as through temporary reinstatement under the Mine Safety and Health Act - that relief should be sought (where the facts warrant) even if it is decided to defer to arbitration on the ultimate merits. Deferral is not appropriate in matters,

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such as those involving OSHA standards, where relief is not primarily in the form of an award to a putative employee.

Department investigators should be encouraged to inquire at the early stages of investigations whether alleged violations falling within the parameters identified above are covered by an agreement to arbitrate or are related to an arbitration award. When the presence of an arbitration agreement or award is brought to their attention, Department investigators should consult with the Office of the Solicitor to determine how to proceed in light of the considerations set forth below.

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The factors listed below are not intended to be exhaustive and no particular item is intended to be determinative. Furthermore, the policy set forth in this memorandum is separate and apart from the Department's own alternative dispute resolution (ADR) program.

FACTORS TO BE CONSIDERED BY DEPARTMENT OF LABOR LAWYERS IN DECIDING WHETHER TO DEFER TO ARBITRATION

- **Special Departmental Considerations**
  - Is it a matter that calls for immediate injunctive relief (e.g., hot goods), or one in which prospective equitable relief obtained by the Department will be particularly important? Is it likely that the violative conduct will recur absent Department intervention?
  - Was the misconduct willful or egregious?
  - Does the dispute involve a general policy or practice of the employer?
  - Does the dispute involve a legal issue the Department has made a priority of emphasizing or clarifying? Is the case one that might establish an important legal precedent?
  - Has the employer previously refused to arbitrate the dispute?

- **Presence of an Agreement to Arbitrate**
  - Does the agreement to arbitrate appear valid and enforceable under applicable state law and the Federal Arbitration Act?
    - Did the employer explain the key provisions of the agreement orally or in writing?
    - Was the employee informed that by signing the agreement he waived the right to trial by jury?
    - Did the employer give the employee time to consider the agreement before signing it?
    - Did the employer inform the employee that he might want to discuss the agreement with an attorney before signing it?
    - Note: When the arbitration agreement is part of a collective bargaining agreement, these factors should be presumed satisfied. However, the collective bargaining agreement must clearly and unmistakably indicate that the claim is subject to arbitration, or there must be other clear evidence that the union and employer regard the claim as arbitrable.

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- **Cost of Arbitration (Pre-Arbitration)**
  - In light of arbitration expenses, is the arbitral forum in this particular case accessible financially? (Consideration should be given to the approximate amount of arbitration fees and costs, the extent to which fees and costs would be paid by the employer, and the estimated cost differential for the claimant between arbitration and private litigation.)
  - Does the arbitrator have authority to provide for reimbursement of attorneys fees, in whole or in part, in accordance with applicable law or in the interests of justice, as part of the remedy?

- **Arbitrator Qualification**
  - Does the arbitrator (or pool of available arbitrators) have an appropriate background, including experience in overseeing hearings, knowledge of the pertinent legal issues, and an understanding of employment relations?
  - Is the arbitrator associated with a reputable arbitration or mediation service, particularly one with established rules of procedure?
  - Is the pool of available arbitrators created in a nondiscriminatory manner, such that it can be expected the parties' positions will be considered fairly?
  - Does the arbitrator have a duty to inform the parties of any relationship that might reasonably create or be perceived as creating a conflict of interest?

- **Arbitrator Selection**
  - Is the employee (or an employee representative) afforded a meaningful role in selecting the arbitrator? (An example of a meaningful role is the following: Upon the request of the parties, a designated agency selects a pool composed of an odd number of arbitrators; the parties alternate in striking names from the list until a single arbitrator is remaining.)

- **Representation for Employee**
  - May the employee be represented by counsel in the arbitration?

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- **Access to Information**
  - Is there provision for reasonable mutual discovery (e.g., pre-hearing disclosures, depositions) consistent with the expedited nature of the arbitration?
  - Does the employee have access to the information reasonably relevant to the arbitration?

- **Authority of the Arbitrator Regarding Procedural Matters**
  - Does the arbitrator have authority regarding the time and place of the hearing, the issuance of subpoenas, evidentiary matters, and the authority to issue an award resolving the dispute?
  - **Timing** - Does the arbitration agreement set a limitations period shorter than that granted the employee by statute?
  - **Collective action** - Is any right the employee has to proceed through a collective action (such as under the FLSA) preserved?
  - **Venue** - Is the employee required to travel a great distance to arbitrate the claim?

- **Authority of the Arbitrator Regarding Substantive Matters**
  - Is the arbitrator provided the authority to award whatever relief would be available in a judicial forum?

- **Timing of Arbitration (Pre-Arbitration)**
  - Is the defendant prepared to arbitrate without delay? Special consideration should be given if the defendant agrees to an accelerated arbitration schedule that enables the claimant to obtain a decision within a far shorter period than available in the courts - six to nine months, for instance - without the loss of discovery opportunities identified above.
  - Does the defendant waive any argument that arbitration is untimely?
  - If the Department agrees to defer to the arbitration process, will the parties sign a tolling agreement? (The Department may wish to review the award post-arbitration to ensure that it is consistent with the law, as indicated below.)

- **Thoroughness of Judgment (Post-Arbitration)**
  - Does the arbitration agreement provide for (or the employer consent to) a written arbitration decision setting out not only the award but also the essential findings of fact and conclusions of law on which it is based?

- **Review of Award (Post-Arbitration)**
  - If deference is sought to an arbitration award, is the award palpably wrong or clearly inconsistent with the applicable statutes?

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The U.S. Equal Employment Opportunity Commission

EEOC NOTICE
Number 915.002
Date July 10, 1997

1. SUBJECT: Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment

2. PURPOSE: This policy statement sets out the Commission's policy on the mandatory binding arbitration of employment discrimination disputes imposed as a condition of employment.

3. EFFECTIVE DATE: Upon issuance.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Coordination and Guidance Programs, Office of Legal Counsel.

6. INSTRUCTIONS: File in Volume II of the EEOC Compliance Manual.

7. SUBJECT MATTER:

The United States Equal Employment Opportunity Commission (EEOC or Commission), the federal agency charged with the interpretation and enforcement of this nation's employment discrimination laws, has taken the position that agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in these laws. EEOC Motions on Alternative Dispute Resolution, Motion 4 (adopted Apr. 25, 1995), 80 Daily Lab. Rep. (BNA) E-1 (Apr. 26, 1995).1 This policy statement sets out in further detail the basis for the Commission's position.

I. Background

An increasing number of employers are requiring as a condition of employment that applicants and employees give up their right to pursue employment discrimination claims in court and agree to resolve disputes through binding arbitration. These agreements may be presented in the form of an employment contract or be included in an employee handbook or elsewhere. Some employers have even included such agreements in employment applications. The use of these agreements is not limited to particular industries, but can be found in various sectors of the workforce, including, for example, the securities industry, retail, restaurant and hotel chains, health care, broadcasting, and security services. Some individuals subject to mandatory arbitration agreements have challenged the enforceability of these agreements by bringing employment discrimination actions in the courts. The Commission is not unmindful of the case law enforcing specific mandatory arbitration agreements, in particular, the Supreme Court's decision in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 33 (1991).2 Nonetheless, for the reasons stated herein, the Commission believes that such agreements are inconsistent with the civil rights laws.

II. The Federal Civil Rights Laws Are Squarely Based In This Nation's History And Constitutional Framework And Are Of A Singular National Importance

Federal civil rights laws, including the laws prohibiting discrimination in employment, play a unique role in American jurisprudence. They flow directly from core Constitutional principles, and this nation's history testifies to their necessity and profound importance. Any analysis of the mandatory arbitration of rights guaranteed by the employment discrimination laws must, at the outset, be squarely based in an understanding of the history and purpose of these laws.

Title VII of the historic Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., was enacted to ensure equal opportunity in employment, and to secure the fundamental right to equal protection guaranteed by the Fourteenth Amendment to the Constitution.3 Congress considered this national policy against discrimination to be of the "highest priority" (Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968)), and of "paramount importance" (H.R. Rep. No. 88-914, pt. 2 (1963) (separate views of Rep. McCulloch et al.)),4 reprinted in 1964 Leg. Hist. at 2123.5 The Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq., was intended to conform "[t]he practice of American democracy . . . to the spirit which motivated the Founding Fathers of this Nation -- the ideals of freedom, equality, justice, and opportunity." H.R. Rep. No. 88-914, pt. 2 (1963) (separate views of Rep. McCulloch et al.), reprinted in 1964 Leg. Hist. at 2123. President John F. Kennedy, in addressing the nation regarding his intention to introduce a comprehensive civil rights bill, stated the issue as follows:

> We are confronted primarily with a moral issue. It is as old as the Scriptures and it is as clear as the American Constitution.
>
> The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated.

President John F. Kennedy's Radio and Television Report to the American People on Civil Rights (June 11, 1963), Pub. Papers 468, 469 (1963).6

Title VII is but one of several federal employment discrimination laws enforced by the Commission which are "part of

a wider statutory scheme to protect employees in the workplace nationwide," McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995). See the Equal Pay Act of 1963 ("EPA"), 29 U.S.C. § 206(d); the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 et seq.; and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 et seq. The ADEA was enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace" and "reflects a societal condemnation of invidious bias in employment decisions." McKennon, 513 U.S. at 357. The ADA explicitly provides that its purpose is, in part, to invoke congressional power to enforce the Fourteenth Amendment. 29 U.S.C. § 12101(b)(4). Upon signing the ADA, President George Bush remarked that "the American people have once again given clear expression to our most basic ideals of freedom and equality." President George Bush's Statement on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), Pub. Papers 1070 (1990 Book II).

III. The Federal Government Has The Primary Responsibility For The Enforcement Of The Federal Employment Discrimination Laws

The federal employment discrimination laws implement national values of the utmost importance through the institution of public and uniform standards of equal opportunity in the workplace. See text and notes supra in Section II. Congress explicitly entrusted the primary responsibility for the interpretation, administration, and enforcement of these standards, and the public values they embody, to the federal government. It did so in three principal ways. First, it created the Commission, initially giving it authority to investigate and conciliate claims of discrimination and to interpret the law, see §§ 706(b) and 713 of Title VII, 42 U.S.C. §§ 2000e-5(b) and 2000e-12, and subsequently giving it litigation authority in order to bring cases in court that it could not administratively resolve, see § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1). Second, Congress granted certain enforcement authority to the Department of Justice, principally with regard to the litigation of cases involving state and local governments. See §§ 706(f)(1) and 707 of Title VII, 42 U.S.C. §§ 2000e-5(f)(1) and 2000e-6. Third, it established a private right of action to enable aggrieved individuals to bring their claims directly in the federal courts, after first administratively bringing their claims to the Commission. See § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1).7

While providing the states with an enforcement role, see 42 U.S.C. §§ 2000e-5(c) and (d), as well as recognizing the importance of voluntary compliance by employers, see 42 U.S.C. § 2000e-5(b), Congress emphasized that it is the federal government that has ultimate enforcement responsibility. As Senator Humphrey stated, "[t]he basic rights protected by [Title VII] are rights which accrue to citizens of the United States; the Federal Government has the clear obligation to see that these rights are fully protected." 110 Cong. Rec. 12725 (1964). Cf. General Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980) (in bringing enforcement actions under Title VII, the EEOC "is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement'") (quoting 118 Cong. Rec. 4941 (1972)).

The importance of the federal government's role in the enforcement of the civil rights laws was reaffirmed by Congress in the ADA, which explicitly provides that its purposes include "ensur[ing] that the Federal Government plays a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities." 42 U.S.C. § 12101(b)(3).

IV. Within This Framework, The Federal Courts Are Charged With The Ultimate Responsibility For Enforcing The Discrimination Laws

While the Commission is the primary federal agency responsible for enforcing the employment discrimination laws, the courts have been vested with the final responsibility for statutory enforcement through the construction and interpretation of the statutes, the adjudication of claims, and the issuance of relief.8 See, e.g., Kremer v. Chemical Constr. Corp., 454 U.S. 461, 479 n.20 (1982) ("federal courts were entrusted with ultimate enforcement responsibility" of Title VII); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64 (1980) ("Of course the 'ultimate authority' to secure compliance with Title VII resides in the federal courts").9

A. The Courts Are Responsible For The Development And Interpretation Of The Law

As the Supreme Court emphasized in Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974), "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." This principle applies equally to the other employment discrimination statutes.

While the statutes set out the basic parameters of the law, many of the fundamental legal principles in discrimination jurisprudence have been developed through judicial interpretations and case law precedent. Absent the role of the courts, there might be no discrimination claims today based on, for example, the adverse impact of neutral practices not justified by business necessity, see Griggs v. Duke Power Co., 401 U.S. 424 (1971), or sexual harassment, see Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). Yet these two doctrines have proved essential to the effort to free the workplace from unlawful discrimination, and are broadly accepted today as key elements of civil rights law.

B. The Public Nature Of The Judicial Process Enables The Public, Higher Courts, And Congress To Ensure That The

Discrimination Laws Are Properly Interpreted And Applied

Through its public nature -- manifested through published decisions -- the exercise of judicial authority is subject to public scrutiny and to system-wide checks and balances designed to ensure uniform expression of and adherence to statutory principles. When courts fail to interpret or apply the antidiscrimination laws in accord with the public values underlying them, they are subject to correction by higher level courts and by Congress.

These safeguards are not merely theoretical, but have enabled both the Supreme Court and Congress to play an active and continuing role in the development of employment discrimination law. Just a few of the more recent Supreme Court decisions overruling lower court errors include: Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997) (former employee may bring a claim for retaliation); O'Connor v. Consolidated Coin Caterers, Corp., 116 S. Ct. 1307 (1996) (comparator in age discrimination case need not be under forty); McKennon, 513 U.S. 352 (employer may not use after-acquired evidence to justify discrimination); and Harris 510 U.S. 17 (no requirement that sexual harassment plaintiffs prove psychological injury to state a claim).

Congressional action to correct Supreme Court departures from congressional intent has included, for example, legislative amendments in response to Court rulings that: pregnancy discrimination is not necessarily discrimination based on sex (General Elec. Co. v. Gilbert, 429 U.S. 125 (1978), and Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), overruled by Pregnancy Discrimination Act of 1978); that an employer does not have the burden of persuasion on the business necessity of an employment practice that has a disparate impact (Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), overruled by §§ 104 and 105 of the Civil Rights Act of 1991); that an employer avoids liability by showing that it would have taken the same action absent any discriminatory motive (Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), overruled, in part, by § 107 of the Civil Rights Act of 1991); that mandatory retirement pursuant to a benefit plan in effect prior to enactment of the ADEA is not prohibited age discrimination (United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977), overruled by 1978 ADEA amendments); and, that age discrimination in fringe benefits is not unlawful (Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989), overruled by Older Workers Benefits Protection Act of 1990).

C. The Courts Play A Crucial Role In Preventing And Deterring Discrimination And In Making Discrimination Victims Whole

The courts also play a critical role in preventing and deterring violations of the law, as well as providing remedies for discrimination victims. By establishing precedent, the courts give valuable guidance to persons and entities covered by the laws regarding their rights and responsibilities, enhancing voluntary compliance with the laws. By awarding damages, backpay, and injunctive relief as a matter of public record, the courts not only compensate victims of discrimination, but provide notice to the community, in a very tangible way, of the costs of discrimination. Finally, by issuing public decisions and orders, the courts also provide notice of the identity of violators of the law and their conduct. As has been illustrated time and again, the risks of negative publicity and blemished business reputation can be powerful influences on behavior.

D. The Private Right Of Action With Its Guarantee Of Individual Access To The Courts Is Essential To The Statutory Enforcement Scheme

The private right of access to the judicial forum to adjudicate claims is an essential part of the statutory enforcement scheme. See, e.g., McKennon, 513 U.S. at 358 (granting a right of action to an injured employee is "a vital element" of Title VII, the ADEA, and the EPA). The courts cannot fulfill their enforcement role if individuals do not have access to the judicial forum. The Supreme Court has cautioned that, "courts should ever be mindful that Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum." Gardner-Denver, 415 U.S. at 60 n.21.10

Under the enforcement scheme for the federal employment discrimination laws, individual litigants act as "private attorneys general." In bringing a claim in court, the civil rights plaintiff serves not only her or his private interests, but also serves as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978) (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)). See also McKennon, 513 U.S. at 358 ("[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and compensation objectives of the ADEA").

V. Mandatory Arbitration Of Employment Discrimination Disputes "Privatizes" Enforcement Of The Federal Employment Discrimination Laws, Thus Undermining Public Enforcement Of The Laws

The imposition of mandatory arbitration agreements as a condition of employment substitutes a private dispute resolution system for the public justice system intended by Congress to govern the enforcement of the employment discrimination laws. The private arbitral system differs in critical ways from the public judicial forum and, when imposed as a condition of employment, it is structurally biased against applicants and employees.

A. Mandatory Arbitration Has Limitations That Are Inherent And Therefore Cannot Be Cured By The Improvement Of Arbitration Systems

That arbitration is substantially different from litigation in the judicial forum is precisely the reason for its use as a form of ADR. Even the fairest of arbitral mechanisms will differ strikingly from the judicial forum.

1. The Arbitral Process Is Private In Nature And Thus Allows For Little Public Accountability

The nature of the arbitral process allows -- by design -- for minimal, if any, public accountability of arbitrators or arbitral decision-making. Unlike her or his counterparts in the judiciary, the arbitrator answers only to the private parties to the dispute, and not to the public at large. As the Supreme Court has explained:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept.
>
> He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . .

United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581 (1960) (quoting from Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1016 (1955)).

The public plays no role in an arbitrator's selection; s/he is hired by the private parties to a dispute. Similarly, the arbitrator's authority is defined and conferred, not by public law, but by private agreement.11 While the courts are charged with giving force to the public values reflected in the antidiscrimination laws, the arbitrator proceeds from a far narrower perspective: resolution of the immediate dispute. As noted by one commentator, "[a]djudication is more likely to do justice than . . . arbitration . . . precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason." Owen Fiss, Out of Eden, 94 Yale L.J. 1669, 1673 (1985).

Moreover, because decisions are private, there is little, if any, public accountability even for employers who have been determined to have violated the law. The lack of public disclosure not only weakens deterrence (see discussion supra at 8), but also prevents assessment of whether practices of individual employers or particular industries are in need of reform. "The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of [Title VII's] operation or entrenched resistance to its commands, either of which can be of industry-wide significance." McKennon, 513 U.S. at 358-59.

2. Arbitration, By Its Nature, Does Not Allow For The Development Of The Law

Arbitral decisions may not be required to be written or reasoned, and are not made public without the consent of the parties. Judicial review of arbitral decisions is limited to the narrowest of grounds.12 As a result, arbitration affords no opportunity to build a jurisprudence through precedent.13 Moreover, there is virtually no opportunity for meaningful scrutiny of arbitral decision-making. This leaves higher courts and Congress unable to act to correct errors in statutory interpretation. The risks for the vigorous enforcement of the civil rights laws are profound. See discussion supra at section IV. B.

3. Additional Aspects Of Arbitration Systems Limit Claimants' Rights In Important Respects

Arbitration systems, regardless of how fair they may be, limit the rights of injured individuals in other important ways. To begin with, the civil rights litigant often has available the choice to have her or his case heard by a jury of peers, while in the arbitral forum juries are, by definition, unavailable. Discovery is significantly limited compared with that available in court and permitted under the Federal Rules of Civil Procedure. In addition, arbitration systems are not suitable for resolving class or pattern or practice claims of discrimination. They may, in fact, protect systemic discriminators by forcing claims to be adjudicated one at a time, in isolation, without reference to a broader -- and more accurate -- view of an employer's conduct.

B. Mandatory Arbitration Systems Include Structural Biases Against Discrimination Plaintiffs

In addition to the substantial and inevitable differences between the arbitral and judicial forums that have already been discussed, when arbitration of employment disputes is imposed as a condition of employment, bias inheres against the employee.14

First, the employer accrues a valuable structural advantage because it is a "repeat player." The employer is a party to arbitration in all disputes with its employees. In contrast, the employee is a "one-shot player"; s/he is a party to arbitration only in her or his own dispute with the employer. As a result, the employee is generally less able to make an informed selection of arbitrators than the employer, who can better keep track of an arbitrator's record. In addition, results cannot but be influenced by the fact that the employer, and not the employee, is a potential source of future business for the arbitrator.15 A recent study of nonunion employment law cases16 found that the more frequent a user of arbitration an employer is, the better the employer fares in arbitration.17

In addition, unlike voluntary post-dispute arbitration -- which must be fair enough to be attractive to the employee -- the employer imposing mandatory arbitration is free to manipulate the

arbitral mechanism to its benefit. The terms of the private agreement defining the arbitrator's authority and the arbitral process are characteristically set by the more powerful party, the very party that the public law seeks to regulate. We are aware of no examples of employees who insist on the mandatory arbitration of future statutory employment disputes as a condition of accepting a job offer -- the very suggestion seems far-fetched. Rather, these agreements are imposed by employers because they believe them to be in their interest, and they are made possible by the employer's superior bargaining power. It is thus not surprising that many employer-mandated arbitration systems fall far short of basic concepts of fairness. Indeed, the Commission has challenged -- by litigation, amicus curiae participation, or Commissioner charge -- particular mandatory arbitration agreements that include provisions flagrantly eviscerating core rights and remedies that are available under the civil rights laws.18

The Commission's conclusions in this regard are consistent with those of other analyses of mandatory arbitration. The Commission on the Future of Worker-Management Relations (the "Dunlop Commission") was appointed by the Secretary of Labor and the Secretary of Commerce to, in part, address alternative means to resolve workplace disputes. In its Report and Recommendations (Dec. 1994) ("Dunlop Report"), the Dunlop Commission found that recent employer experimentation with arbitration has produced a range of programs that include "mechanisms that appear to be of dubious merit for enforcing the public values embedded in our laws." Dunlop Report at 27. In addition, a report by the U.S. General Accounting Office, surveying private employers' use of ADR mechanisms, found that existing employer arbitration systems vary greatly and that "most" do not conform to standards recommended by the Dunlop Commission to ensure fairness. See "Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution" at 15, HEHS-95-150 (July 1995).

The Dunlop Commission strongly recommended that binding arbitration agreements not be enforceable as a condition of employment:

> The public rights embodied in state and federal employment law -- such as freedom from discrimination in the workplace . . . -- are an important part of the social and economic protections of the nation. Employees required to accept binding arbitration of such disputes would face what for many would be an inappropriate choice: give up your right to go to court, or give up your job.

Dunlop Report at 32. The Brock Commission (see supra n.13) agreed with the Dunlop Commission's opposition to mandatory arbitration of employment disputes and recommended that all employee agreements to arbitrate be voluntary and post-dispute. Brock Report at 81-82. In addition, the National Academy of Arbitrators recently issued a statement opposing mandatory arbitration as a condition of employment "when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights." See National Academy of Arbitrators' Statement and Guidelines (adopted May 21, 1997), 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997).

C. Mandatory Arbitration Agreements Will Adversely Affect The Commission's Ability To Enforce The Civil Rights Laws

The trend to impose mandatory arbitration agreements as a condition of employment also poses a significant threat to the EEOC's statutory responsibility to enforce the federal employment discrimination laws. Effective enforcement by the Commission depends in large part on the initiative of individuals to report instances of discrimination to the Commission. Although employers may not lawfully deprive individuals of their statutory right to file employment discrimination charges with the EEOC or otherwise interfere with individuals' protected participation in investigations or proceedings under these laws,19 employees who are bound by mandatory arbitration agreements may be unaware that they nonetheless may file an EEOC charge. Moreover, individuals are likely to be discouraged from coming to the Commission when they know they will be unable to litigate their claims in court.20 These chilling effects on charge filing undermine the Commission's enforcement efforts by decreasing channels of information, limiting the agency's awareness of potential violations of law, and impeding its ability to investigate possible unlawful actions and attempt informal resolution.

VI. Voluntary, Post-Dispute Agreements To Arbitrate Appropriately Balance The Legitimate Goals Of Alternate Dispute Resolution And The Need To Preserve The Enforcement Framework Of The Civil Rights Laws

The Commission is on record in strong support of voluntary alternative dispute resolution programs that resolve employment discrimination disputes in a fair and credible manner, and are entered into after a dispute has arisen. We reaffirm that support here. This position is based on the recognition that while even the best arbitral systems do not afford the benefits of the judicial system, well-designed ADR programs, including binding arbitration, can offer in particular cases other valuable benefits to civil rights claimants, such as relative savings in time and expense.21 Moreover, we recognize that the judicial system is not, itself, without drawbacks. Accordingly, an individual may decide in a particular case to forego the judicial forum and resolve the case through arbitration. This is consistent with civil rights enforcement as long as the individual's decision is freely made after a dispute has arisen.22

VII. Conclusion

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 permitted to exempt themselves from federal enforcement of civil rights laws. Nor

should they be permitted to deprive civil rights claimants of the choice to vindicate their statutory rights in the courts -- an avenue of redress determined by Congress to be essential to enforcement.

Processing Instructions For The Field And Headquarters

1. Charges should be taken and processed in conformity with priority charge processing procedures regardless of whether the charging party has agreed to arbitrate employment disputes. Field offices are instructed to closely scrutinize each charge involving an arbitration agreement to determine whether the agreement was secured under coercive circumstances (e.g., as a condition of employment). The Commission will process a charge and bring suit, in appropriate cases, notwithstanding the charging party's agreement to arbitrate.

2. Pursuant to the statement of priorities in the National Enforcement Plan, see § B(1)(h), the Commission will continue to challenge the legality of specific agreements that mandate binding arbitration of employment discrimination disputes as a condition of employment. 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).

/s/

_____ _____

Date Gilbert F. Casellas

Chairman

1. Although binding arbitration does not, in and of itself, undermine the purposes of the laws enforced by the EEOC, the Commission believes that this is the result when it is imposed as a term or condition of employment.

2. The Gilmer decision is not dispositive of whether employment agreements that mandate binding arbitration of discrimination claims are enforceable. As explicitly noted by the Court, the arbitration agreement at issue in Gilmer was not contained in an employment contract. 500 U.S. at 25 n.2. Even if Gilmer had involved an agreement with an employer, the issue would remain open given the active role of the legislative branch in shaping the development of employment discrimination law. See discussion infra at section IV. B.

3. See, e.g., H.R. Rep. No. 88-914, pt. 1 (1963), reprinted in United States Equal Employment Opportunity Commission, Legislative History of Title VII and XI of the Civil Rights Act of 1964 ("1964 Leg. Hist.") at 2016 (the Civil Rights Act of 1964 was "designed primarily to protect and provide more effective means to enforce. . . civil rights"); H.R. Rep. No.88-914, pt.2 (1963) (separate views of Rep. McCulloch et al.), reprinted in 1964 Leg. Hist. at 2122 ("[a] key purpose of the bill . . . is to secure to all Americans the equal protection of the laws of the United States and of the several States"); Charles & Barbara Whalen, The Longest Debate: A legislative history of the 1964 Civil Rights Act 104 (1985) (opening statement of Rep. Celler on House debate of H.R. 7152: "The legislation before you seeks only to honor the constitutional guarantees of equality under the law for all. . . . [W]hat it does is to place into balance the scales of justice so that the living force of our Constitution shall apply to all people . . . ."); H.R. Rep. No. 92-238 (1971), reprinted in Senate Committee on Labor and Public Welfare, Subcommittee on Labor, Legislative History of the Equal Employment Opportunity Act of 1972 ("1972 Leg. Hist.") at 63 (1972 amendments to Title VII are a "reaffirmation of our national policy of equal opportunity in employment").

4. William McCulloch (R-Ohio) was the ranking Republican of Subcommittee No. 5 of the House Judiciary Committee, to which the civil rights bill (H.R. 7152) was referred for initial consideration by Congress. McCulloch was among the individuals responsible for working out a compromise bill that was ultimately substituted by the full Judiciary Committee for the bill reported out by Subcommittee No. 5. His views, which were joined by six members of Congress, are thus particularly noteworthy.

5. See also Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975) (The Civil Rights Act of 1964 is a "complex legislative design directed at an historic evil of national proportions").

6. Commitment to our national policy to eradicate discrimination continues today to be of the utmost importance. As President Clinton stated in his second inaugural address:

> Our greatest responsibility is to embrace a new spirit of community for a new century . . . . The challenge of our past remains the challenge of our future: Will we be one Nation, one people, with one common destiny, or not? Will we all come together, or come apart?
>
> The divide of race has been America's constant curse. And each new wave of immigrants gives new targets to old prejudices . . . . These forces have nearly destroyed our Nation in the past. They plague us still.

President William J. Clinton's Inaugural Address (Jan. 20, 1997), 33 Weekly Comp. Pres. Doc. 61 (Jan. 27, 1997).

7. Section 107 of the ADA specifically incorporates the powers, remedies, and procedures set forth in Title VII with

respect to the Commission, the Attorney General, and aggrieved individuals. See 42 U.S.C.§ 12117. Similar enforcement provisions are contained in the ADEA. See 29 U.S.C. §§ 626 and 628.

8. In addition, unlike arbitrators, courts have coercive authority, such as the contempt power, which they can use to secure compliance.

9. See also H.R. Rep. No. 88-914, pt.2 (1963) (separate views of Rep. McCulloch et al.), reprinted in 1964 Leg. Hist. at 2150 (explaining that EEOC was not given cease-and-desist powers in the final House version of the Civil Rights Act of 1964, H.R. 7152, because it was "preferred that the ultimate determination of discrimination rest with the Federal judiciary").

10. See also 118 Cong. Rec. S7168 (March 6, 1972) (section-by-section analysis of H.R. 1746, the Equal Opportunity Act of 1972, as agreed to by the conference committees of each House; analysis of § 706(f)(1) provides that, while it is hoped that most cases will be handled through the EEOC with recourse to a private lawsuit as the exception, "as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief").

11. Article III of the Constitution provides federal judges with life tenure and salary protection to safeguard the independence of the judiciary. No such safeguards apply to the arbitrator. The importance of these safeguards was stressed in the debates on the 1972 amendments to Title VII. Senator Dominick, in offering an amendment giving the EEOC the right to file a civil action in lieu of cease-and-desist powers, explained that the purpose of the amendment was to "vest adjudicatory power where it belongs -- in impartial judges shielded from political winds by life tenure." 1972 Leg. Hist. at 549. The amendment was later revised in minor respects and adopted by the Senate.

12. Under the Federal Arbitration Act, arbitral awards may be vacated only for procedural impropriety such as corruption, fraud, or misconduct. 9 U.S.C. § 10. Judicially created standards of review allow an arbitral award to be vacated where it clearly violates a public policy that is explicit, well-defined, "dominant" and ascertainable from the law, see United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987), or where it is in "manifest disregard" of the law, see Wilko v. Swan, 346 U.S. 427, 436-37 (1953). The latter standard of review has been described by one commentator as "a virtually insurmountable" hurdle. See Bret F. Randall, The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards, 1992 BYU L. Rev. 759, 767. But cf. Cole v. Burns Int=l Sec. Servs., 105 F.3d 1465, 1486-87 (1997) (in the context of mandatory employment arbitration of statutory disputes, the court interprets judicial review under the "manifest disregard" standard to be sufficiently broad to ensure that the law has been properly interpreted and applied).

13. Congress has recognized the inappropriateness of ADR where "a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent," see Alternative Dispute Resolution Act, 5 U.S.C. § 572(b)(1) (providing for use of ADR by federal administrative agencies where the parties agree); or where "the case involves complex or novel legal issues," see Judicial Improvements and Access to Justice Act, 28 U.S.C. § 652(c)(2) (providing for court-annexed arbitration; §§ 652(b)(1) and (2) also require the parties' consent to arbitrate constitutional or statutory civil rights claims) Similar findings were made by the U.S. Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperation ("Brock Commission"), which was charged with examining labor-management cooperation in state and local government. The Task Force's report, "Working Together for Public Service" (1996) ("Brock Report"), recommended "Quality Standards and Key Principles for Effective Alternative Dispute Resolution Systems for Rights Guaranteed by Public Law and for Other Workplace Disputes" which include that "ADR should normally not be used in cases that represent tests of significant legal principles or class action." Brock Report at 82.

14. A survey of employment discrimination arbitration awards in the securities industry, which requires as a condition of employment that all brokers resolve employment disputes through arbitration, found that "employers stand a greater chance of success in arbitration than in court before a jury" and are subjected to "smaller" damage awards. See Stuart H. Bompey & Andrea H. Stempel, Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims After Gilmer v. Interstate/Johnson Lane Corp., 21 Empl. Rel. L.J. 21, 43 (autumn 1995).

15. See, e.g., Julius G. Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 916, 936 (1979) ("an arbitrator could improve his chances of future selection by deciding favorably to institutional defendants: as a group, they are more likely to have knowledge about past decisions and more likely to be regularly involved in the selection process"); Reginald Alleyne, Statutory Discrimination Claims: Rights 'Waived' and Lost in the Arbitration Forum, 13 Hofstra Lab. L.J. 381, 428 (Spring 1996) ("statutory discrimination grievances relegated to . . . arbitration forums are virtually assured employer-favored outcomes," given "the manner of selecting, controlling, and compensating arbitrators, the privacy of the process and how it catalytically arouses an arbitrator's desire to be acceptable to one side").

16. Arbitration of labor disputes pursuant to a collective bargaining agreement is less likely to favor the employer as a repeat-player because the union, as collective bargaining representative, is also a repeat-player.

17. See Lisa Bingham, "Employment Arbitration: The effect of repeat-player status, employee category and gender on

arbitration outcomes," (unpublished study on file with the author, an assistant professor at Indiana U. School of Public & Environmental Affairs).

18. Challenged agreements have included provisions that: (1) impose filing deadlines far shorter than those provided by statute; (2) limit remedies to "out-of-pocket" damages; (3) deny any award of attorney's fees to the civil rights claimant, should s/he prevail; (4) wholly deny or limit punitive and liquidated damages; (5) limit back pay to a time period much shorter than that provided by statute; (6) wholly deny or limit front pay to a time period far shorter than that ordered by courts; (7) deny any and all discovery; and (8) allow for payment by each party of one-half of the costs of arbitration and, should the employer prevail, require the claimant, in the arbitrator's discretion, to pay the employer's share of arbitration costs as well.

19. See "Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) statutes," Vol. III EEOC Compl. Man. (BNA) at N:2329 (Apr. 10, 1997).

20. The Commission remains able to bring suit despite the existence of a mandatory arbitration agreement because it acts "to vindicate the public interest in preventing employment discrimination," General Tel., 446 U.S. at 326. Cf. S.Rep. No. 101-263 (1990), reprinted in, Legislative History of The Older Workers Benefits Protection Act, at 354 (amendment to ADEA § 626(f)(4), which provides that "no waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]," was intended "as a clear statement of support for the principle that the elimination of age discrimination in the workplace is a matter of public as well as private interest"). As a practical matter, however, the Commission's ability to litigate is limited by its available resources.

21. Despite conventional wisdom to the contrary, the financial costs of arbitration can be significant and may represent no savings over litigation in a judicial forum. These costs may include the arbitrator's fee and expenses; fees charged by the entity providing arbitration services, which may include filing fees and daily administrative fees; space rental fees; and court reporter fees.

22. The Dunlop Commission similarly supported voluntary forms of ADR, but based its opposition to mandatory arbitration on the premise that the avenue of redress for statutory employment rights should be chosen by the individual rather than dictated by the employer. Dunlop Report at 33.

This page was last modified on September 14, 2004.

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U-Haul Company of California *and* Machinist District Lodge 190, Local Lodge 1173, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 32–CA–20665–1

June 8, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 6, 2004, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions. The Charging Party filed cross-exceptions and a supporting brief. The Respondent filed both an answering brief to the General Counsel's cross-exceptions and a brief in reply to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

1. The judge found that the Respondent violated Section 8(a)(1) of the Act by interrogating employee Michael Warren at an employee meeting. For the reasons stated below, we reverse the judge and dismiss this allegation.

Warren, an active union supporter at the Respondent's Fremont, California facility distributed union materials to the Respondent's employees in the parking lot before working time on June 3, 2003,[3] and again around June 10. These materials included an article about the Union's organizing campaign at a facility in Las Vegas, Nevada, and also included copies of a collective-bargaining agreement between the Union and Penske Truck Leasing, a competitor of the Respondent. On June 12, the Respondent's shop manager, Chip Thorn, held an employee meeting, at which approximately 30 employees were in attendance. Thorn began the meeting by asking Warren, "What do you know about the Union in Vegas, Warren?" Warren answered that the employees in Las Vegas had voted for the Union, and that the employees here were waiting to see what would happen. Thorn replied that the Union had not been voted in at Las Vegas and that the issue had not yet been resolved. Thorn then stated that it would cost the employees initiation fees and monthly dues to join the Union, that all employees would get was a green card, and that if it is what the employees wanted then they should go ahead. Thereafter, on June 16, Thorn discharged Warren, along with another union supporter, Andrew Johnson.[4]

The judge found that Thorn's questioning of Warren was coercive and thus violated Section 8(a)(1). The judge relied on the fact that the questioning took place in front of 30 employees, that in that meeting Thorn also expressed an opinion that employees would gain nothing by union representation, and that Thorn discharged Warren and Johnson shortly after the interrogation. We disagree.

Contrary to the judge, we find that neither the subject matter of Thorn's question, nor the circumstances in which it was asked, were coercive. Thorn posed the question to Warren, an open union supporter, in an open forum on the plant floor. It occurred at one of the Respondent's plant meetings, where employees and managers periodically meet to discuss and exchange information on a wide range of issues, such as quotas, safety, attendance, production, and efficiency. Thorn's question, about an event at a different location, was the subject of literature that Warren had openly distributed. The question was not, however, about Warren's union activity, and Warren was not asked to reveal his union sentiments or those of his fellow employees. Thus, even though the question was posed in front of 30 employees, this fact hardly makes the circumstances coercive.

Further, the question did not become coercive by Thorn's subsequent opinion that employees would gain nothing from union representation. The subsequent

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to require the Respondent to rescind its unlawful arbitration policy at all its facilities where it is in effect, and to post a notice regarding the unlawful arbitration policy at all such facilities. See *Jack In The Box Distribution Center Systems*, 339 NLRB 40 (2003). We shall additionally modify the judge's recommended Order to include the Board's standard remedial language for the violations found. Finally, we shall substitute a new notice to employees at the Respondent's Fremont, California facility to conform to the language set forth in the Order.

[3] All dates hereafter are in 2003 unless otherwise indicated.

[4] We adopt, for the reasons set forth in his decision, the judge's finding that the discharges of Warren and Johnson violated Sec. 8(a)(3) of the Act.

statement was nothing more than an opinion protected by Section 8(c). Thorn merely expressed his opinion by telling employees that all they would get is a green card to put in their wallets, and added that if that was what the employees wanted then they should "go right ahead."

Concededly, Warren was discharged shortly after this incident. However, that subsequent event, while unlawful, does not render unlawful the prior question concerning employees and events not involved here. For all these reasons, we find that Thorn's question was not coercive in these circumstances, and accordingly we shall dismiss this allegation.[5]

Our dissenting colleague conversely contends that Thorn's question was unlawful. In the dissent's view, Thorn singled out Warren and questioned him in a confrontational tone that demonstrated that those who supported the Union would be subjected to a public inquisition. This description of Thorn's questioning, however, is not supported by the record.

First, Thorn did not rebuke Warren for supporting the Union at any point in the meeting. Second, Warren was not asked about his union activities or sentiments, or about those of his fellow employees. Rather, he was asked about a union campaign in Las Vegas. Third, the dissent's characterization of Thorn's question fails to adequately account for the fact that it was posed in response to Warren's public distribution of union literature concerning the union campaign in Las Vegas. The Board has previously found questioning of this character to be lawful. *Rossmore House,* 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985) (after receiving mailgram announcing employee's role in organizing campaign, manager lawfully asked employee "What is this about a union?" and told employee owners of business would not like it). Finally, the fact that Thorn voiced his opposition to the Union does not establish that the question was coercive. Thorn had a Section 8(c) right to express that view.

Our colleague further contends that the questioning served as an early warning against supporting the Union. However, nothing in Thorn's question either implicitly or explicitly conveyed such a warning. Indeed, the complaint alleges an interrogation, not a threat. To the extent that it could be inferred that Thorn's question, standing alone, suggests his dislike of unions, that expression of opinion did not include any statements constituting a warning not to support the Union.

Our colleague, like the judge, states that the subsequent termination of Warren renders Thorn's prior questioning coercive, and cites in support *Medcare Associates, Inc*., 330 NLRB 935, 940–942 (2000), and *Aldworth Co*., 338 NLRB 137, 141–142 (2002), enfd. 363 F.3d 437 (D.C. Cir. 2004). Those cases are clearly distinguishable. In *Medcare Associates,* the employer subjected two union supporters to a series of specific questions concerning their union activity over a period of several months. In the course of these questions, one employee was told she could not stay neutral and the employer needed her on its side and both employees were told that two supervisors had been fired because they had supported the union in violation of the employer's orders.[6] Relying on all of these factors, a majority of the Board found that the numerous interrogations were coercive and violated Section 8(a)(1). Although the Board relied, in part, on subsequent events, there was a close nexus between those events and the questions. By contrast, there is no such nexus here. The question concerned Warren's knowledge of union activity in Las Vegas. No subsequent event involved that activity or Warren's knowledge of, or participation in, that activity.[7]

As pertinent here, *Aldworth Co*. involved an employer's statement, at an employee meeting concerning organizing activity, admonishing employees not to "grab onto somebody with one foot out the door for lateness and another for stealing company time and sleeping on the job." The Board found the statement unlawful because it directed employees not to follow the lead of employees who favored the union and implied that they and any employees who did follow their lead would lose their job. The Board also found that the accusation that the employees were guilty of lateness and sleeping on the job was unlawful because the accusation was false. It therefore disparaged the employees and served as a warning to other employees that they would be subjected to the same treatment if they supported the union. Thus, the Board relied on the false accusations coupled with the announcement of discipline, rather than the subsequent discipline based on the accusations, in finding that the statement was unlawful. Here, there is nothing about Warren's termination that can be linked to the earlier question asked of him by Thorn. Accordingly, his termination does not render Thorn's prior statement unlawful.

Our colleague also says that we are "rejecting as irrelevant Warren's ensuing unlawful discharge." We do nothing of the kind. We consider it—and all of the surrounding circumstances—relevant, but ultimately insufficient to convert Thorn's sole question, about union activity elsewhere, into a coercive interrogation.

Finally, our colleague says that Thorn revealed his awareness of the union campaign and of the literature that was distributed. Assuming that this is so, we note that no one contends that Thorn was thereby creating an impression of surveillance or otherwise violating the Act. Similarly, our colleague notes that Thorn disclosed his negative view of the Union. Of course, negative views are expressly protected by Section 8(c).

For all these reasons, we find, contrary to the judge, that Thorn's question was not coercive in these circumstances.

2. The judge found that the Respondent violated Section 8(a)(1) and (4) of the Act by maintaining a mandatory arbitration policy as a condition of employment with the Respondent. We agree.

On May 20, 2003, the Respondent distributed to its employees a policy entitled "U-Haul Arbitration Policy" and a document entitled "U-Haul Agreement to Arbitrate." The policy states that it:

> . . . applies to all UCC[8] employees, regardless of length of service or status and covers all disputes relating to or arising out of an employee's employment with UCC or the termination of that employment. Examples of the type of disputes or claims covered by the UAP include, but are not limited to, claims for wrongful termination of employment, breach of contract, fraud, employment discrimination, harassment or retaliation under the Americans With Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and its amendment, the California Fair Employment and Housing Act or any other state or local anti-discrimination laws, tort claims, wage or overtime claims or other claims under the Labor Code, or any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations.

The policy continues with the following statement:

> Your decision to accept employment or to continue employment with UCC constitutes your agreement to be bound by the UAP. (Emphasis in original.)

The judge found that the arbitration policy, as stated, violates the Act because it would reasonably tend to inhibit employees from filing charges with the Board. Specifically, the judge found that the phrase "any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations" reasonably includes the filing of unfair labor practice charges with the Board, and thus employees could reasonably believe that they are precluded from filing such charges with the Board. We agree that the arbitration policy is unlawful.

In *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004), the Board held that in determining whether a challenged rule is unlawful, the inquiry begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If so, then the Board will find that the rule is unlawful. If, however, the rule does not explicitly restrict activity protected by Section 7, the finding of a violation is dependent upon a showing of one of the following: (1) reasonable employees would construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. 343 NLRB No. 75, slip op. at 2.[9]

Applying that standard here, we find the arbitration policy is unlawful. We recognize that the language in the arbitration policy does not explicitly restrict employees from resorting to the Board's remedial procedures. However, the breadth of the policy language, referencing the policy's applicability to causes of action recognized by "federal law or regulations," would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. Plainly, the employees would reasonably construe the remedies for violations of the National Labor Relations Act as included among the legal claims recognized by Federal law that are covered by the policy. Thus, we find that the language of the policy is reasonably read to require employees to resort to the Respondent's arbitration procedures instead of filing charges with the Board.

In its exceptions, the Respondent argues, as does our dissenting colleague, that the above-arbitration policy is not unlawful because the memo announcing this policy included a phrase, in a section titled "What is Arbitration," stating that the "arbitration process is limited to disputes, claims or controversies that a court of law would be authorized to entertain or would have jurisdiction over to grant relief. . . ." The Respondent and our colleague contend that this statement makes clear that the policy does not extend to the filing of charges with the Board. We find this argument unavailing. The reference to a "court of law" in this part of the memo does not by its terms specifically exclude an action governed by an administrative proceeding such as one conducted by the National Labor Relations Board. Indeed, there is nothing in this portion of the memo that reasonably suggests that

[5] Member Liebman separately dissents on this issue.

[6] The Board found that the discharges were lawful.

[7] Member Schaumber does not pass on whether *Medcare* was correctly decided insofar as it found coercive the questions at issue in that case. He agrees that the case is distinguishable for the reasons stated above.

[8] "UCC" refers to Respondent (U-Haul Company of California).

[9] While Member Liebman dissented in that case, she concurs in the finding of a violation herein. She finds that, under either the majority or dissenting views in *Lutheran Heritag*e, the policy is unlawful.

its intent is to modify the policy language referencing the applicability of the policy to causes of action recognized by Federal laws or regulations. Further, inasmuch as decisions of the National Labor Relations Board can be appealed to a United States court of appeals, the reference to a "court of law" does nothing to clarify that the arbitration policy does not extend to the filing of unfair labor practice charges. While our dissenting colleague correctly states that it is the NLRB, and not the individual, who presents the case to the court, we believe that most nonlawyer employees would not be familiar with such intricacies of Federal court jurisdiction, and thus the language is insufficient to cure the defects in the policy.[10]

Accordingly, because the employees would reasonably construe the broad language to prohibit the filing of unfair labor practice charges with the Board, we find that the policy violates Section 8(a)(1) of the Act.[11]

[10] The dissent asserts that the policy is lawful even if it would reasonably be read to cover NLRB charges, because it does not "impose any sanction" for violations of its terms. We respectfully disagree. Employees were required to agree to the policy as a condition of continued employment. Having entered into the agreement under those circumstances, a reasonable employee would be deterred from violating it by filing a charge.

[11] Our dissenting colleague notes that mandatory arbitration provisions "are used increasingly in the employment context," and suggests that we have condemned such clauses as unlawful. Our decision, however, is limited to the specific clause at issue in this case, which we have determined would be reasonably read to restrict the filing of unfair labor practice charges with the Board, thereby interfering with employees' Sec. 7 rights. We do not pass on the lawfulness of mandatory arbitration provisions. We note, however, that even in the context of other employment statutes, the courts and other administrative agencies have consistently recognized that individuals possess a nonwaivable right to file charges with the EEOC, and that mandatory arbitration provisions that attempt to restrict such rights are void and invalid as a matter of public policy. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 28 (1991) (individual who signed an agreement to submit an employment discrimination claim to arbitration remained free to file a charge with the EEOC); *EEOC v. Cosmair, Inc*., 821 F.2d 1085, 1090 (5th Cir. 1987) (invalidating former employee's promise not to file a charge with EEOC because it could impede EEOC enforcement of the civil rights laws and is void as against public policy); *EEOC v. U.S. Steel Corp*., 671 F. Supp. 351, 357–359 (W.D. Pa. 1987) (invalidating as contrary to public policy a retirement plan provision that conditioned higher benefits on a retiree's promise not to file charges with the EEOC); "Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) statutes," Vol. III EEOC Compl. Man. (BNA) at N:2329 (Apr. 10, 1997). Congress explicitly reaffirmed the public policy against interference with EEOC enforcement efforts, including the right to file a charge, in the waiver provisions of the Older Workers Benefit Protection Act of 1990 (OWBRA), amending the ADEA: "No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission." 29 U.S.C. § 626(f)(4)(ADEA). Nothing in our decision is inconsistent with well-established legal principles applicable to arbitration agreements in the employment context.

3. The judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining a statement in its employee handbook requiring employees to bring work-related complaints first to their supervisor and then to the Respondent's president and chairman of the board. For the reasons stated below, we find, contrary to the judge, that maintenance of the handbook statement is not unlawful.

The Respondent's employee handbook, distributed to all new employees, includes a section entitled "What about Unions?" This section states the Respondent's preference to be union-free, and asserts that employees do not need a union or outside third party to resolve workplace issues. The concluding paragraph of this section reads as follows:

> We know that you want to express your problems, suggestions, and comments to us so that we can understand each other better. You have that opportunity here at U-Haul. This can be done without having a union involved in the communication between you and the company. Here you can speak up for yourself at all levels of management. We will listen, and we will do our best to give you a responsible reply. *Furthermore, you should understand that if your supervisor cannot resolve your problems, you are expected to see me*. [Emphasis in original.]

The section is signed by the Respondent's president and chairman of the board of directors, whose photograph appears on the facing page.

The judge found that the Respondent violated Section 8(a)(1) by including the following statement in its employee handbook: ". . . if your supervisors cannot resolve your problems, you are expected to see me." Because the statement is accompanied by certain language expressing the Respondent's preference that its employees not be represented by a union, the judge found that the statement would reasonably be interpreted by employees as requiring them to resolve their workplace problems through internal measures rather than by exercising rights guaranteed them by Section 7 of the Act. Contrary to the judge, we find that the handbook statement is not unlawful.

First, the judge erred in reading the disputed statement in isolation, rather than considering it in the context in which it appears. The statement appears in the same paragraph, and immediately follows, the Respondent's assertion that its employees "can speak up for yourself at all levels of management" and that it will "listen" and do its best to give them a "responsible reply." The statement that employees "can speak up for yourself" invites, but does not require, the presentation of workplace problems to management. Concededly, the Respondent was "expecting" that the employees would accept the invitation. But, that expectation is far short of a command that they do so.

Second, even if the disputed statement could be read as a direction to employees to present their workplace problems to the Respondent's managers, or at least an encouragement to do so, the handbook does not foreclose employees from also using other avenues (e.g., the union, fellow employees, the NLRB.) In addition, the handbook does not state that the employee must go to management before using other avenues. Further, there is no evidence that the statement has been applied to foreclose such access. Therefore, the handbook statement would not reasonably forestall employees from bringing their work-related complaints to persons or entities other than the Respondent.[12]

Finally, the fact that the handbook statement is accompanied by statements of the Respondent's preference that its employees not be represented by a union does not render the prior statement unlawful. Such statements are opinions about unions and are protected by Section 8(c), and as such, are insufficient to establish an unfair labor practice.

In agreeing with the judge that the sentence at issue violates Section 8(a)(1), our dissenting colleague essentially makes two arguments. First, our colleague contends that because the word "expected" is accompanied by the Respondent's expression of its preference not to have a union, the use of that word would tend to restrain employees from seeking resolution of their workplace through a union or other outside entity. However, the fact remains that the accompanying lawful statements discuss the opportunities available to employees to take their workplace concerns to officials other than their immediate supervisors, and that—in this context—the word "expected" specifically describes the availability of such opportunities. Thus, when read in context, employees would reasonably view the sentence as nothing more than an explanation of why the Respondent believes that a union is not necessary.

In addition, our colleague contends that a finding of a violation is warranted under *Kinder-Care Learning Center*, 299 NLRB 1171 (1990). However, that case is clearly distinguishable, on two fundamental bases. First, the rule there explicitly required employees to bring their complaints to the employer. Second, the rule there explicitly threatened discipline and/or discharge if the employees did not bring their complaints to the employer. Contrary to our colleague's contention, the Respondent's use of the word "expected" is in no way comparable to the explicit requirement and threat of discipline and discharge contained in the rule in *Kinder Care*. Moreover, there is no evidence in the record demonstrating that the Respondent ever enforced the rule in a manner suggesting that the word "expected" is tantamount to a warning of adverse consequences. In essence, our colleague does nothing more than surmise that the word "expected" could be read as a threat of adverse consequences. However, in the absence of evidence that it would reasonably be read that way, a finding of a violation is not warranted.

[12] Cf. *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990).

4. The General Counsel excepts to the judge's failure to find that the Respondent additionally violated Section 8(a)(1) by threatening to terminate employees if they talked about the Union. The General Counsel argues that the judge neglected to consider employee Andrew Johnson's testimony that, at the June 12 meeting, Thorn stated, "if [Thorn] hears anymore whispering about [the Union] in the shop [they] could face termination."[13] The General Counsel contends that consideration of this testimony warrants the finding of this additional 8(a)(1) violation.

We disagree with the General Counsel that this testimony warrants a finding of a violation. The record shows Johnson further testified on cross-examination that Thorn's statement made it clear that he was talking about situations where he (Thorn) "was walking up and down the aisles," and when the employees "were in the bays." In addition, the record shows that Thorn repeatedly emphasized to the employees that they were not permitted to talk while working. For instance, Warren testified that Thorn stated at other employee meetings that he did not want employees talking about nonwork topics on work time. In view of this additional evidence, we find that the testimony cited by the General Counsel, even if credited, would not be sufficient to establish that Thorn unlawfully threatened employees for engaging in nonwork time activity.

ORDER

The National Labor Relations Board orders that the Respondent, U-Haul Company of California, Fremont, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[13] This conduct was not originally alleged in the complaint. At the hearing, the judge granted the General Counsel's motion to amend the complaint to include this allegation. However, the judge failed to make any specific finding regarding the testimony or the allegation.

(a) Discharging or otherwise discriminating against employees because they engage in union or other concerted activity protected by the Act.

(b) Requiring employees to execute waivers of their rights to take legal action with respect to their hire, tenure, and terms and conditions of employment, to the extent such waivers apply to the filing of Board charges.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Michael Warren and Andrew Johnson full reinstatement to their former positions or, if those positions are unavailable, to substantially equivalent positions, without prejudice to their seniority and any other rights or privileges previously enjoyed.

(b) Make Michael Warren and Andrew Johnson whole for any loss of earnings, with interest, and other benefits suffered as a result of the Respondent's unlawful discharges of them in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful discharges, and within 3 days thereafter, notify employees Michael Warren and Andrew Johnson in writing that this has been done and that the discharges will not be used against them in any way.

(d) Within 14 days from the date of this Order, remove from its files all unlawful waivers of the right to take legal action executed by its employees, and within 3 days thereafter, notify in writing each present or former employee who executed such waiver that this has been done and that the waiver will not be used in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Fremont, California facility copies of the attached notice marked "Appendix A" and, at each of its other facilities where its arbitration policy has been in effect, copies of the attached notice marked "Appendix B." [14]

Copies of the notices, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 20, 2003.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 8, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

My colleagues find, in agreement with the judge, that employees would reasonably view the Respondent's arbitration policy as one prohibiting them from invoking the Board's processes. They find that, because the policy states that it covers claims recognized by "federal law or regulations", the policy is reasonably understood as a prohibition of the right to file unfair labor practice charges. Contrary to the judge and my colleagues, I find that the policy is not unlawful.

This is another in a series of cases in which the General Counsel attacks a policy as unlawful on its face.[1] That is, there is no evidence that the rule has been applied to the protected activity of invoking Board processes. Further, there is no evidence that it was intended to apply to such activity. Finally, the policy does not explicitly bar any Section 7 activity.

In *Lutheran Heritage*, the Board concluded that there is no violation in cases of this kind, unless the policy expressly interferes with Section 7 rights or it is reasonable to read it in that manner. The mere fact that the policy could possibly be read in that manner is not sufficient, absent evidence that it was actually applied in that manner or that it was intended to be applied in that manner.

Applying these principles here, I note that the policy does not expressly refer to Section 7 activity, i.e., employee access to the NLRB. In addition, there is no evidence that the policy was applied to such access or was intended to so apply. Thus, the issue is whether the policy would reasonably be read to so apply.

Concededly, the policy states generally that it covers "any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations." In addition, the policy covers "employment discrimination." Although the NLRA is not among the list of covered statutes, the list is only an "example" of the kinds of disputes that are covered.

On the other hand, the memo accompanying the policy sheds considerable light on the issue. The memo says that the policy is "limited to" claims that "a court of law" would be authorized to entertain. The NLRB is not a court of law. Unlike the other listed statutes, a claim of an unfair labor practice is made exclusively to the NLRB**,** an administrative tribunal. Thus, in the absence of any evidence of application or intent, I would not presume that a reasonable employee would read the policy as foreclosing his right to come to the NLRB. I recognize that NLRB orders are enforceable by Federal courts of appeal. However, it is the individual who files the charge with the NLRB, and it is his access to the NLRB that is the Section 7 right. I simply do not believe that a reasonable employee would read a provision regarding access to courts as limiting his ability to come to the NLRB. To repeat, no one has even suggested that interpretation to employees. At the very least, the General Counsel has not borne his burden of persuasion in this case.[2]

Moreover, even if the policy were read to cover matters cognizable by the NLRA, that would not make the policy unlawful. The provision does not impose any sanction against an employee who files a charge with the Board. Further, even my colleagues suggest that an employee who filed such a charge may well have it processed because the Board would not be bound by the agreement. Concededly, there is a theoretical possibility that an employee might refrain from filing a charge in the first place. But I am unwilling to find a violation of Federal law [Section 8(a)(1)] simply because of that hypothetical possibility.

I note that agreements like that involved herein are used increasingly in the employment context. The issue of whether arbitration is better than litigation is not for us to decide. However, I am concerned that my colleagues have gone out of their way to find a violation. Their approach would seem to outlaw, as violations of the NLRA, policies which, like the instant one, do not even mention the NLRB.

Finally, as noted my colleagues cite cases which suggest that an employee, who signs such an agreement, nonetheless retains the right to file a claim outside of arbitration. Even if that is so, that does not support my colleagues conclusion that the clause is itself a violation of Federal law [i.e., Section 8(a)(1)].

Dated, Washington, D.C. June 8, 2006

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

My colleagues err in reversing the judge's findings that the Respondent violated Section 8(a)(1) by coercively interrogating employee Michael Warren and by maintaining a policy that reasonably would be interpreted as restricting employees from taking work-related complaints outside the company hierarchy. As I will explain, Warren was singled out for questioning about union activity, by the shop's highest-ranking manager, before 30 other employees in a mandatory meeting—and was unlawfully fired soon afterward. The Respondent's complaint policy, in turn, explicitly told employees, after describing unions as unnecessary, that they were "expected to see" the Respondent's top official if they could not first resolve problems with their supervisors. Contrary to my colleagues' view, a careful examination of the circumstances demonstrates that, in each instance, the Respondents' actions reasonably tended to coerce employees in the exercise of their Section 7 rights.[1]

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] See, e.g., *Lutheran Heritage*, 343 NLRB No. 75 (2004); *Mediaone*, 340 NLRB 277 (2003).

[2] I therefore do not reach the issue of whether an employer violates the Act if he has a policy that requires employees to agree to pursue NLRA claims only through arbitration.

[1] I join my colleagues in adopting the judge's finding that the Respondent unlawfully discharged Michael Warren and Andrew Johnson because they engaged in Union and protected activities in violation of Sec. 8(a)(3) and (1), and I agree with Member Schaumber that the Respondent maintained a mandatory arbitration policy that reasonably

I. THE INTERROGATION OF MICHAEL WARREN

The judge determined that the Respondent's shop manager, Chip Thorn, began a meeting with approximately 30 employees by interrogating leading union adherent Warren about his knowledge of a union organizing campaign in a neighboring state.[2] The majority reverses the judge's determination that this question was unlawful, finding neither the subject matter nor the circumstances of the exchange coercive, and rejecting as irrelevant Warren's ensuing unlawful discharge. Describing Thorn's meeting as an "open forum" and focusing on Warren's open support for and activities on behalf of the Union, my colleagues overlook classic elements of coercion during the meeting. And because Warren's interrogation served merely as the opening thrust in Respondent's effort to thwart employees' organizing activities, they compound their error by disregarding the probative value of related subsequent events.

A.

Warren initiated contact with the Union on May 26, 2003.[3] Within a few days, he began distributing union materials to employees in the Respondent's parking lot before work. Among the materials he handed out was an article dealing with the Union's on-going organizing campaign at a Nevada U-Haul facility.[4] Fellow mechanic Andrew Johnson soon joined Warren in discussing the Union with other employees during lunch and break times. On June 11, Warren arranged for a union representative to meet with the Respondent's mechanics on June 16. On June 12, Warren informed a number of employees[5] about the upcoming meeting.

On the same day, shop manager Thorn called employees to a meeting in Building C, the mechanical maintenance area where both Warren and Johnson worked. Once all employees had assembled, Thorn opened the meeting by looking directly at Warren and, addressing him by name, asked, "What do you know about the Union in Las Vegas, Warren?" Warren answered that employees there had voted for the Union and were waiting to see what would happen. Thorn countered that the Union had not been voted in and that the issue was not resolved. He continued by saying that the Union would cost employees $250 in initiation fees and $50 in monthly dues and that all they would get in return was a card for their wallets. He also explained that even if the Nevada U-Haul operation unionized, it did not mean the Respondent's California facility would follow suit because the two were separate corporations. Thereafter, Thorn responded to several questions concerning working conditions and advised employees that if they had questions about unions, they could come to his office for information.

B.

In determining whether employers' questions about employees' union and protected activities violate the Act, the Board assesses the totality of circumstances in which the questioning takes place.[6] Among the factors weighed in this analysis are the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. The Board emphasizes that "these and other relevant factors are not to be mechanically applied . . . but rather represent some areas of inquiry that may be considered . . ." in evaluating whether the interrogation "reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act."[7]

Thorn was the highest-ranking official at the facility, and the exchange with Warren occurred before an audience of 30 unit employees. By posing the question as he did, Thorn revealed for the first time not only that the Respondent was aware of employees' nascent organizational activities, but also that it knew the subject matter of certain union literature Warren distributed to them. As the meeting continued, Thorn disclosed his negative view of the Union. And just 4 days later, Warren was unlawfully discharged.

The judge concluded that these under these circumstances, taken together, Thorn's interrogation of Warren would reasonably tend to interfere with and restrain employees' organizational activities. I agree with the judge's conclusion. Because his analysis is not extensive however, several aspects of the exchange that underscore its unlawful coercive character should be further emphasized.

First, the manner in which the question was posed—at the very outset of the meeting, without introductory remarks or explanation as to the purpose of the meeting—set a serious and confrontational tone. Staring directly Warren and calling him by name, Thorn pointedly asked what he knew about the Union's Las Vegas activities. By singling out the leading union activist before his coworkers and placing him squarely on the spot, Thorn demonstrated that those who supported the Union would be subject to a public inquisition. By then disputing Warren's version of the Nevada situation and dismissing its relevance to the Respondent and the merits of the Union generally, the Respondent made clear its strong opposition to the employees' organizing efforts. Being confronted, and challenged, by the highest representative of management before a gathering of coworkers would reasonably tend to intimidate even an open union supporter like Warren.

Moreover, because of the setting in which the exchange took place, the coerciveness of the interrogation was not limited in its effect to Warren alone. It extended to the many other employees at the meeting. The questioning itself simply served as an early warning against supporting the Union. Because Thorn's remarks were made at a shop meeting called by the Respondent, attended by about 30 employees, the predictable impact of his words would not—indeed could not—reasonably be limited to one individual. Regardless of how the violations was plead, we can and should take the wider coercive tendency of Thorn's questioning into account.

Finally, that warning was soon made emphatic by Thorn's unlawful firing of Warren (along with union supporter Johnson) just 4 days later. If the interrogation of Warren did not tend to coerce immediately, it certainly did considered retrospectively, in light of Warren's firing. See, e.g., *Medcare Associates, Inc*., 330 NLRB 935, 940 fn. 17 (2000) (holding that subsequent events may be considered in determining coercive tendency of interrogation: "[A] question that might seem innocuous in its immediate context may, in the light of later events, acquire a more ominous tone"). The Respondent's swift and severe manifestation of disapproval of employees' organizational activities ensured that the memory of Thorn's interrogation of Warren would linger and resound throughout the unit. See *Aldworth Co*., 338 NLRB 137, 141–142 (2002), enfd. 363 F.3d 437 (D.C. Cir. 2004) (employer's remarks during employee meeting warning unnamed but identifiable union adherents of adverse consequences may reasonably be interpreted by other employees as a threat, where remarks are followed by unlawful, retaliatory action against those individuals).[8]

II. Restricting Protected Activity

The judge found that the Respondent unlawfully interfered with employees' right to seek redress of employment problems through protected concerted activities by maintaining a policy implicitly prohibiting resolution of employee complaints through entities other than the Respondent's supervisory hierarchy. The majority reverses the judge, faulting him for failing to consider the full context of the policy statement, and finding instead that the Respondent was merely "inviting" employees to discuss their problems with management. In reaching this result, the majority mistakenly criticizes the judge's analysis, but also fails to meaningfully address *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990), aptly relied on by the judge.

The disputed policy is set forth in an employee handbook which the Respondent provides to all newly-hired employees. Page two of the handbook displays a photograph of the Chairman of the Board, E.J. (Joe) Shoen, and on the opposite page contains a six-paragraph message from Shoen entitled, "What About Unions?". The paragraph touts the Respondent's positive employment environment, expresses its preference for remaining union-free, emphasizes employees' individuality, and asserts that union representation would not be in the best interests of employees, the Respondent, or its customers. The full text of the last paragraph reads as follows:

> We know that you want to express your problems, suggestions, and comments to us so that we can understand each other better. You have that opportunity here at U-Haul. This can be done without having a union involved in the communication between you and the company. Here you can speak up for yourself at all levels of management. We will listen, and we will do our best to give you a responsible reply. *Furthermore, you should understand that if your supervisor cannot resolve your problems you are expected to see me.*" [Emphasis in original.]

The judge found the statement's final line unlawful, so it was appropriately the focus of his analysis. But, contrary to the majority's assertion, he read this line in the context of the entire paragraph.

Up to the last line, the Respondent communicates that it is now, and wants to remain, a nonunion operation. The essential purpose of this portion of the paragraph is to persuade employees that a union is unnecessary. This message is lawful. But the final sentence—printed in italics—goes further. Employees would reasonably read the emphasized sentence to *require* them to first discuss their complaints with their supervisor and Shoen, before pursuing other, statutorily-protected ways of redressing workplace complaint.

Phrased as an *expectation* from the Respondent's highest-ranking management official, it is unlikely to be read

tends to inhibit employees from filing charges with the Board, in violation of Sec. 8(a)(4) and (1).

[2] The judge credited the testimony of Warren and Johnson over Thorn's version of the meeting.

[3] Dates refer to 2003.

[4] The Respondent is located in California.

[5] The judge states that "Warren told as many employees as he could" about the meeting.

[6] *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[7] Id., at 1178 fn. 20.

[8] While focusing narrowly on the factual differences between the Thorn–Warren exchange and the events of *Medcare Associates* and *Aldworth*, my colleagues miss the fundamental principle for which those cases stand. That is, in evaluating whether conduct tends to interfere with Sec. 7 rights, all the surrounding circumstances are to be considered.

as a mere "invitation;" rather, it would reasonably tend to restrain employees' from seeking resolution of workplace problems through the Union or other entities.

This conclusion is supported by the Board's decision in *Kinder Care*, supra. There, the Board found unlawful a rule requiring employees to report work-related complaints, concerns, or problems to the immediate attention of the Center Director or to use other company-prescribed problem solving procedures. The rule did not, on its face, preclude employees from approaching someone other than the respondent. But because it mandated, on threat of discipline, that they first turn to employer-controlled processes, the Board determined that the rule violated the Act. Here, similarly, while the Respondent's statement does not explicitly threaten disciplinary action, there is an implicit threat of adverse consequences if employees do not meet the Respondent's "expectation" that they first discuss complaints with their supervisor and Shoen.

Dated, Washington, D.C. June 8, 2006

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or discriminate against you because you engage in union or concerted activity.

WE WILL NOT require you to execute waivers of your rights to take legal action with respect to your hire, tenure, and terms and conditions of employment, to the extent that it applies to filing charges to the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer employees Michael Warren and Andrew Johnson full reinstatement to the positions from which they were discharged in June 2003 or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and any other rights or privileges previously enjoyed.

WE WILL make employees Michael Warren and Andrew Johnson whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful discharge and, WE WILL**,** within 3 days thereafter, notify employees Michael Warren and Andrew Johnson in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL rescind our arbitration provision requiring you to execute a waiver of your rights to take legal action with respect to your hire, tenure, and terms and conditions of employment, to the extent it applies to filing charges with the National Labor Relations Board.

U-HAUL OF CALIFORNIA

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT require you to execute waivers of your rights to take legal action with respect to your hire, tenure, and terms and conditions of employment, to the extent that it applies to filing charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 or the Act.

WE WILL rescind our arbitration provision requiring you to execute a waiver of your rights to take legal action with respect to your hire, tenure, and terms and conditions of employment, to the extent it applies to filing charges with the National Labor Relations Board.

U-HAUL OF CALIFORNIA

Michelle M. Smith, Atty., for the General Counsel.
Burton F. Boltuch, Atty., of Oakland, California, for the Respondent and Employee Willy Tandoc.
David A. Rosenfeld, Atty., of Oakland, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at Oakland, California, on October 15–17 and 22-23, 2003. On June 18, 2003, Machinists District Local Lodge 1173, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) filed the original charge in Case 32–CA–20665–1 alleging that U-Haul Co. of California, (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On July 3, the Union filed an amended charge alleging that Respondent had violated Section 8(a)(1) and (3) of the Act. The Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent on August 27, 2003. The complaint alleges that Respondent unlawfully discharged employees Michael Warren and Andrew Johnson, for their union activities. Further, General Counsel alleges that Respondent interrogated employees about their union activities and that Respondent maintains a provision in its employee handbook, which interferes with employee Section 7 rights. Finally, the complaint alleges that Respondent maintains a mandatory arbitration provision in violation of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation with an office and principal place of business located in Fremont, California, where it is engaged in the business of renting trucks and trailers. During the past 12 months, Respondent received gross revenues in excess of $500,000. During the same period of time, Respondent purchased and received goods and services valued in excess of $5000 from outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent operates a truck and trailer rental business in California. This case concerns Respondent's repair facility in Fremont, California.

Organizing at Respondent's Fremont facility began in late May 2003. On May 26, Michael Warren, a mechanic, contacted the Union. Thereafter, Warren downloaded materials from the Union's Internet website. On June 3, Warren distributed these union materials to approximately 10 employees in Respondent's parking lot, prior to reporting for work. Warren told the employees that the Union was interested in meeting with the employees and that he would try and set up a meeting with the Union. Warren asked the employees to read the union materials and he directed them to the Union's website. At that time, union organizing activities were taking place at the Las Vegas and Henderson, Nevada facilities of U-Haul of Nevada.

On June 10 or 11, Warren passed out union information to 10 employees in the parking lot, prior to beginning work. Warren passed out an article about the union organizing at U-Haul of Nevada's Las Vegas facility and copies of a collective-bargaining agreement between the Union and Penske Truck Leasing, Respondent's major competitor. In addition to distributing these materials, Warren spoke to employees about the Union, during lunch and breaks. One of the employees whom Warren spoke with was mechanic, Andrew Johnson. After receiving union materials from Warren, Johnson began speaking with other employees about his belief that the Union could help the employees improve their wages.

On June 11, Warren spoke with a union representative and they set up a meeting for Respondent's mechanics, for Monday, June 16, after work. On June 12, Warren told as many employees as he could about the scheduled June 16 union meeting. Among the employees that Warren approached about the union meeting were Willy and Donathan Tandoc. During the afternoon of June 12, Chip Thorn, Respondent's shop manager called an employee meeting in building C, the shop where Warren and Johnson worked.[2]

[2] The Fremont repair facility consists of three buildings: "Building A" houses sales and administrative offices, "Building

Thorn began the meeting by looking at Warren and asking, "What do you know about the Union in Vegas, Warren?" Warren answered that the employees in Las Vegas had voted for the Union and were waiting to see what would happen. Thorn denied that the Union had been voted in and said that the issue had not yet been resolved.[3] Thorn told the employees that it would cost them $250 in initiation fees and $50 in monthly dues to join the Union. He said all that the employees would get for their money was a green card to put in their wallets. He said that if that was what the employees wanted, they should "go right ahead." Thorn said that the Nevada operation was a separate corporation and that even if the Nevada operation became unionized, it did not mean that the California operation would be unionized. Thorn said that U-Haul had separate corporations and that Respondent had a "firewall" to protect it against the Union from Nevada.

Johnson asked Thorn several questions, including questions as to why Respondent's wages were so low and why Penske could afford to pay its mechanics $25 per hour. Thorn answered that the repair shop only charged Respondent $26 per hour making it unfeasible to pay a wage rate of $25 per hour. Thorn reminded Johnson that Thorn was already working on making Johnson a front-end specialist, which would result in a pay increase for Johnson. Thorn told the employees that he had a book in his office with questions and answers about unions. He told employees that if they had questions about the Union, they could come to his office for answers. Thorn told the employees that could talk about the Union before and after work but not while they were on company time. He also told employees to ask questions while at the meeting and not to have "mini-discussions" after the meeting when they should be working. When Thorn ended the meeting, the employees took their afternoon break.

Thorn denied that he started the June 12 meeting by questioning Warren about the Union. Thorn claimed that the subject of the Union was raised by a question from employee Willy Tandoc. Thorn claimed that the purpose of the meeting was to dispel rumors that the facility would be closed or moved. Supervisors Pugh and Contreras testified that they did not hear Thorn discuss the Union. However, these supervisors were not present at the start of the meeting. Warren and Johnson credibly testified that Thorn began the meeting by questioning Warren about the Union in Las Vegas. Employee John Soper, still employed as a mechanic, corroborated this testimony. Willy Tandoc was clearly biased and prejudiced in favor of Respondent, his employer.

In July 2003, Tandoc gave the Board a pretrial affidavit in which he stated that Warren and Johnson asked many questions about the Union, unionization and wages at the June 12 meeting. He claimed that "The meeting became Johnson and Warren's meeting." At the trial, Tandoc following leading questions by Respondent's attorney, who was also Tandoc's attorney, attempted to testify that he questioned Thorn about Las Vegas and that Thorn only mentioned the Union in order to answer the question. Tandoc otherwise denied that the Union was discussed. After prompting by Respondent's attorney, Tandoc attempted to testify that Board agents exerted undue pressure in taking the affidavit. However, on cross-examination Tandoc testified that the Board agents only stressed the importance of telling the truth and that Tandoc should carefully read the affidavit before signing it. Tandoc was told to make corrections, if necessary and he did, in fact, make a correction on the fifth and final page of the affidavit.

I credit the testimony of Warren and Johnson over that of Thorn. Both Warren and Johnson testified in a straightforward manner. Thorn's testimony, on the other hand, changed frequently at the urging of Respondent's counsel. The demeanor of a witness may satisfy the trier of fact, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies. I find Thorn to be such a witness. See *Walton Mfg. Co. v. NLRB*, 369 U.S. 404, 408 (1962).

After the meeting, Warren and Johnson took their afternoon break at a picnic table with several other employees. Johnson suggested that Willy Tandoc had told Thorn about the employees' discussion of the Union. Two other employees said they had seen Willy Tandoc talking with Thorn. Warren stated that he did not believe that Tandoc would inform on the employees. Warren said that because Tandoc was Respondent's chief diagnostician, it was only natural that he be involved in frequent conversations with Thorn. Tandoc had another job and left work after the employee meeting. Neither Warren nor Johnson spoke to Tandoc after the employee meeting.

On Friday, June 13, Tandoc did not report to work. Respondent contends that Tandoc did not work because Warren and Johnson had threatened him on June 12. Tandoc gave various reasons for not reporting to work on Friday the 13th. The credible evidence leads me to believe that Tandoc did not want to work on Friday the 13th and because he "had other things to do." On Saturday June 14, Tandoc returned to work. Warren spoke to Tandoc to obtain the phone number of a mutual friend in Las Vegas. There was no indication that Tandoc was intimated or threatened by Warren. Johnson was not scheduled to work on Saturday.

On June 16, prior to clocking in for work, Tandoc told Warren that he had spoken with their friend in Las Vegas. Tandoc said that the Union had been voted in at two of U-Haul's facilities in Nevada but that the matter was pending in Washington, D.C. Later that same day, Warren approached Tandoc while he was eating with his nephew Donathan Tandoc and asked them to come to the union meeting scheduled for that evening. Tandoc was working his other job and said he would not be able to attend. Warren asked Donathan to remind other employees about the union meeting. Johnson also asked Tandoc and Donathan to attend the union meeting that evening. Donathan revealed that they would not be attending the meeting.

At approximately, 3:15 p.m. Thorn called Warren and Johnson outside of their building. Also present were Patrick Pugh, shop foreman and Thomas Contreras, dispatch manager. Thorn told the two employees that he had spent a whole lot of money having an employee meeting about not discussing the Union and they just violated the rule by talking to Willy Tandoc about the Union. Thorn claimed that Warren and Johnson had threatened Tandoc and that was the reason that Tandoc did not report to work on Friday, June 13. Johnson said that Tandoc was a liar and that he would tell that to Tandoc, "to his face." Thorn said that would not happen and that the two employees were fired. Thorn told the employees that they had an hour to pack up their tools and leave the facility. Finally, Thorn stated, the Union may come in, but the two employees would not be there to see it.

According to Thorn, he learned on the morning of June 16 that Warren and Johnson had told Tandoc to "stop talking to management" and that Tandoc was then too upset to go to work on Friday the 13th. According to Thorn, he corroborated this story by talking to two mechanics. These mechanics were not called to corroborate Thorn's testimony. Thorn then spoke with Tandoc who allegedly claimed that Warren and Johnson had told him not to speak to Thorn. I note that this testimony differs from that of Tandoc. As stated earlier, I do not credit any of Thorn's testimony. As seen below, I do not credit any of Tandoc's testimony.

As Johnson was packing his tools to leave, he told Patrick Pugh, shop foreman, that the alleged threats were completely fabricated. Pugh replied that he had told Thorn that he had never heard Johnson talking about the Union. Pugh then said, "What can I do?"

After terminating Johnson and Warren, Thorn wrote an e-mail to his superiors stating that Johnson and Warren had been discharged because they had "pulled an employee away from the group and harassed him." There was no mention of any alleged threat. The General Counsel presented evidence that evidence that Warren and Johnson were given harsher discipline than other employees actually guilty of harassment. In 2002, two mechanics were involved in a confrontation, which included name-calling and the suggestion of a fight. One of these employees was suspended for 1 day and the other employee was not disciplined at all. Also in 2002, two employees were involved in a shoving match. One employee was suspended and the other given an oral and written warning. None of the four employees involved in these incidents were terminated. Thorn did give examples of employees discharged for threatening coworkers but those incidents involved more serious conduct than that which Thorn falsely accused Warren and Johnson.

At the times material, Thorn possessed a U-Haul human resources policy manual from 1993. The manual included the following advice to avoid unionization and to discourage a union drive beforehand: "Develop some company-minded people who consider any danger to the company as a danger to themselves. They will warn you of union activity, so you will be aware of organization attempts before the union is in the saddle." Thorn testified that he did not read this portion of the policy manual and argued that it was an old manual just sitting in his desk. I need not, and do not credit this self-serving testimony. It appears to me that Willy Tandoc was such a company-minded employee and he certainly attempted to help Thorn justify the discharges of Warren and Johnson.

At the end of September, Warren stopped Tandoc on a street near Tandoc's home and told Tandoc that he still respected Tandoc and that they were still friends in spite of Tandoc's involvement with Warren's discharge. Tandoc told Warren that Respondent had provided him with an attorney and if anybody contacted him, Tandoc was supposed to contact the attorney. Tandoc told Warren that Respondent was paying for his attorney. In addition, Tandoc said that he had told Thorn that he was not going to lie for him. Tandoc admitted that Warren had not threatened or harassed him. With respect to missing work on Friday June 13, Tandoc said that he didn't work that day because it was Friday the 13th and he had other plans and not because of any threats.

Tandoc's testimony was self-contradictory, shifting, and evasive. In his pretrial affidavit Tandoc stated, "I did not tell Thorn that Warren and Johnson physically confronted me. I did not tell Thorn that Warren and Johnson approached me together. I did not tell Thorn that Warren and Johnson blocked my way. I did not tell Thorn that I feared for the safety of my family or myself." According to the affidavit, after Thorn approached him, Tandoc told Thorn that Warren said, "Someone ratted me out." Tandoc told Thorn that Johnson said, "What kind of trouble are you starting." After Respondent provided him with an attorney, he attempted to backtrack on his affidavit and falsely accused the Board agents of misconduct. At the trial Tandoc, attempting to bolster Respondent's case, testified that Johnson and Warren scared him. Based on Tandoc's testimony and the inconsistencies in his pretrial statements, I am convinced that Tandoc changed his testimony whenever he thought it would assist Respondent's case. It appeared that in testifying, Tandoc was attempting to please Respondent's attorney rather than trying to answer questions truthfully. Under these circumstances, I cannot credit any of his testimony.

B. Respondent's Employee Handbook

Respondent distributes an orientation packet to all new hires. The orientation packet includes an employee handbook and an acknowledgement form. The first text page of the employee handbook is entitled "What About Unions?" and states Respondent's preference to be union free. Respondent states that employees do not need a union or outside third party to resolve workplace issues. The section ends with the following statement: "*Furthermore, you should understand that if your supervisor can-*

B" contains the preventative maintenance bay where employees clean vehicles and perform minor mechanical work (such as changing oil and replacing fan belts), and "Building C" houses the maintenance bays where the mechanical work on trucks and trailers is performed.

[3] Machinists Local Lodge 845 filed a representation petition in Case 28–RC–6159 seeking to represent the maintenance employees at U-haul of Nevada's Las Vegas and Henderson, Nevada facilities. An election was held on May 7, 2003. The employees cast a majority of votes in favor of representation by Local Lodge 845. However, the Employer filed timely objections to the election. On June 10, a hearing was held on the Employer's objections to the election. As of June 12, 2003, there was no ruling on the objections to the election. The hearing officer's report on objections did not issue until July 18, 2003.

not resolve your problems, you are expected to see me." (Emphasis in original.) The statement is immediately followed by the name, "E. J. (Joe) Shoen, chairman of the board." Shoen is president and chairman of the board of U-Haul International, Respondent's parent corporation. A copy of this page of the handbook was also posted on a bulletin board at the repair facility. A week after he discharged Johnson and Warren, Thorn posted an updated "What About Unions?' page which contained the statement at issue herein.

C. Respondent's Arbitration Policy

On May 20, 2003, Thorn distributed Respondent's arbitration policy entitled "U-Haul Arbitration Policy" and a separate document entitled "U-Haul Agreement to Arbitrate," at an employee meeting. When Thorn handed out these documents he explained that the purpose was to cut litigation expenses. He told employees that they did not have to sign the arbitration agreement but that it would make him look bad if the employees didn't sign the agreement; he also stated that if employees didn't sign the agreement, they would probably not be able to work. The policy included the statement, "Your decision to accept employment or to continue employment with [Respondent] constitutes your agreement to be bound by the [arbitration policy]." Most but not all of Respondent's employees signed an agreement to arbitrate.

> The arbitration policy covers:
>
> All disputes relating to or arising out of an employee's employment with [Respondent] or the termination of that employment. Examples of the type of disputes or claims coved by the [U-Haul Arbitration Policy] include, but are not limited to, claims for wrongful termination of employment, breach of contract, fraud, employment discrimination, harassment or retaliation under the Americans With Disabilities Act, the Age Discrimination in Employment act, Title VII of the Civil rights Act of 1964 and its amendments, the California Fair employment and Housing act or any other state or local anti-discrimination laws, tort claims, wage or overtime claims or other claims under the Labor Code, or any other legal or equitable claims and causes of action recognized by local, state or federal laws or regulations.

There is no evidence that the arbitration policy has been enforced. There is also no evidence that any employee was disciplined for failing to sign an arbitration agreement. Respondent argues that the arbitration clause only applies to court proceedings. However, I find the language of the arbitration policy that it applies to any dispute or claim recognized by Federal laws or regulations is certainly broad enough to apply to NLRB proceedings.

D. Analysis and Conclusions

1. The "What About Unions?" page of the employee handbook

As stated above, Respondent's handbooks states Respondent's opinion that a union would not be in the best interests of either the employer or its employees. Respondent states that employees may express their problems without having a union involved. Respondent's opinion is then followed by the mandatory language, "*furthermore, you should understand that if your supervisor cannot resolve your problems, you are expected to see me."*

Respondent's policy unlawfully interferes with the statutory right of employees to communicate their employment-related complaints to persons and entities other than the Respondent, including fellow employees, a union or the Board. Although the policy does not on its face prohibit employees from approaching someone other than the Respondent concerning work-related complaints, it provides that employees first report such complaints to a supervisor and if the issue is not resolved, employees are "expected" to report the problems to Shoen. I find that the Respondent's rule does not merely state a preference that the employees follow its policy, but rather that compliance with the policy is required. I further find that this requirement reasonably tends to inhibit employees from bringing work-related complaints to, and seeking redress from, entities other than the Respondent, and restrains the employees' Section 7 rights to engage in concerted activities for collective bargaining or other mutual aid or protection. See *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990).

2. The mandatory arbitration policy

Employer attempts to limit or bar the exercise of statutory rights, particularly those of individual employees as distinguished from those of their agents, have been held unlawful. See *Athey Products Corp*., 303 NLRB 92, 96 (1991); *Isla Verde Hotel Corp*., 259 NLRB 496 (1981), enfd. 702 F.2d 268 (1st Cir. 1981); *Reichhold Chemicals*, 288 NLRB 69 (1988)). The Board has regularly held that an employer violates the Act when it insists that employees waive their statutory right to file charges with the Board or to invoke their contractual grievance-arbitration procedure. *Athey Products*, supra; *Kinder-Care Learning Centers*, supra; *Retlaw Broadcasting Co*., 310 NLRB 984 (1993).

Respondent's mandatory arbitration provision covers all disputes relating to or arising out of an employee's employment with Respondent. Claims covered include wrongful termination, employment discrimination and claims recognized by Federal laws or regulations. I find that this policy reasonably tends to inhibit employees from filing charges with the Board, and, therefore, restrains the employees' Section 7 rights to engage in concerted activities for collective bargaining or other mutual aid or protection.

3. The Discharges of Warren and Johnson

In *Wright Line, A Division of Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 98 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's Wright Line test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983).

It has long been held that there are five principal elements that constitute a prima facie case insofar as Section 8(a)(3) and (1) are concerned. The first is that the employee alleged to be unlawfully disciplined must have engaged in union or protected activities. The second is that the employer knew about those protected activities. Third, there must be evidence that the employer harbored animus against those individuals because of such activities. Fourth, the employer must discriminate in terms of employment. Finally, the discipline must usually be connected to the protected activity in terms of timing. See, e.g., *Goodyear Tire & Rubber Co*., 312 NLRB 674 (1993).

I find that General Counsel has made a very strong prima facie showing that Respondent was motivated by Warren and Johnson's union activities in discharging the employees. Warren contacted the Union and distributed union materials. Johnson asked questions about wages at the employee meeting. Thereafter, Warren and Johnson invited employees, including Tandoc to the union meeting of June 16. At the June 12 meeting, Thorn started the meeting by asking Warren two questions about the Union in Las Vegas. On June 16 at the exit interview, Thorn stated that the two employees had broken the rule about talking about the Union. After, discharging the employees for threatening Tandoc, conduct for which they were innocent, Thorn stated, the Union may come in, but the two employees would not be there to see it.

The General Counsel has also demonstrated Respondent's animus toward the Union. In addition to the Respondent's lawful statements indicating that it was opposed to the Union, Respondent directed its employees to bring work problems or issues to their supervisors and Shoen, implying that employees should not contact a union The Respondent's animus was further demonstrated by Thorn's comments at the June 12 meeting and particularly Thorn's comments at the exit interview. Having shown knowledge, animus, and that the discharges occurred immediately after Respondent apparently gained knowledge of Warren's and Johnson's union support, the General Counsel has made out a very strong prima facie case that employees' union sympathies were the motivating factor in the discharge decision.

My finding that Thorn's reason for the discharges—threats to Tandoc—was false amounts to a finding that it was a pretext. The failure of his testimony in this respect to withstand scrutiny not only dooms Respondent's defense but it buttresses the General Counsel's affirmative evidence of discrimination. See *Limestone Apparel Corp*., 255 NLRB 722 (1981). Respondent's patently false reason for the discharge supports an inference that it had an unlawful motive for the discharge. See, e.g., *Keller Mfg. Co*.., 237 NLRB 712, 716 (1978); *Party Cookies, Inc*., 237 NLRB 612, 623 (1978); *Capital Bakers, Inc*., 236 NLRB 1053, 1057 (1978). See also *Shattuck Denn Mining Corp. (Iron King Branch) v. NLRB*., 362 F.2d 466, 470 (9th Cir. 1966). I draw the inference that the motive of the discharge is one Respondent desires to conceal—a discriminatory and unlawful motive.

The burden shifts to Respondent to establish that the same action would have taken place in the absence of the employees' union and protected concerted activities. Under Wright Line, Respondent must show that it would have discharged these employees anyway, absent their union activities. Since I found the proffered reasons for the discharges incredible, I find that the Respondent has not met its Wright Line burden. Therefore, I find that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Michael Warren and Andrew Johnson because of their union activities.

4. The interrogation

Interrogation of employees is not unlawful per se. In determining whether or not an interrogation violates Section 8(a)(1) of the Act, the Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

Here, I find that the interrogation of Warren tended to interfere with and restrain employees in their organizing activities. First, the interrogation took place in the presence of approximately 30 of Respondent's employees by Thorn the highest-ranking official at the repair facility. This was the first indication that Respondent had knowledge of the fledgling organizing effort. The interrogation took place during a meeting at which Thorn expressed an opinion that employees would gain nothing by bringing in a union. Third, Thorn discriminatorily discharged Warren and Johnson shortly after this interrogation. Under these circumstances, employees would reasonably conclude that union activities would lead to adverse action by Thorn and Respondent. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging employees Michael Warren and Andrew Johnson because of their union and protected concerted activities, Respondent violated Section 8(a)(3) and(1) of the Act.

4. By unlawfully interrogating employees Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By requiring employees to execute waivers of their rights to take legal action with respect to their hire, tenure, and terms and conditions of employment, and thereby requiring a waiver of the right to file NLRB charges, Respondent violated Section 8(a)(1) and (4) of the Act.

6. By requiring employees to bring work-related complaints to their supervisors and then to Respondent's president and chairman of the board, and thereby implying that employees could not discuss such problems with other employees, unions or the NLRB, Respondent violated Section 8(a)(1) of the Act.

7. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist

therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Respondent must offer Michael Warren and Andrew Johnson full and immediate reinstatement to the positions they would have held, but for the unlawful discrimination against them. Further, Respondent must make Warren and Johnson whole for any and all loss of earnings and other rights, benefits and privileges of employment they may have suffered by reason of Respondent's discrimination against them, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See also *Florida Steel Corp*., 231 NLRB 651 (1977) and *Isis Plumbing Co*., 139 NLRB 716 (1962).

Respondent must also expunge any and all references to its unlawful discharge of Warren and Johnson from its files and notify Warren and Johnson in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against them in the future. *Sterling Sugars, Inc*., 261 NLRB 472 (1982).

In addition, Respondent must rescind the portion of its "What About Unions?" rule or policy in its employee handbook that that requires employees to report work-related complaints or problems to their supervisors and then to the president and chairman of the board of U-Haul International.

Respondent must remove from its files all unlawful waivers of the right to take legal action executed by employees of Respondent and notify, in writing, each present or former employee who executed such waiver that this has been done and that the waiver would not be used in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, U-Haul Company of California, Freemont, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union beliefs or activities.

(b) Discharging or otherwise discriminating against employees because they engaged in union activities or other protected concerted activities within the meaning of Section 7 of the Act.

(c) Discriminatorily requiring employees to execute waivers of their rights to take legal action with respect to their hire, tenure, and terms and conditions of employment.

(d) Maintaining a "What About Unions?" rule or policy that requires employees to report work-related complaints or problems to their supervisors and then to the president and chairman of the Board.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer reinstatement to Michael Warren and Andrew Johnson to the positions they would have held, but for the discrimination against them.

(b) Make whole Michael Warren and Andrew Johnson for any and all losses incurred as a result of Respondent's unlawful discharge of them, with interest, as provided in the Section of this Decision entitled "The Remedy".

(c) Within 14 days from the date of this Order, expunge from its files any and all references to the discriminatory discharges of Michael Warren and Andrew Johnson and notify them in writing that this has been done and that Respondent's discrimination against them will not be used against them in any future personnel actions.

(d) Remove from Respondent's files all unlawful waivers of the right to take legal action executed by employees of Respondent and notify, in writing, each present or former employee who executed such waiver that this has been done and that the waiver would not be used in any way.

(e) Rescind or modify its "What About Unions?" rule or policy by deleting those portions of the rule or policy that require employees to report work- related complaints or problems to their supervisors and then to the president and chairman of the board.

(f) Preserve, and within 14 days of a request make available to the Board or its agents for examination and copying, all payroll records, timecards, social security payment records, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Fremont, California facilities copies of the attached Notice marked "Appendix".[5] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since June 12, 2003.

Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

Dated, San Francisco, California, February 6, 2004

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees or otherwise discriminate against employees in order to discourage union activities or other protected concerted activities.

WE WILL NOT coercively interrogate employees about their union beliefs or activities.

WE WILL NOT require you to execute waivers of your rights to take legal action with respect to the hire, tenure, and terms and conditions of employment.

WE WILL NOT expressly or impliedly limit your access to the National Labor Relations Board.

WE WILL NOT maintain a "What About Unions?" rule or policy that requires you to report work-related complaints or problems to your supervisors and then to the president and chairman of the Board. Our employees are free to discuss such issues with other employees, unions or regulatory agencies.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer reinstatement to Michael Warren and Andrew Johnson to the positions they would have held, but for the discrimination against them.

WE WILL make whole Michael Warren and Andrew Johnson for any and all losses incurred as a result of our unlawful termination of their employment, with interest.

WE WILL expunge from our files any and all references to the unlawful discharges of Michael Warren and Andrew Johnson and notify them in writing that this has been done and that the fact of this discrimination will not be used against them in any future personnel actions.

WE WILL remove from our files all unlawful waivers of the right to take legal action executed by our employees and notify, in writing, each present or former employee who executed such waiver that this has been done and that the waiver will not be used in any way. Our employees are free to file petitions or charges with the National Labor Relations Board.

WE WILL rescind or modify our "What about Unions?" rule or policy by deleting those portions of the rule or policy that that require you to report work-related complaints or problems to your supervisors and then to the president and chairman of the board. Our employees are free to discuss such issues with other employees, unions or regulatory agencies.

U-HAUL COMPANY OF CALIFORNIA

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."