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Overview of a Pre-Dispute Employment Resolution Process

— by Lee Hornberger

This article reviews Michigan law concerning pre-dispute employment resolution processes and provides a suggested resolution process.

In *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 624 (1980), the Supreme Court stated that "the employer can avoid the perils of jury assessment by providing for an alternative method of dispute resolution." In Renney v Port Huron Hospital, 427 Mich 415 (1986), the Court found that a resolution procedure was defective when it did not comport with elementary fairness.

Pre-dispute agreements to arbitrate employment claims, including statutory discrimination claims, are enforceable so long as no rights or remedies are waived and the procedure is fair. *Rembert v. Ryan's Family Steak Houses*, Inc, 235 Mich App 118 *(en banc), lv den*, 461 Mich 923 (1999). Pre-dispute agreements are valid if the parties have agreed to arbitrate the claims, there is no statute prohibiting such agreements, the arbitration agreements do not waive substantive statutory rights and remedies, and the arbitration procedures are fair so that the employee may effectively vindicate statutory rights.

Rembert rights include (1) clear notice that the employee is waiving the right to adjudicate claims, including discrimination claims, in a judicial forum and is choosing instead to arbitrate these claims; (2) the right to be represented by counsel in the arbitration; (3) a neutral arbitrator, meeting the criteria of MCR 3.602(E); (4) provision for reasonable discovery, including permitting the taking of depositions for use as evidence and subpoena power pursuant to MCR 2.506; (5) a fair arbitral hearing, including the procedures provided for in MCR 3.602; and (6) a written decision containing findings of fact and conclusions of law.

"Pre-dispute agreements to arbitrate employment claims, including statutory discrimination claims, are enforceable so long as no rights or remedies re waived and the procedure is fair."

Cole v. Burns International Security Services, 105 F3d 1465 (DC Cir 1997), outlined fairness requirements for pre-dispute resolution procedures. Cole required a neutral arbitrator, appropriate discovery, a written award, all relief available in court, and the employee's not being required to pay unreasonable costs. Under *Morrison v. Circuit City Stores, Inc*, 317 F3d 646 (6th Cir 2002)(en banc), a cost splitting provision that placed an undue burden on employees was found unenforceable; and limitations on statutory recovery rights were found unenforceable. Similarly, an arbitration agreement was unenforceable where the employer's exclusive control over arbitrator selection was so unfair as to prevent the employee from effectively vindicating her rights. *McMullen v. Meijer, Inc*, 355 F3d 485 (6th Cir 2004).

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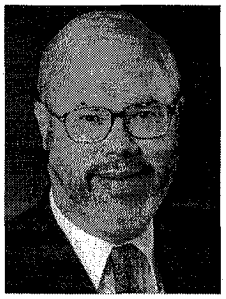

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With that as a background, we will review the essence of a process for a small or medium sized employment setting with the realization that each workplace calls for a slightly different procedure. A major goal for a resolution process is to have a fair, final, and binding process that respects all parties' rights and dignity.

Dispute Resolution Process Suggestions

There should be legal consideration by the employee for the arbitration agreement. This consideration would include a signed written agreement that the parties are entering into the process as a condition of hire, continued employment, and any bonuses, raises, or promotions received during employment.

The agreement process will cover all matters directly or indirectly related to recruitment, employment, treatment, or termination of employment; including, but not limited to, claims involving laws against discrimination whether brought under federal and state law, and claims involving co-employees. Excluded from coverage will be workers' compensation claims, unemployment compensation claims, claims arising under employee benefit plans and collective bargaining agreements, and disputes concerning trade secrets and non-competition agreements.

There should be clear notice of waiving all rights to a jury trial or judicial determination on behalf of anyone on any covered issue.

The process should not affect an employee's ability to file a charge with the Equal Employment Opportunity Commission, National Labor Relations Board, or similar state and local agencies.

The proceedings, including the collaboration, mediation, and arbitration proceedings, should be completely confidential and not disclosed to the public unless otherwise required by law or by enforcement proceedings concerning the process.

There should be legal consideration by the employee for the arbitration agreement.

This process will not change the at-will status of the employee or the at-will employment relationship.

There should be a provision providing that there are no other agreements between the parties concerning the resolution of employment related disputes unless such agreements are in writing signed by both the employee and the company president.

The process should provide that if any portion of the process is determined to be invalid, unenforceable or inoperative, such determination will not affect any of the remaining portions of the process and that all issues concerning the enforceability of the process will be decided by the arbitrator.

The process would be enforceable in court in the Western District of Michigan pursuant to the Federal Arbitration Act, 9 USC 1 et seq, utilizing Michigan law.

Collaborative Meeting

The process will call for an initial good faith collaborative meeting with at least the supervisor, the employee, and the human resource person in an attempt to resolve the situation. This will resemble a mediation without a mediator. Information concerning collaborative law can be found at www.collaborativelaw.com.

Mediation

If the matter cannot be resolved in the collaborative meeting, the parties will attempt in good faith to resolve the situation in mediation pursuant to MCR 2.411(A)(2), (B)(4), and (C)(2) and (5). A neutral mediator or co-mediators will work with the parties to jointly explore and attempt to resolve the situation. The services and procedures of the local Community Mediation Service will be utilized. Community Dispute Resolution Act, MCL 691.1556 *et seq*. The confidential mediation session will be held and completed within sixty calendar days of contacting CMS. The employer will pay the CMS fees. Neutral mediators will attempt to help the parties confidentially resolve the situation in a mutually respectful atmosphere.

Arbitration

If good faith mediation does not resolve the situation, the parties will proceed to final and binding arbitration before a neutral arbitrator.

Time requirements would provide that the arbitration request shall be filed within a specified number of days of the event giving rise to the dispute.

Unless determined otherwise by the arbitrator, the employer will pay for the services of the arbitrator concerning statutory issues. The arbitrator will determine who will pay for the costs of the arbitrator's services where there are non-statutory claims at issue. The employee will not be required to pay an arbitrator's compensation in order to secure the resolution of employment discrimination statutory claims. When one arbitrator is utilized, the company will pay all costs and expenses of the

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arbitrator, unless otherwise ordered by the arbitrator.

The neutral arbitrator shall be appointed through the American Arbitration Association or National Arbitration Forum employment rules and the conduct of the arbitration proceeding shall be in accordance with AAA or NAF employment rules to the degree consistent with this agreement.

The parties have the right to representation by counsel of their own choosing in the arbitration process. The arbitrator shall have the authority to order the payment of attorney fees as a judge would under federal statutory law or Michigan law.

The arbitrator is fully bound to apply statutory and other applicable public law, both as to substance and remedy, in accordance with statutory requirements and prevailing federal statutory or Michigan judicial interpretations. The arbitrator can award all relief authorized by applicable law.

After the selection of the arbitrator, there will be a pre-hearing meeting with the parties and their counsel. The purpose of this meeting will be to discuss resolution, discovery, simplification of issues, hearing procedures, and compliance with the arbitration procedure. If the arbitrator upon request finds that a party did not mediate in good faith, the arbitrator may return the matter to mediation for good faith mediation.

Either party can have a court reporter at the hearing. The party requesting the court reporter shall pay for the original transcript and the other party, if it wishes, can pay for a transcript copy. The party not ordering a transcript will have reasonable access to the original transcript. The party ordering the original transcript will provide a copy to the arbitrator.

Unless otherwise provided, the arbitrator shall give deference to but not be strictly bound by the Michigan Court Rules concerning discovery and motion practice, consistent with the purposes of arbitration.

Unless otherwise provided, the arbitrator shall give deference to but not be strictly bound by the Michigan Rules of Evidence including rules on examination and cross examination of witnesses, consistent with the proposes of arbitration.

The arbitrator, upon request, will provide for discovery pursuant to the AAA, NAF, or National Association of Securities Dealers employment discovery rules.

The arbitrator will have the power to subpoena and subpoena duces tecum parties and non-parties to attend the arbitration hearing pursuant to MCR 3.602(d). A copy of all subpoenas shall be immediately provided to all parties at the time of issuance.

Each side may provide a pre-arbitration statement of no more than ten pages and an oral opening of no more than thirty minutes. Giving due consideration to the issues and other appropriate factors, the arbitrator, upon request, may provide for longer submissions.

Each side will have four hours of evidence presentation time, including all witness examination of any kind by that party. Giving due consideration to the issues and other appropriate factors, the arbitrator, upon request, may provide for additional time.

Each side may provide a post-hearing written argument of no more than ten pages. Giving due consideration to the issues and other appropriate factors, the arbitrator, upon request, may provide for a different length. There will be no oral post-hearing arguments unless ordered by the arbitrator.

The arbitrator will issue the award within twenty calendar days of the closing of the hearing, including the receipt of the transcript. The reasoned award will contain findings of fact and conclusions of law. The award will not be more than ten pages in length. Giving due consideration to the issues and other appropriate factors, the arbitrator, upon request, may submit a longer award.

The arbitration award may be entered as a judgment by the applicable court.

The arbitrator is fully bound to apply statutory and other applicable public law, both as to substance and remedy, in accordance with statutory requirements and prevailing federal statutory or Michigan judicial interpretations.

Conclusion

This article has reviewed the establishment of a prototype pre-dispute employment resolution program, including collaboration, mediation, and arbitration, in order to create a process which has "equal judicial dignity" in the resolution of employment disputes. *Renney, supra*, 427 Mich at 436 n. 16.