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# Due Process Protocol Influence On Statutory Claims Employment Arbitration In Michigan

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## Introduction

This article reviews the influence of the "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship" (Protocol) (1995) on statutory claims employment arbitration in Michigan. <http://naarb.org/protocol.asp>

In response to the growth of pre-dispute employment arbitration and at the urging of the National Academy of Arbitrators, the Task Force on Alternative Dispute Resolution in Employment was created. The Task Force consisted of American Bar Association, American Civil Liberties Union, Federal Mediation and Conciliation Service, National Academy of Arbitrators, National Employment Lawyers Association, and Society of Professionals in Dispute Resolution representatives.

On May 9, 1995, the Task Force issued its "Protocol" recommendations. Arnold M Zack, 1994-1995 President of the National Academy of Arbitrators, called the Protocol a "modest undertaking to protect the credibility of labor management arbitration and to provide guidance to NAA arbitrators who might be undertaking such [employment arbitration] work." "The Due Process Protocol: Getting There and Getting Over It," *Beyond the Protocol: The Future of Due Process in Workplace Dispute Resolution*, 2 NAA Conference, Chicago, April 13-14, 2007 (Beyond). [http://](http://www.law.harvard.edu/programs/lwp/people/staff/papers/zack/Protocol%20getting%20there%20and%20over%20it.%20Published%20format.pdf)

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## The Protocol

### Statutory Employment Disputes

The Protocol concerns statutory employment dispute arbitration. It provides that such arbitration which is conducted under proper due process safeguards should be encouraged in order to provide expeditious, inexpensive, and fair enforcement of statutory disputes.

### Timing of Agreement to Arbitrate

The Protocol did not achieve consensus on the timing of an agreement to arbitrate statutory disputes. The Protocol achieved consensus concerning some procedural due process issues.

### Representation by Counsel

The Protocol provides:

1. Employees should have the right to be represented by a representative of their own choosing. This right should be included in the arbitration agreement.
2. Payment for representation should be determined

between the employee and the representative. The employer should reimburse a portion of the employee's attorney fees, especially for lower paid employees. The arbitrator should have authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law or the interests of justice.

#### Neutral Arbitrator

The Protocol provides that:

1. Arbitrators should have hearing conduct skills, statutory issue knowledge, and familiarity with the workplace and employment environment. Arbitrator rosters should be established on a nondiscriminatory and diverse basis in order to satisfy the parties that their interests and objectives will be respected.
2. Arbitrators whom both parties trust should be selected. The arbitrator must be unbiased. Arbitrators should decline cases if they believe the procedure lacks requisite due process.
3. Upon request of the parties, the designating agency should utilize a procedure such as that of the American Arbitration Association. The selection process could empower the agency to appoint an arbitrator if the striking procedure is unacceptable or unsuccessful.
4. The arbitrator has a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest. The arbitrator should be required to sign an oath affirming the absence of such present or preexisting situations.
5. Arbitrator impartiality is best assured by the parties sharing the arbitrator fees and expenses. If economic conditions do not permit this, the parties should agree on an appropriate split. In the absence of an agreement, the arbitrator should determine the payment allocation.

#### Discovery

The Protocol provides for access to information and encourages adequate but limited pre-hearing discovery. Employees should have reasonable pre-hearing and hearing access to all information reasonably relevant to their claims. Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available.

#### Fair Hearing

The Protocol provides the arbitrator should be bound by applicable agreements, statutes, and procedural rules,

including the authority to determine the hearing time and place; permit reasonable discovery; issue subpoenas; decide arbitrability; preserve hearing order and privacy; rule on evidentiary issues; and determine the close of the hearing and procedures for post-hearing submissions. The arbitrator should be empowered to award whatever relief would be available in court.

#### Written Opinion

The Protocol recommends the arbitrator should issue an award resolving the submitted dispute. The award should contain:

1. A summary of the issues, including types of disputes, damages and other relief requested and awarded,
2. A statement of any other issues resolved, and
3. A statement regarding the disposition of any statutory claims.

The Protocol recommends the arbitrator's award should be final and binding and the scope of review should be limited.

#### Designating Agencies' Responses To The Protocol

##### American Arbitration Association

According to the AAA, the Protocol seeks to ensure fairness and encourages arbitration of statutory disputes, provided there are due process safeguards. AAA Employment Arbitration Rules and Mediation Procedures, November 1, 2009 (AAA Rules). [https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004362&revision=latestreleased](https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased)

The AAA Rules provide for:

1. The right to representation by counsel or other authorized representative. Rule 19.
2. Appointment of neutral arbitrators, party appointed arbitrators, chairperson, disclosure, disqualification of arbitrator, communication with arbitrator, and arbitrator vacancies; and the employer pays the arbitrator's compensation for disputes arising out of an employer-promulgated plan. Rules 12-18, and 44.
3. Reasonable discovery, including discovery of witness information and discovery authority. Rules 8-9.
4. A fair arbitral hearing, including providing for administrative conferences, arbitration management conferences, hearing locale, stenographic record, oath requirements, order of proceedings, evidence require-

ments. and closing of hearing. Rules 7-8, 10-11, 20, 25, 28, 30, and 33.

5. A written award. Rule 39.

#### National Academy of Arbitrators

The NAA has Guidelines for Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration (2014). [http://naarb.org/Guidelines\\_for\\_standards.asp](http://naarb.org/Guidelines_for_standards.asp) The Guidelines are intended to assist arbitrators in deciding whether to accept a case and to fairly conduct a case. The Guidelines provide for:

1. Adequate rights of representation.
2. A fair manner for the selection of a neutral arbitrator. Arbitrator compensation arrangements should be fair.
3. Arbitrator authority to ensure reasonable discovery.
4. A fair hearing. This includes arbitrator remedial authority equal to that provided by statute, and no unfair hearing restrictions.
5. A written award.

#### Financial Industry Regulatory Authority

Statutory employment claims may be arbitrated only if the parties have agreed to arbitrate them, either before or after the dispute arose. [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=4096](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096) If the parties agree to arbitration, the claim will be administered under Rule 13802. FINRA Rules provide for:

1. Right to representation by counsel. Rule 13208.
2. Neutral public arbitrators. Rule 13802.
3. Discovery. Rules 13505-13514.
4. Fair hearing. Rules 13600-13609. This includes any relief that would be available in court. Rule 13802 (e).
5. The Arbitrator must issue an award setting forth a summary of the issues, including the types of disputes, the damages or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claims. Rule 13802(e).

#### JAMS

JAMS has promulgated its Policy on Employment Arbitration Minimum Standards of Procedural Fairness (JAMS Policy). <https://www.jamsadr.com/employment-minimum-standards/> JAMS supports the application of the Protocol and intends that its Employment Arbitration

Rules and Procedures be consistent with the Protocol. The JAMS Policy provides for:

1. The right to representation by counsel. Standard No 3. Rule 12.
2. Arbitrator neutrality. Standard No 2. Rule 7.
3. Discovery, including exchange of core information and some depositions. Standard No 4.
4. A fair hearing, including all remedies available in a court, presentation of evidence, hearing location, and mutuality, Standard No's 1, 5, and 6-7. Rules 19, 20, 21, and 22.
5. A written award. Standard No 8. Rule 24.

#### Initial Court Discussion Of Protocol

Initially the Protocol was cited by some courts in considering arbitration due process issues. Jacquelin Drucker, "The Protocol in Practice: Reflections, Assessments, Issues for Discussion, and Suggested Actions," Beyond. <http://heinonline.org/HOL/LandingPage?handle=hein.journals/emprght11&div=16&id=&page=> *Hooters v Phillips*, 39 F Supp 2d 582 (D SC 1985), aff'd 173 F3d 933 (4th Cir 1999), alluded to the Protocol. *Rosenberg v Merrill Lynch Pierce Fenner & Smith*, 995 F Supp 190, 208 n 23 (D Mass 1998), aff'd 170 F3d 1 (1st Cir 1999), cited the Protocol.

*Cole v Burns Int'l Security Services*, 105 F3d 1465, 1490-1491 (1997), cited the Protocol concerning the arbitrator fee payment issue. *Cole* held an arbitration agreement must:

1. Provide for neutral arbitrators,
2. Provide for appropriate discovery,
3. Require a written award,
4. Provide for all relief available in court, and
5. Not require employees to pay either unreasonable costs or any arbitrators' fees as a condition of access to the arbitration tribunal. *Id.* at 1482.

#### Arbitration Due Process In Michigan Courts

The Michigan Supreme Court had previously reviewed arbitration procedural due process issues in *Renny v Port Huron Hosp*, 427 Mich 415; 398 NW2d 327 (1986). *Renny* held:

where an employee has expressly consented to submit a complaint to a joint employer-employee grievance board established by the employer with the knowledge that the resulting decision is final and binding, the decision shall be final unless the

court finds as a matter of law that the procedures used did not comport with elementary fairness. *Id.* at 418.

In *Renny* the employee was not permitted to have counsel present or see the complaint against her. She was not informed of the identity of witnesses testifying at the hearing. She was not present during the testimony or during opening remarks. There were no records or transcripts of the discharge hearing, and the tribunal made no finding. No witnesses could be called without the tribunal's consent. A witness's appearance was voluntary. An employee had no right to cross examine or rebut testimony or to make closing arguments. *Id.* at 423-424.

*Renny* held elements necessary to fair arbitration proceedings are:

1. Adequate notice to persons who are to be bound by the adjudication;
2. The right to present evidence and arguments and the fair opportunity to rebut evidence and argument by the opposing argument;
3. A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status;
4. A rule specifying the point in the proceeding when a final decision is rendered; and,
5. Other procedural elements as may be necessary to ensure a means to determine the matter in question. ... *Id.* at 437.

A Court of Appeals Conflicts Panel subsequently reviewed arbitration procedural due process issues in *Rembert v Ryan's Family Steak Houses, Inc.*, 235 Mich App 118; 596 NW2d 208, lv dn 461 Mich 923 (1999).

*Rembert* did not cite the Protocol although it cited the AAA National Rules for the Resolution of Employment Disputes. *Id.* at 160 n 32. *Rembert* indicated:

While our decision upholds the principle of freedom of contract and advances the public policy that strongly favors arbitration, it does so subject to two conditions generally accepted in the common law: that the agreement waives no substantive rights, and that the agreement affords fair procedures. *Id.* at 124.

*Rembert* noted that *Renny* and *Cole*, as well as leading ADR organizations, "suggest certain baseline fundamentals to ensure fairness in an arbitral process for discrimination claims." *Id.* at 161. *Rembert* held that to satisfy *Renny* and MCR 3.602, the arbitration procedures must provide:

1. Clear notice the employee is waiving the right to adjudicate claims in court and is instead opting for arbitration,
2. The right to representation by counsel,
3. A neutral arbitrator,
4. Reasonable discovery,
5. A fair arbitral hearing, and
6. Written awards containing findings of fact and conclusions of law. *Id.* at 163-165.

*Saveski v Tisco Architects, Inc.*, 261 Mich App 553, 556; 682 NW2d 542 (2004), said the *Rembert* record requirements are more stringent because a court reviewing a civil rights claim must have a means of analyzing whether the arbitrator properly preserved the employee's statutory rights.

There are no other published Michigan cases discussing the *Rembert* due process requirements. *Miller v Miller*, 474 Mich 27; 707 NW2d 341 (2005), held a Michigan Domestic Relations Arbitration Act, MCL 600.5701 *et seq.*, arbitration hearing does not have to be a formal hearing if "the parties and the arbitrator" agree it does not have to be. Any possible tension between *Miller* and *Rembert* is probably unimportant in employment arbitration cases since parties are unlikely to agree to an informal hearing.

#### Michigan Uniform Arbitration Act

The Michigan Uniform Arbitration Act, MCL 691.1681 *et seq.* (effective July 1, 2013), governs an agreement to arbitrate whenever made. MCL 691.1683. A party may be represented by counsel. MCL 691.1696. The arbitrator may award attorney fees if authorized by law or by agreement of the parties. MCL 691.1701. An individual who has a known, direct, and material interest in the outcome of the arbitration or a known, existing, and substantial relationship with a party shall not serve as a neutral arbitrator. MCL 691.1691 and .1692. There are provisions for subpoenas, depositions, and discovery. MCL 691.1697. The arbitrator may award punitive damages or exemplary relief if authorized by law and the evidence justifies the award and may order remedies that the arbitrator considers just and appropriate under the circumstances. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award. MCL 691.1701. An arbitrator shall make a record of the award. MCL 691.1699.

#### Conclusion

Michigan case law is largely consistent with the Protocol recommendations of right to representation, reasonable

discovery, impartial arbitrators, fair hearing, and written awards. *Rembert* did not adopt the Protocol theory of the employer paying part of the employee's attorney fees, absent statutory requirement. *Miller's* permission of an informal hearing, if agreed to by the parties and the arbitrator, has not affected the *Rembert* due process rules. The Michigan Uniform Arbitration Act is not inconsistent with the Protocol and codifies some of the Protocol recommendations. ■

#### About the Author

**Lee Hornberger** is an arbitrator and mediator. He was selected to the 2016 Michigan Super Lawyers list. He is a recipient of the George N. Bashara, Jr. Award from the State Bar's Alternative Dispute Resolution Section in recognition of

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