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Eugene K. Connors

Brooke Bashore-Smith

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## Employment Dispute Resolution in the United States: An Overview

*Eugene K. Connors\* and Brooke Bashore-Smith\*\**

### I. INTRODUCTION

**M**anagement and work force representatives devote a larger share of their time to administering the employment relationship than to creating it. To a large extent, the climate of employer/employee relations is determined by the manner in which management and employees, whether union or non-union, understand and react to problems that grow out of the employment relationship.

When the work force is unionized, day-to-day employment relations primarily involve applying the language and principles of the labor agreement. Problems are generally resolved through the grievance procedure of the collective bargaining agreement, with final and binding resolution in arbitration. Today, ninety-eight percent of all labor agreements provide for final and binding arbitration of grievance disputes involving contractual rights.<sup>1</sup>

Even when employees are not represented by a union, many employers have recognized the contribution that arbitration can make towards creating a healthy employer/employee relationship. As a result, many companies now apply grievance-arbitration procedures in varying levels of formality to their unorganized work force.

Avoiding litigation is a common goal of grievance and arbitration procedures in both union and non-union settings.<sup>2</sup> The explosion of litigation initiated by employees and ex-employees has prompted many employers to create or improve their existing internal dispute resolution systems.

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\* Partner, Reed, Smith, Shaw & McClay, Pittsburgh, Pennsylvania.

\*\* Associate, Reed, Smith, Shaw & McClay, Pittsburgh, Pennsylvania.

<sup>1</sup> Matthew T. Roberts, Roger S. Wolters, William H. Holley, Jr. & Hubert S. Field, *Grievance Mediation: A Management Perspective*, 45 No. 3 ARBITRATION JOURNAL 15 n.1 (Sept. 1990)[hereinafter, Roberts].

<sup>2</sup> The employee litigation explosion in the United States is well documented. In 1986-87, for example, the Equal Employment Opportunity Commission (EEOC) received 66,305 charges of employment discrimination against private sector employers, while state and local human rights agencies received 52,139 charges - a total of 119,289 charges of unlawful employment discrimination. In the same year, over 10,000 cases alleging employment discrimination were filed in federal or state courts. In addition, the number of wrongful discharge cases filed in state courts by private sector employees has multiplied 100 times in the past decade (approximately 200 cases in the late 1970s compared to 200,000 cases in 1988). Alan F. Westin & Alfred G. Feliu, *RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION*, 1-2 (1988) [hereinafter Westin].

Aside from grievance-arbitration procedures, employment disputes are governed by local, state or federal statutory law. Employment disputes are generally resolved according to procedures defined in the laws and enforced through administrative agencies and/or courts.

Volumes have been written about employment dispute resolution. The purpose of this paper is to provide a general overview of the most common methods of employment dispute resolution in the United States, highlighting the most significant aspects of each and discussing recent trends.

## II. GRIEVANCE-ARBITRATION UNDER COLLECTIVE BARGAINING AGREEMENTS

The unionized sector generally recognizes that the costly and prolonged nature of a court action is not well adapted to the peculiar needs of labor/management relations where a "speedy decision by men with a practical knowledge of the subject is desired."<sup>3</sup> Accordingly, the United States Supreme Court has acknowledged that arbitration, rather than litigation, is the superior means of resolving disputes under collective bargaining agreements.

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, and his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.<sup>4</sup>

In the words of one writer, arbitration is a "simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding."<sup>5</sup> By and large, arbitration in the private sector of the United States has been, and still is, a product of private contract between labor and man-

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<sup>3</sup> Frank Elkouri & Edna Asper Elkouri, *HOW ARBITRATION WORKS*, 7 n.31 (4th ed. 1985) [hereinafter Elkouri], quoting *Webster v. Van Allen*, 216 N.Y.S. 552, 554 (N.Y.S. Ct. App. Div. 1926).

<sup>4</sup> *Id.* at 7-8 n.32, quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

<sup>5</sup> *Id.* at 2.

agement, rather than a product of law.<sup>6</sup> Once parties agree to use arbitration to resolve their disputes they usually honor this agreement rather than litigating.<sup>7</sup>

### *Grievance Procedure Preceding Arbitration*

Arbitration is usually the final step of dispute resolution under labor contracts. Management and labor generally agree that no dispute will be arbitrated without first exhausting the collective bargaining agreement's grievance procedure.<sup>8</sup>

A typical grievance procedure consists of a series of progressive "steps" that must occur within time limits specified in the contract. An employee<sup>9</sup> generally initiates the grievance process by advising his immediate supervisor of the complaint, either verbally or, preferably, in writing.<sup>10</sup> Depending on the collective bargaining agreement, the employee may or may not be entitled to union representation at this first step.<sup>11</sup> If the first step does not resolve the dispute, the employee or union may appeal the grievance through successive levels of management. Often, the employee is entitled to representation by a higher union representative at each ascending step of the grievance process.

Several factors contribute to an effective grievance procedure. First, collective bargaining agreements should provide that grievances and disputes involving the agreement are to be settled through the grievance procedure, with arbitration as a final step, and without resort to strikes, lockouts or other business interruptions. Second, the collective bargaining agreement should clearly and simply state the successive steps in the grievance procedure and the method of presenting and appealing the grievance at each step. Third, the procedure should facilitate prompt resolution of the grievance by setting forth specific time limits for presentation, decision and appeal at each step. Fourth, management and unions should inform and train their representatives in the proper functioning of the grievance procedure and in their responsibilities under

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<sup>6</sup> *Id.* at 23.

<sup>7</sup> *Id.*

<sup>8</sup> A party who refuses to comply or fails to properly comply with the grievance procedure cannot prevent arbitration on the ground that the grievance procedure has not been exhausted. *Id.* at 205.

<sup>9</sup> A contract can also provide the labor organization and/or the employer with the right to initiate and process a grievance. Ordinarily the union or employer must adhere to the same rules as an individual grievance.

<sup>10</sup> A written rather than verbal grievance is recommended even at the early stages of the process. A written statement "cements" the allegations and focuses the investigation. Although some companies prefer an oral "first step," the further removed in time the written grievance is from the actual occurrence, the more likely it is that the event will become distorted and more difficult to resolve.

<sup>11</sup> Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), provides an employee with the right to resolve a grievance without union representation at any stage.

it.<sup>12</sup>

If the grievance procedure is exhausted without resolving the dispute, and the labor organization<sup>13</sup> appeals the grievance to arbitration, the parties proceed to arbitration.<sup>14</sup>

### *Labor Arbitration*

#### 1. Arbitration Practice and Procedure

Parties may choose from several different types of arbitration tribunals and may select arbitrators in several different ways. For example, the parties may agree in their contract on the number of arbitrators to be used, either single or multiple, and may specify either "temporary" or "permanent" arbitrators.

Although certain industries have historically used arbitration boards,<sup>15</sup> most companies use one neutral arbitrator. The neutral arbitrator is selected on a dispute-by-dispute basis, and there is no commitment to select that arbitrator again. The advantages of using temporary arbitrators include: 1) selection of arbitrators with special qualifications for deciding particular disputes; 2) a decreased chance of getting "stuck" with a previously unsatisfactory arbitrator; and 3) less chance of bias in favor of either party, because the arbitrator is not personally acquainted with either party.<sup>16</sup>

On the other hand, there may be disadvantages to using temporary arbitrators. The parties may find it difficult to agree upon an arbitrator or even a method of selecting one. This takes additional time while the dispute remains unsettled. In addition, the arbitrator chosen for a specific dispute usually will not be familiar with the industry or the general circumstances and relationship of the parties. Another disadvantage of temporary arbitrators is that the chances for conflicting decisions and interpretations increase when several arbitrators render interpretations of the same contract over time.<sup>17</sup>

Unlike temporary arbitrators, permanent arbitrators are elected to serve for a given period of time, typically the duration of the collective bargaining agreement. The permanent arbitrator's responsibilities and functions are determined by the collective bargaining agreement, which

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<sup>12</sup> See President's National Labor-Management Conference of 1945, *quoted in* Elkouri, *supra* note 3, at 154-55.

<sup>13</sup> Typically, only the labor organization, not the aggrieved employee, has the right to appeal a grievance to arbitration.

<sup>14</sup> Collective bargaining agreements frequently provide that parties who wish to arbitrate disputes must give notice of their desire and intent to arbitrate within a specified period of time. Elkouri, *supra* note 3, at 208-209.

<sup>15</sup> Arbitration boards are provided by statute, for example, in the railroad and airline industries. *Id.* at 147-51.

<sup>16</sup> See generally *Id.* at 119-132 for discussion of advantages and disadvantages of various arbitration formats.

<sup>17</sup> *Id.* at 120.

creates the arbitrator's position. Permanent arbitrators may be especially desirable in situations where arbitrations are frequent and complex because the permanent arbitrator gains a great deal of knowledge about a specific industry and its practices. Nevertheless, it may be difficult to find mutually acceptable and available permanent arbitrators. In addition, permanent arbitrators generally work on a retainer fee that must be paid regardless of whether the arbitrator's services are used.<sup>18</sup>

Parties may also agree to implement either a temporary or permanent multi-person arbitration board. Such boards typically consist of one or more members selected by management, an equal number selected by labor, and a neutral member who serves as the chair. Due in large part to their makeup, arbitration boards are not likely to reach unanimous decisions. Therefore, a decision reached by the majority of the board usually constitutes a final and binding award. One advantage of a tripartite board is that the neutral member may obtain valuable advice and assistance from the partisan members.<sup>19</sup> Disadvantages of the tripartite arbitration panel include added delays and costs, and a degree of lost control for the lawyers representing the parties. Control is lost because after the attorneys present their cases and the official proceedings are terminated, the partial arbitrators have another opportunity to attempt to persuade the neutral to rule in their client's favor.<sup>20</sup>

Arbitrators may be selected in several ways, although selection is usually by mutual agreement of the parties. However, if the parties fail to agree on an arbitrator within a specified time, collective bargaining agreements often provide for alternative selection methods. For instance, the contract may include a list of arbitrators who will be automatically selected on a rotating basis or it may simply provide a list from which mutual selection must be made.<sup>21</sup>

Parties may also use outside agencies to select an arbitrator, either at the outset or after they fail to agree upon an arbitrator. The American Arbitration Association (AAA), a private company, and the Federal Mediation and Conciliation Service (FMCS), a governmental organization, are probably the best known agencies. The agency usually submits a list of possible arbitrators to the parties from which, often by process of elimination, they select an arbitrator. Alternatively, an agency may appoint the arbitrator. If an arbitrator is selected through AAA, the agency is also responsible for scheduling the hearing, acting as a transmittal agency for briefs and other correspondence with the arbitrator, and mailing the

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<sup>18</sup> *Id.* at 120-125.

<sup>19</sup> *Id.* at 129-130.

<sup>20</sup> J. Hart & D. Wolf, *Grievance Arbitration - Some Hints on Arbitrator Selection, Preparation and Trial*, in *RESOURCE MATERIALS: LABOR AND EMPLOYMENT LAW*, The American Law Institute, 1072 (4th ed. 1988) [hereinafter Hart].

<sup>21</sup> Although it is possible to research any arbitrator's prior decisions when there is a rotating panel of arbitrators, there is often a single location where all of the decisions by these arbitrators under a particular contract may be found. *Id.* at 1073.

arbitrator's opinion, award, and bill to the parties. FMCS, on the other hand, is not involved in administering the arbitration procedure. In addition, AAA charges a fee for its services while FMCS does not.

When choosing an arbitrator, parties consider factors such as: professional qualifications; previous experience in the industry; previous experience of the client with the arbitrator; and, especially, the arbitrator's tendencies in particular types of cases.<sup>22</sup> Among others, the Bureau of National Affairs and Commerce Clearing House each publish reported arbitrators' decisions in volumes that are frequently updated. Through each of these multi-volume sets, parties can research arbitration decisions by subject matter and by the arbitrator's name. In addition, R.C. Simpson, Inc. publishes *Arbitrators' Qualifications Reports*, which includes background information on arbitrators, analyses of the subject and outcomes of their awards, and a "management consensus" regarding their qualifications. Arbitrators and arbitration awards may also be researched through various computerized databases.

In preparing for arbitration, the parties' representatives should become familiar with all aspects of the governing contract and with any side letters or supplemental agreements.<sup>23</sup> They should also review any prior contracts to see if there was ever a time when the language at issue was rewritten, revised, or significantly changed. The parties' negotiating history should also be examined. Unless the meaning of a clause is clear - which is doubtful if the clause is before an arbitrator - most arbitrators will allow the parties to introduce evidence of negotiating history. Representatives of the parties should also be aware of any possible past practices that conflict with the position that will be argued to the arbitrator. If unfavorable past practices exist, the party can argue the recognized arbitration principle that past practice cannot be used to vary the terms of a contract clear on its face. If the present contract language is unclear, however, the parties may attempt to show that: 1) the past practice has been ignored as often as it has been followed; 2) the present situation is unlike those giving rise to the past practice; or 3) the parties have subsequently modified or even annulled the past practice by some specific, subsequent agreement.<sup>24</sup>

Arbitration evidence is almost always presented through witness testimony and documents. Witnesses are subject to direct and cross-examination. Arbitrators, unlike judges, may personally participate in the hearing by asking questions and seeking information to insure that all

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<sup>22</sup> *Id.* at 1074-1077. It is also wise to select an arbitrator who is readily available to hear the case. This is true particularly in discharge cases, where an employer's loss carries risk of back pay; "risk of back pay; in such cases, arbitrators with a case. . . ." Arbitrators with a case backlog should be avoided. *Id.* at 1078.

<sup>23</sup> See generally, *Id.* at 1079-1091 for an overview of practical considerations in preparing a case for arbitration.

<sup>24</sup> *Id.* at 1082-85.

relevant information has been addressed.<sup>25</sup> Documentary evidence may include formal memoranda, handwritten notes, policies, written work rules, evaluations, written discipline records and the like, and may be introduced by either party or as joint exhibits. Although formal rules of evidence do not apply in arbitration, most arbitrators require some adherence to basic evidentiary principles of fundamental fairness.

Generally, the party initiating the grievance, generally an employee or the union, has the burden of proof in arbitration. In those cases, the aggrieved party has the right to present its case first. In discharge and discipline cases, however, management has the burden of proof and, therefore, is required to make the initial presentation, even though the union filed and pressed the grievance to arbitration.<sup>26</sup>

There is usually no transcript made of arbitration proceedings unless a party orders one, in which case that party bears the cost.<sup>27</sup>

At the close of the hearing, the parties generally have the option to present closing arguments or submit post-hearing briefs. When either side asks to file a post-hearing brief, the arbitrator usually grants the request and dispenses with closing arguments.<sup>28</sup>

## 2. The Arbitrator's Decision

Traditionally, an arbitrator is not bound by precedent. This is primarily because his power stems solely from the collective bargaining agreement. Also, awards decided under different contracts are not binding.<sup>29</sup> In addition, given the wide variance in industry working conditions, past practices, and the nature of contract provisions, other cases are unlikely to present identical factual settings. Nevertheless, other arbitration awards are often cited to the arbitrator both orally and in briefs for their inherent logic and other persuasive effect.

As a threshold matter, arbitrators must often decide whether the dispute before them is subject to arbitration. Although the United States Supreme Court held in the "Steelworkers Trilogy" that questions of arbitrability are for the courts.<sup>30</sup> The Court was speaking only of substantive arbitrability - whether the grievance covers an issue which the parties are contractually bound to arbitrate.<sup>31</sup> Arbitrators may, and regularly do, resolve questions of procedural arbitrability. Procedural arbitrability re-

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<sup>25</sup> Elkouri, *supra* note 3, at 264.

<sup>26</sup> *Id.* at 1093-94.

<sup>27</sup> Hart, *supra* note 20, at 1093.

<sup>28</sup> *Id.* at 1100.

<sup>29</sup> A possible exception is where the same parties have arbitrated the same issue under the same contract language in the past, and circumstances have not changed. *E.g.*, O. Fairweather, *PRACTICE AND PROCEDURE IN LABOR ARBITRATION* 637-40. (2d ed. 1983).

<sup>30</sup> The "Steelworkers Trilogy" consists of *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>31</sup> Hart, *supra* note 20, at 1094.



fers to whether the grieving party has complied with the requirements of the grievance procedure.<sup>32</sup> For example, did the union protest the discharge to management within the number of days specified by contract? Was the case processed through the grievance procedure in a timely fashion? If not, was there a waiver by the employer?

Inevitably, when serious questions of procedural arbitrability are raised, the employer must decide whether to defend on the merits or rely solely on the claimed procedural deficiency. Unless the procedural defect is significant, management is ill-advised to rely solely upon the deficiency. Most arbitrators prefer that issues of procedure be presented at the same time as the merits. By requiring that the merits of a dispute be presented with the procedural issue, the arbitrator may be able to avoid issuing a difficult or unpopular decision in a close case by ruling in favor of the employer on the procedural question.<sup>33</sup>

Approximately three quarters of all collective bargaining agreements in the United States contain narrow clauses restricting arbitration to disputes involving interpretation or application of the collective bargaining agreement.<sup>34</sup> These clauses often restrict the arbitrator's authority by prohibiting him from adding to, subtracting from, or otherwise altering the agreement.<sup>35</sup>

Since arbitrators typically derive their power from the collective bargaining agreement, some tension or conflict may arise when they are asked to determine disputes which also could be covered by statute or other "outside law."<sup>36</sup> For example, an employee alleging discharge on the basis of race may file a grievance claiming that his discharge had not been for cause under the collective bargaining agreement. However, the employee's claim may also be covered by federal, state or local anti-discrimination laws.<sup>37</sup>

External law can potentially affect a contract and arbitration in several ways. First, some agreements specifically incorporate external law.<sup>38</sup> Second, when parties use language identical to a statute or regulation, the arbitrator may interpret the contract in accordance with the manner in which the statute or regulation has been interpreted. A more extreme, and strongly criticized position, is that every collective bargaining agreement embodies external law by implication.<sup>39</sup>

Most arbitrators tend to agree that: (1) where the contractual provision being interpreted or applied is broadly formulated, the arbitrator

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1094-95.

<sup>34</sup> Elkouri, *supra* note 3, at 114.

<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., Elkouri, *supra* note 3, at 366; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

<sup>37</sup> See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

<sup>38</sup> O. Fairweather, *supra* note 29, at 447.

<sup>39</sup> Jay E. Grenig, *When Can a Grievance Arbitrator Apply Outside Law?* 18 No. 4 J. LAW AND EDUC. 515, 519 (Fall 1989).

may consider all relevant factors, including relevant law; (2) where a provision is subject to two interpretations, one in accord, and one in conflict with a statute, the statute is relevant because arbitrators logically should try to avoid a contractual interpretation that would invalidate the agreement and subsequently the arbitration decision; and (3) where the submission seeks an advisory opinion as to the law, it is the role of the arbitrator to provide it.<sup>40</sup>

Arbitrators tend not to agree, however, on what constitutes the proper approach when there is a clear conflict between the contract and the law. The United States Supreme Court has strongly suggested that an arbitrator's task is "to effectuate the intent of the parties rather than the requirements of enacted legislation."<sup>41</sup> Therefore, "[w]here the collective bargaining agreement conflicts with Title VII [federal anti-discrimination statute], the arbitrator must follow the agreement [because the arbitrator] has no general authority to invoke public laws that conflict with the bargain between the parties."<sup>42</sup> For that reason, if an "arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced."<sup>43</sup>

The Supreme Court has not held that an arbitrator is foreclosed from examining external law in interpreting and applying the contract. To the contrary, in *United States v. Enterprise Wheel & Car Corp.*, the Court recognized the propriety of "the arbitrator looking to 'the law' for help in determining the sense of the agreement."<sup>44</sup> Only when the arbitrator finds direct conflict between "outside law" and the contract does the Court call for the arbitrator to disregard the law to the extent that it is contrary to the agreement.<sup>45</sup>

### 3. Remedies

In *Enterprise Wheel*, the United States Supreme Court discussed the broad, and yet restricted, remedial power of arbitrators.

When an arbitrator is commissioned to interpret and apply the collec-

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<sup>40</sup> Elkouri, *supra* note 3, at 370.

<sup>41</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. at 57.

<sup>42</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. at 57. The holding in *Gardner-Denver* was that an employee's statutory right to trial de novo on his discrimination claim under Title VII was not foreclosed by prior submission of his claim to final arbitration (where the award was adverse to the employee) under the nondiscrimination clause of a collective agreement. However, *Gardner-Denver* indicates that "where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight." *Id.* at n.21.

<sup>43</sup> *Id.* at 53, (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597 (1960)).

<sup>44</sup> *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. For a general discussion of outside law in arbitration, see Fleischi, *supra* note 39, at 505, 507; Grenig, *supra* note 39, at 515.

<sup>45</sup> Elkouri, *supra* note 3, at 375 n.28.

tive bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement. He does not sit to dispense his own brand of industrial justice.<sup>46</sup>

Arbitrators may enjoin acts which violate the collective bargaining agreement and/or may award monetary relief. The general rule as to monetary damages is that the award "should be limited to the amount necessary to make the injured party 'whole.'"<sup>47</sup> Punitive awards are rare in arbitrations.<sup>48</sup> Also, in some contract cases, arbitrators will not determine the award, but will simply find the contract violation and then return the case to the parties to negotiate the remedy.<sup>49</sup>

#### 4. Judicial Review

Unlike the court system, in which multiple appeals from trial decisions are possible, the arbitrator is generally the court of first and last resort for labor disputes. The United States Supreme Court has ordered a "hands off" policy which severely limits judicial review of arbitration awards. Therefore, as long as the arbitrator's award "draws its essence" from the collective bargaining agreement, it may not be overturned or modified in any way.<sup>50</sup> Even if the reviewing court concludes that the arbitrator made a mistake of fact, the court may not overrule the arbitrator simply because its interpretation of the contract or the law is different.<sup>51</sup> As a result, statistics indicate that approximately one percent of all arbitral awards are challenged in court. Of those, only a fraction are disturbed.<sup>52</sup>

#### 5. Trends In Arbitration

Among the matters that have traditionally been subject to arbitration are contractual issues including seniority rights, vacations, holidays, discharge and discipline, layoffs, and job classifications. Today, arbitrations increasingly involve complex pension and benefit issues, such as withdrawal liability, discharge and discipline for alcohol and/or drug use, subcontracting, and management rights. In addition, the types of employers and employees involved in arbitration has expanded over the years. Currently, federal and state ("public") employers and their em-

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<sup>46</sup> *Enterprise Wheel*, 363 U.S. at 597.

<sup>47</sup> *International Harvester Co.*, 15 LA 1 (Seward 1950).

<sup>48</sup> *Elkouri*, *supra* note 3, at 405.

<sup>49</sup> *Id.* at 289.

<sup>50</sup> *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983).

<sup>51</sup> *Id.*

<sup>52</sup> *Hart*, *supra* note 20, at 1062.

ployees, including police, firefighters, and school employees, operate under collective bargaining agreements. Also, health care facilities and colleges and universities are more likely to have unionized work forces subject to arbitration procedures. Put simply, the issues in and parties to arbitration are becoming more varied and complex.

### III. GRIEVANCE MEDIATION

Grievance mediation is an alternative dispute resolution procedure which avoids the necessity of arbitration by providing a trained, third-party neutral to aid union and management representatives in negotiating a voluntary settlement to the grievance.<sup>53</sup> Grievance mediation is usually included as an additional step just prior to arbitration, typically occurring after management and the union/grievant are unable to resolve the issue through the initial steps of the procedure. Unlike most arbitrations, grievance mediation is often performed without the assistance of attorneys. Grievance mediators have no power to "award" a settlement - they encourage the parties to negotiate a resolution of their differences through constructive suggestions.<sup>54</sup>

Although grievance mediation can and does save time and money, it is not widely used. Less than four percent of private sector labor agreements provide for grievance mediation.<sup>55</sup>

Stephen Goldberg, a leading proponent of alternative dispute resolution, suggests that the limited use of grievance mediation may be due to: (1) the parties' familiarity and relative satisfaction with arbitration and their resulting hesitancy to risk engaging in an additional dispute resolution procedure; (2) opposition from attorneys who perceive the possibility of reduced earnings if mediation avoids arbitration by resolving disputes; (3) union concern that failure to reach an outside settlement without a mediator may be viewed as poor performance; and (4) employer concern that mediation too often means a compromise settlement regardless of the strength of management's position.<sup>56</sup>

Grievance mediators perform a variety of roles. They meet separately with the parties and attempt to achieve a settlement much as a middle-man.<sup>57</sup> If a settlement is not forthcoming, the mediator may be empowered to issue an advisory opinion, designed to further settlement discussions for withdrawal or granting of the grievance.<sup>58</sup> This opinion is

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<sup>53</sup> Although grievance mediation is usually presented as an innovation in the dispute resolution process, it has a considerable history; for example: the anthracite coal industry had grievance mediation in 1903. See John M. Caraway, *Grievance Mediation: Is It Worth Using?* 18 No. 4 J OF LAW & EDUC., 495 (Fall 1989).

<sup>54</sup> See, e.g., Tristater, *Grievance Mediation Cheaper, Quicker than Arbitration*, TRISTATE EMPLOYERS ASSOCIATION, July 1990, at p. 5.

<sup>55</sup> Roberts, *supra* note 1, at 15 n.2.

<sup>56</sup> S. Goldberg, E. Green & F. Sander, *DISPUTE RESOLUTION* 263-64 (1985).

<sup>57</sup> Caraway, *supra* note 52, at 496.

<sup>58</sup> Goldberg, *supra* note 55 at 256.

often orally communicated and is rarely binding.<sup>59</sup> A party is free to appeal the matter to arbitration at this point if no settlement has been reached. Generally, nothing which transpires during mediation can be used against a party in arbitration.<sup>60</sup>

The following grievance mediation procedure illustrates common elements of such a program.

Grievance mediation is only available where the parties have failed to negotiate a settlement in the prior grievance steps and the union has initiated an appeal to arbitration. If both parties agree, the grievance may be presented within 15 days at a mediation conference. The parties maintain a jointly selected mediation panel from which one person will be contacted to serve as the mediator. Only grievances which do not deal with matters of contract interpretation may be appealed to mediation (e.g., discipline or discharge decisions for just cause).

The mediation conference is conducted in an informal manner without the use of attorneys or formal rules of evidence. No formal record is kept of the proceedings, and no settlement offers or statements by the mediator may be used as evidence in any subsequent arbitration hearing of the grievance. The emphasis during the mediation conference is on resolving rather than winning the grievance. If no grievance settlement occurs during the mediation process, the mediator will issue an oral advisory opinion including the rationale for the opinion. The mediator is barred from serving as the arbitrator in any subsequent arbitration hearing involving the grievance.

After this program was implemented, researchers studied reactions to the program in order to gauge the extent to which grievance mediation provides a viable alternative or supplement to grievance arbitration. Results revealed that managers were satisfied with the grievance mediation step. Although the number of grievances filed did not decline after introduction of grievance-mediation, the number of arbitration requests dropped significantly.<sup>61</sup> The researchers concluded that if management is equally satisfied with grievance mediation, the time and cost savings associated with grievance mediation make it a viable and valuable supplement to arbitration.<sup>62</sup>

#### IV. GRIEVANCE PROCEDURES IN THE NON-UNION SETTING

Grievance procedures in non-union companies differ with the "per-

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<sup>59</sup> A small number of programs provide for written advisory opinions.

<sup>60</sup> *Id.*

<sup>61</sup> Roberts, *supra* note 1, at 19-21.

<sup>62</sup> *Id.* Grievance-mediation is not likely to replace arbitration. There will always be cases where the parties' positions are in such conflict that settlement is virtually impossible. In addition, issues likely to have an impact broader than the individual grievant may be inappropriate for mediation out of concern that an individual settlement might be binding. See Caraway, *supra* note 52, at 497. Focused drafting of settlements, however, should lessen that fear.

sonality" of each employer.<sup>63</sup> For example, a small company in which management and employees work closely may be able to implement a simple "open door" policy, inviting employees to approach management officials to voice a problem face-to-face. An "open-door" policy alone may be insufficient to resolve problems, especially when the problem arises from a conflict with the company representative whose door is the "open" one.

Assuming the need for a more structured program, the employer must define what types of "grievances" it will hear. For example, "any job-related grievance or problem" or "any unfair or discriminatory treatment claims, may be designated for hearing."

The actual grievance procedure is generally divided into progressive steps. The first is often an informal meeting between the employee and an immediate supervisor. This allows exploration and investigation of the problem. Although the meeting is informal, supervisors must be sensitized to listen and must communicate respect to the employee. Many non-union grievance procedures specifically promise employees that they will be free from reprisal by supervisors when they use the system.<sup>64</sup>

The second step should require a written grievance form in order to focus and formalize the complaint. The time frame between the incident and second step, or the first written recording of the problem, should be relatively short to insure an accurate description of the dispute and an investigation while facts are fresh. The written grievance is then submitted to a higher level of management for determination.

When disagreement still exists after the first two steps, most non-union companies in the United States reserve for themselves the ultimate decision regarding the grievance. However, input from all sides leading up to the final decision facilitates acceptance of the decision and the overall process and fosters management credibility. A great number of companies' grievance procedures provide for a final resolution by a company official, personnel director, plant manager or even president. Some companies, however, provide for an arbitration proceeding performed either by an outside arbitrator or a panel of one employee, two management personnel who are not involved in the problem.

Of course, a fair and equitable grievance procedure must avoid even the slightest hint of fostering or perpetuating subjective or inequitable employment policies by its decisions. Therefore, the procedure must promise and adhere to objective standards of excellence, performance evaluation, fair promotion policies, strong equal employment policies and similar "merit-based" approaches to the daily operations of the company.<sup>65</sup> Companies must also clearly communicate the availability of

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<sup>63</sup> See Alan F. Westin & Alfred G. Feliu, *RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION* (1988) for a series of "real world" examples of non-union dispute resolution programs.

<sup>64</sup> *Id.* at 221.

<sup>65</sup> *Id.* at 219.

their complaint procedures to employees. Such communication is essential to the system's use and may avoid problems before they begin. For example, supervisors are not as likely to act arbitrarily or unfairly if they think that employees will use the grievance system.<sup>66</sup>

Some companies periodically survey their employees regarding employee satisfaction with the complaint and appeal system. These surveys identify and cure trouble spots, test particular features of the plan, and generally keep the program running productively and credibly.<sup>67</sup>

## V. LITIGATION

Despite the wide variation in available grievance and arbitration alternatives, several of which are discussed above, dissatisfied employees frequently seek redress through the court system. Employment-related lawsuits may be based on statute or judicially created common law. The number and types of legal proceedings available to disgruntled employees render almost all major employment decisions subject to legal challenge.

Federal, state, and local statutes in the United States generally prohibit discrimination on the basis of race, sex, religion, national origin, age and disability.<sup>68</sup> Some of the more important federal statutes that govern employment disputes include: Title VII of the Civil Rights Act of 1964; the Age Discrimination in Employment Act ("ADEA"); the Rehabilitation Act; the Americans with Disabilities Act ("ADA"); and the Post Civil War Civil Rights Acts, 42 U.S.C. §§ 1981-1985.<sup>69</sup> These statutes are enforced through a civil action brought in an appropriate court by the aggrieved individual or, in some cases, by the government body charged with enforcing the particular law, such as the Equal Employment Opportunity Commission ("EEOC") or the Department of Justice.<sup>70</sup> Many statutes require the complaining party to exhaust administrative procedures before seeking redress from the court system. This requirement induces the government agency charged with enforcing the particular statute to investigate the charges and seek conciliation before bringing a lawsuit.<sup>71</sup>

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<sup>66</sup> *Id.* at 220.

<sup>67</sup> *Id.* at 223.

<sup>68</sup> These statutes generally do not apply beyond the boundaries of the United States, although the Supreme Court recently heard argument urging the extension of Title VII to apply to Americans working for American employers overseas. *EEOC v. Arabian American Oil Co.; Boureslan v. Arabian American Oil Co.*; U.S. Sup. Ct. Nos. 89-1838 and 89-1845, 1/16/91, discussed in BNA Daily Labor Report (1/17/91).

<sup>69</sup> Other important federal statutes include Title VI of the Civil Rights Act of 1964, prohibiting discrimination on the basis of race, color, sex, national origin or religion in programs receiving federal financial assistance, Title IX of the Education Amendments of 1972, prohibiting discrimination on the basis of sex in any educational program or activity receiving financial assistance, and the Immigration Reform and Control Act of 1986, prohibiting certain instances of discrimination on the basis of national origin and citizenship.

<sup>70</sup> Paul N. Cox, *EMPLOYMENT DISCRIMINATION*, Garland Law Publishing 1-3 (1987).

<sup>71</sup> See, e.g., *Novotny v. GAF*, 442 U.S. 366 (1979).

Increasingly, employees are adding state common law causes of action to their federal and/or state statutory lawsuits.<sup>72</sup> Plaintiffs may pursue such common law remedies in preference or, more likely, in addition to statutory discrimination remedies for at least three reasons. First, state common law actions may not have the procedural obstacles to suit, such as the administrative exhaustion requirement and short limitations periods found in most statutes. Second, state law may prohibit conduct not covered by federal statute. Third, there may be remedial advantages to state actions. For example, the current version of Title VII provides only for equitable remedies, monetary damages other than back pay cannot be recovered.<sup>73</sup> In contrast, a state tort action, where available, may provide the possibility of recovering compensatory damages, and perhaps even punitive damages, for such things as emotional distress, loss of economic advantage or injury to reputation. Moreover, state tort claims generally carry the right to a jury trial, while Title VII actions traditionally have not.

#### VI. DISPUTE RESOLUTION BEFORE THE NATIONAL LABOR RELATIONS BOARD

Section 7 of the National Labor Relations Act (NLRA) establishes the basic rights of employees to: self-organization; to form, join, or assist labor organizations; to engage in concerted activities for collective bargaining purposes or other mutual aid or protection; and to refrain from "any or all such activities."<sup>74</sup> Section 7 rights are protected by "unfair labor practices" defined and prohibited by Section 8 of the NLRA.<sup>75</sup> Both employer and union unfair labor practices are covered by Section 8. Whether an unfair labor practice has occurred is subject to judicial review or appeal within the exclusive jurisdiction of the National Labor Relations Board (NLRB). An unfair labor practice which also constitutes a breach of the collective bargaining agreement does not preclude court action or arbitration to enforce the contract.<sup>76</sup> State causes of action are preempted if they concern conduct which is regulated by the NLRA or is intended by Congress to be unregulated. However, states may regulate conduct that involves deeply rooted local interests or is of peripheral concern to federal law.<sup>77</sup>

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<sup>72</sup> Typical state law tort claims include: (1) wrongful discharge, (2) negligent termination, (3) fraudulent misrepresentation, (4) defamation, (5) intentional infliction of emotional distress, (6) invasion of privacy, (7) interference with contractual relations, (8) negligent hiring and retention, and (9) assault and battery.

<sup>73</sup> Currently pending in the United States Congress is legislation that would amend Title VII to include, *inter alia*, the right to a jury trial and compensatory and punitive damages.

<sup>74</sup> 29 U.S.C. § 157.

<sup>75</sup> *Id.* at § 158.

<sup>76</sup> Louis B. Livingston, *Unfair Labor Practice Charges Against Employers*, RESOURCE MATERIALS: LABOR AND EMPLOYMENT LAW, American Law Institute 989 (4th ed. 1988) [hereinafter Livingston], (citing, *Smith v. Evening News*, 371 U.S. 195 (1962)).

<sup>77</sup> Livingston, *supra* note 75, citing, *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983).



NLRA actions are commenced by filing a charge with the appropriate NLRB regional office. Generally, the charge must be filed and served within six months of the conduct alleged in order to violate the NLRA. The NLRB then investigates the charge and, if warranted, issues a complaint.

The NLRB will defer to a prior arbitration decision if: (1) the arbitration proceedings were fair and regular; (2) all parties had agreed to be bound by arbitration; (3) the award was not repugnant to the purposes and policies of the NLRA, even if the NLRB might have decided the case differently; (4) the contractual and statutory issues are factually parallel; (5) the arbitrator was presented generally with facts relevant to the statutory issue; and (6) the party opposing deferral does not meet the burden of showing that the arbitration was deficient.<sup>78</sup> The NLRB will not defer to a prior arbitration award, however, when the issue before the NLRB involves questions of representation, accretion, or a unit appropriate for bargaining.<sup>79</sup> Finally, the NLRB may defer cases that have not yet reached arbitration if the dispute is in the grievance procedure, is likely to be arbitrated and presents issues such as those discussed above which would be suitable for post arbitration deferral.<sup>80</sup>

After the NLRB investigates the charge, four outcomes are possible at the regional level: (1) the NLRB solicits withdrawal of the charge; (2) the NLRB dismisses the charge; (3) the NLRB seeks informal or formal settlement; or (4) the NLRB issues an administrative complaint.

When a complaint is issued, the case proceeds to a hearing before an NLRB administrative law judge (ALJ). The NLRB regional attorney prosecutes the case on behalf of the NLRB's general counsel. The charging party may also intervene and participate. Parties may file exceptions to the ALJ's decision which are reviewed by the Board. Further review of NLRB decisions and orders is performed in the circuit court.

## VII. CONCLUSION

The nature of employment dispute resolution in the United States is continually changing. The employer-employee relationship is increasingly regulated by legislation. This makes "noncontract" based actions, at the very least, significant additions to traditional forms of employment dispute resolution such as grievance arbitration. In 1990 alone, approximately thirty employment-related bills were pending before the United States Congress. These involved topics such as family leave, electronic surveillance, fetal monitoring, drug testing, child care and pension benefits. With the ever increasing scope of potential employer liability, com-

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<sup>78</sup> Livingston, *supra* note 75 (citing, *inter alia*, Spielberg Manufacturing Co., 112 NLRB 1080 (1955); OLIN Corp, 268 NLRB 573 (1984); Louis G. Freeman Co, 270 NLRB 80 (1984) (arbitrator need not explicitly attempt to resolve statutory issue)).

<sup>79</sup> Livingston, *supra* note 75, at 1006.

<sup>80</sup> *Id.*

panies are well-advised to consider the benefits of pre-litigation dispute resolution methods.

With the creativity and commitment of employers, employees, and labor organizations to recognize and resolve their sometimes divergent needs, including the need to compete and survive globally, dispute resolution vehicles will continue to adapt and improve.

