

Introduction

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Disputes happen in the workplace. They always have and always will. This book focuses on how such disputes are addressed and resolved in the American workplace, in settings outside the courthouse.

This book was drafted by practitioners with the practitioner—both counsel and neutral—in mind. Topics are organized functionally, most notably tracing the progressive stages of an employment arbitration. Historical, global, ethical, and empirical perspectives are offered to provide a context for the resolution of employment disputes. Mediation, the increasingly popular alternative to the adjudication of employment disputes, is highlighted and receives separate treatment.

In short, this book's guiding principle was the needs of the practitioner in navigating the choppy and unsettled waters of employment alternative dispute resolution (ADR).

Why ADR Matters in the Employment Context

Almost uniquely among western civilizations, legal claims arising out of the American workplace are submitted to courts of general jurisdiction for final resolution. These claims are not sent to a single employment tribunal, or to a labor court or administrative body with broad jurisdiction over all types of employment disputes. Rather, employment disputes as a matter of last resort are heard and resolved generally by judges, many of whom have no particular expertise in the law or in the dynamics of the modern American workplace. These judges, particularly in federal court, almost undoubtedly are burdened with heavy dockets that likely include constitutional matters, commercial

disputes, and criminal proceedings. The ever-growing docket of fact-intensive employment disputes continues to absorb a disproportionate percentage of time of the court dockets around the country, to the chagrin of many judges. The simple truth is that litigation is neither an efficient nor cost-effective method for resolving most employment disputes.

Further burdening the efficient resolution of employment disputes is the tremendous expense of litigation and the inherent imbalance in the resources available to employers and most employees. Few employees have tens or hundreds of thousands of dollars available to pursue litigation against their current or former employers, in addition to the years it may take to resolve any such dispute, with no guarantee of a return on their investment. The number of counsel willing to take employment matters on a contingency basis is also severely limited and, consequently, only a small percentage of the overall number of employment claims is actually pursued in the courts. Even equal employment opportunity agencies—a cost-free refuge for employees with discrimination claims—are often far too overburdened, understaffed, and underfunded to expeditiously manage their dockets and to meet the expectations of the parties before them. Further, as the reach of labor unions in the private sector continues to diminish, an ever-increasing percentage of the American workforce is subject to employment—and termination of employment—at will.

In sum, litigation is a valuable but frequently impractical tool for the resolution of employment disputes that often serves neither the needs of employers nor those of employees well. Consequently, employees' legal rights may be likened to the gems in Tiffany's window, admired from afar by all, but far too expensive to be worn by most.

What, then, are the viable alternatives? This book focuses on the two most common alternatives: arbitration and mediation.

Arbitration

Arbitration in the collective bargaining context has worked with great efficiency and success for nearly a century. The level playing field on which labor disputes are addressed is key to labor arbitration's success. It would seem reasonable to assume that the employment field can learn and borrow liberally from labor arbitration to develop a workable dispute resolution process for the non-union context.

The fundamental underpinnings that make labor arbitration so successful, however, are often lacking in the non-union workplace. The imbalanced setting in which employment disputes arise (whether in arbitration or judicial proceedings) prevent the labor-arbitration model from being lifted intact into the employment field. The contrast between the two is indeed stark.

Union employees generally cannot be terminated without “just cause.” Non-union employees, in the absence of contractual rights to the contrary, generally are employed at-will (again, a uniquely American concept born in the throes of the Industrial Revolution reflecting the U.S. economy’s needs at the time) and bear the burden of demonstrating the merits of their legal claims. Employment arbitration also does not come with the benefit of a built-in representative, such as a labor union, available to the employee at no cost, which would otherwise serve to help balance the disparity in resources between employer and employee. Further, there is generally no ongoing relationship between the disputants that might foster compromise and accommodation. Also, the rights adjudicated in employment arbitration often extend beyond contractual rights and may implicate significant public policies raised, for example, by discrimination in the workplace. The need for greater due process where the public interest and statutory rights are invoked is understandable, but increased due process also serves to increase the costs and delay associated with the resolution of such disputes.

Employment arbitration has taken a different path than labor arbitration and combines aspects of both labor and commercial arbitration. Its birth year is properly denoted as either 1991, the year of the U.S. Supreme Court’s *Gilmer v. Interstate/Johnson Lane Corp.* decision,¹ or 1996, the year that the American Arbitration Association (AAA) established its Employment Disputes Panel. The AAA, recognizing that employment disputes did not fit comfortably into any existing category, drafted a new set of arbitration rules and established a new panel of arbitrators specifically to address these claims. Employment arbitrators, as such, did not truly exist as a specialized body until then. In the 19 years since, the panel of employment arbitrators has grown, along with these arbitrators’ experience and skills. Other ADR providers, such as JAMS (originally Judicial Arbitration and

¹500 U.S. 20, 56 FEP Cases 1116 (1991).

Mediation Services, Inc.), have followed suit and established their own employment arbitration panels. Employment disputes found a new venue for their resolution.

Mediation

Arbitration is an adversarial and adjudicative proceeding, complete with winners and losers.

Mediation, by contrast, is a facilitated negotiation. The ultimate resolution of the dispute remains in the parties' hands at all times. This problem-solving approach empowers the parties and allows for creative solutions to often difficult, emotion-laden disputes. It is particularly well suited for disputes in which the employment relationship is still intact, allowing for the parties to approach their dispute in conciliatory tones and increasing the chances that the ongoing relationship may be saved.

Mediation has gained a favored place in the pantheon of dispute resolution vehicles for employment disputes, invoked with increasing frequency by courts, administrative agencies, and the parties themselves.

Yet, even mediation, the Mother Teresa of dispute resolution vehicles, has its critics. Some employee advocates argue that employees are not on a level playing field, even in mediation, and are on occasion compelled to compromise too deeply due to their lack of bargaining power and resources. Some management representatives contend that, by making external dispute resolution more accessible, mediation encourages frivolous claims. Both sides have been heard to complain that a mediation step adds additional time and expense to the ultimate resolution of disputes, particularly if it is ill-timed, as there is no guarantee of finality with mediation, and that it encourages parties to "split the baby" and accept a resolution that is not completely satisfactory to either side.

Are There Alternatives to Arbitration and Mediation?

Are there viable alternatives to arbitration and mediation?

The best solution, as any Human Resources or dispute resolution professional will tell you, is to resolve disputes at the lowest level within the organization. If a supervisor and a subordinate or two co-workers can raise, frame, and resolve all

disputes between them, there would be no need for an external tool like arbitration or mediation.

Other steps employers can take to increase the chances of resolving employment disputes internally include: a robust complaint procedure and process for investigating concerns; a strong antiretaliation policy; an “open door” policy where employees can raise issues, perhaps even anonymously, without fear of reprisal; a stronger, more sophisticated Human Resources Department; an ombudsman office; and a peer review system. There is also always the hope that greater education, diversity, and experience with the underlying causes of workplace disputes will serve to minimize those causes and reduce the need for external ADR.

Other potential external alternatives for resolving disputes exist. The most comprehensive is what exists in most western civilizations, namely, government agencies or tribunals dedicated solely to the resolution of employment disputes. Under such systems, all workplace controversies are directed to a single agency or tribunal, which then, ideally, provides an expeditious and cost-effective means for resolving all forms of employment disputes. However, with the polarized state of the U.S. political system in mind, the prospect for a comprehensive solution to workplace disputes is no more than a pipe dream.

Criticism of Employment ADR—Legitimate or Overstated?

The courts, led by the Supreme Court, have demonstrated repeatedly in recent years their strong support for arbitration as a vehicle for resolving employment disputes. The Supreme Court has stated clearly that it views arbitration as an alternative, and not a lesser, forum for resolving most legal disputes. Nonetheless, in the employment setting, criticism of the use of arbitration to resolve employment disputes remains.

On the plaintiff side, the mandatory arbitration of employment disputes, resulting in the loss of access to a jury among other things, is viewed as an affront and a violation of basic due process. To add insult to injury, discovery is limited and class actions may be waived.

On the employer side, the increasing costs of arbitration, the limitation on dispositive motions such as summary judgment motions, and the loss of the right to a meaningful appeal

from unfavorable decisions undercut the value of arbitration as a dispute resolution tool.

Both sides legitimately complain that employment arbitration has increasingly come to mirror the worst aspects of litigation, adding delay and expense to what was intended to be an expeditious and cost-effective way of resolving employment disputes.

Certainly, there are legitimate criticisms to be made of the current state of employment arbitration. It is also true that both employee and employer representatives have evidenced a tendency to overstate the negative aspects of employment arbitration and to hold unrealistic expectations for it.

On the plaintiff side, the tendency to extol the virtues of litigation can ring hollow. Litigation, in truth, is generally ill suited for a majority of employment-related disputes. Slow, cumbersome, and expensive, litigation tends to favor the party with resources. The hurdles to realistically getting to trial, most notably dispositive motions such as summary judgment motions, are substantial. Only a small fraction of filed employment disputes get to juries, and the employee success rate before a jury hovers around 50 percent at best. Litigation is best suited for those who shop at Tiffany's, much less so for the typical plaintiff with an employment dispute, limited means, and an urgent need for resolution of the dispute.

Employers, similarly, bemoan the limited availability of summary judgment in arbitration, circumscribed discovery, and limited appeal rights from an arbitrator's award. Yet, courts have allowed employers great discretion in imposing arbitration on their employees and to define its terms and scope, including the ability to require the waiver of class claims.

Coming to Terms With Employment ADR

Arbitration as a means of resolving employment disputes is still, by any measure, in its infancy. Litigators, like boxers being asked to wrestle, are still learning to adapt to the unconventional ways of employment arbitration. Mediation is even a more foreign process, more like arm-wrestling than boxing and that much more baffling to the strident litigator. Employment arbitrators themselves are still learning their craft.

Although the criticism of employment arbitration is often times valid, it is also at times unrealistic and shortsighted.

Unlike litigation, parties to an employment arbitration can mutually select their decision maker and, except in the mandatory arbitration setting, can generally define the procedures to be followed.

We know what ADR in the employment setting is not—it is not a union grievance process in which two parties of relative equal strength construct a relatively efficient, low-cost dispute resolution system specifically designed for a particular workplace and setting. Employment ADR is also not litigation. Broad discovery is not the norm, the common sense perspective of the jury is forfeited, and the broad right of appeal is effectively abandoned. It is not commercial arbitration. There, like in a grievance system, two relatively equal parties with ongoing relationships and almost always the financial resources to protect their rights are often able to adjudicate their claims on an equal basis.

What is employment ADR then? It is an effort to provide a more efficient and cost-effective way to resolve employment disputes short of full-blown litigation. Certainly, employment ADR has its flaws. Like a toddler, employment arbitration is just learning to walk on its own and has at times stumbled in providing an efficient, cost-effective, and fair process to adjudicate employment disputes. The root cause of the concerns raised on both sides, however, often has less to do with arbitration as a dispute resolution procedure itself than with the circumstances under which the parties come to the process and the limits the process places on the excesses of litigation. Like the child of flawed parents, employment ADR deserves to be measured on its own merits and not against the perceived sins of its parents.

The focus of this book is not on the merits or de-merits of mandatory arbitration, or the value judgments and assumptions that go into the debate whether arbitration is suited for class or collective actions, or any of a number of similar questions external to the arbitration and ADR processes. This book, written for the practitioner, is principally about the ADR process itself—how it works and how best to prepare for and present claims, whether to an arbitrator or mediator, or as an advocate or a neutral.

In an ideal world, by building a better employment ADR vehicle, the need for and resistance to mandatory arbitration would diminish. If employees and their representatives were confident in the equity and efficiency of the process, then being

before arbitrators with their cases, however they got there, would be less of a concern. Employers that focus on building an effective and fair process that truly allows their employees to fully vindicate their rights may find less of a need to make the process mandatory and may discover employees willingly opting into the process to avoid the excesses of the litigation process. If both sides were to emphasize and better utilize the strengths of the arbitration process—including the ability to select the fact finder, to mold the process to the needs of the particular dispute at hand, and to take a broader view and to embrace the flexibility of ADR—then the needs of the parties could be addressed in a setting better suited for the dispute at hand.

Can the ADR process be improved to better address the needs of the parties? Of course it can. It is ADR's flexibility and adaptability that is one of its greatest strengths. A good example of the continuing evolution of ADR is the recent establishment of the option of arbitration appeal processes created to address one of the concerns expressed by the parties, namely, the limited review that the law affords arbitration awards. All the major ADR providers now have such procedures. They are not mandatory and in fact are rarely invoked, but are available to parties who choose to use them.

In sum, this book works from the premise that employment ADR should be accepted on its own terms rather than based on the circumstances under which it was invoked. With that in mind, this book is designed to help practitioners to optimize their use of available ADR processes, to do what they do now but only better. Perhaps as confidence in employment ADR grows, so will the willingness and opportunity for employees with disputes to come forward and have their concerns resolved voluntarily through ADR devices. With this comes the hope that dispute resolution in the employment setting, outside of the litigation context, will be less an abstract principle, a gem to be admired in a Tiffany window, and instead will become a more integral part of the American workplace.

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