



ADR IN THE WORKPLACE

ISSUE: Should employers and employees be able to engage in mediation and mandatory binding arbitration of employment disputes as an alternative to litigation?

WHY IMPORTANT: The use of Alternative Dispute Resolution (“ADR”) in employment is common and increasing as a means of avoiding litigation, addressing *more* employee issues, and resolving these concerns more amicably. Given the costs, delays, and divisiveness of employment litigation, a more sensible and conciliatory option is preferable for employers *and their employees*. The net result of the use of ADR is: (1) more employee complaints received *and* resolved; (2) employee complaints resolved sooner and with less tension; (3) less turnover/more favorable preservation of employment relationships; (4) improved morale, more effective communication, and enhanced constructive input by employees into their companies; and (5) better workplaces. Many government and judicial institutions *favor* ADR as a means of reducing the backlog clogging our courts, giving *more* people legal recourse to have their issues addressed, expediting resolution of employment claims, and saving money.

THE OPPOSITION: The American Association for Justice (formerly the American Trial Lawyers Association) and another trial lawyer association, the National Employment Lawyers Association, lead the opposition to ADR, claiming that arbitration is skewed against consumers and employees, and that it should be voluntary and non-binding. The plaintiffs’ bar recognizes that arbitration, as an option to litigation, is more likely to limit awards for damages and attorneys’ fees, and their ability to negotiate lucrative settlements. They claim it is a fundamental right that everyone deserves “their day in court,” and that large verdicts and settlements send a message to companies and inhibit future misconduct. Organized labor, a normal ally of the plaintiffs’ bar, is in an awkward position on ADR since arbitration has long been a hallmark of union representation, and has largely been on the sidelines on this issue.

STATUS: Legislation in the 111th Congress which would prohibit or greatly restrict ADR use:

- Rep. Hank Johnson (D-GA) and Sen. Russ Feingold (D-WI) introduced the broad-based “Arbitration Fairness Act of 2009” as H.R. 1020 and S. 931. The AFA is *the* major threat to the employer community;
- President Obama signed into law an amendment to the 2010 Defense Appropriations bill that effectively bans mandatory arbitration agreements for defense contractors regarding Title VII discrimination claims and tort claims involving sexual assault or harassment. The amendment, sponsored by Senator Al Franken (D-MN), passed the Senate 68-30 on October 6, 2009, and is effective February 19, 2010;
- Two industry-specific anti-arbitration bills applicable to nursing homes were reintroduced in this 111th Congress: Rep. Linda Sanchez’s (D-CA) H.R. 1237, and former Senator Mel Martinez’s (D-FL) S. 512;
- The American Recovery and Reinvestment Act, H.R. 1, included a provision voiding pre-employment arbitration agreements in whistleblower claims against companies receiving federal stimulus money;
- On May 7, 2009, Rep. Brad Miller’s (D-NC) H.R. 1728 to amend the Truth in Lending Act passed the House containing anti-arbitration language which Rep. Tom Price (R-GA) unsuccessfully sought to strike in committee; and
- President Obama proposed allowing the Securities and Exchange Commission to ban pre-dispute arbitration.

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