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Chapter 8

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Arbitration of Employment Discrimination Claims: Can Arbitration Replace Traditional Adjudication of Cases?

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Synopsis

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1 The author wishes to acknowledge the substantial contribution of Andrea Naested, Esq. and Diana Schroeher in the preparation of this chapter.

§ 8.01. Introduction.

Alternative dispute resolution in the employment context refers to a variety of methods and procedures for resolving employee disputes. Programs such as open door policies, conciliation or in-house mediation are informal, voluntary types of alternative dispute resolution which allow parties to design their own solutions to employee disputes. Typically, these internal problem solving mechanisms resolve many disputes successfully and keep the employment relationship running smoothly.[2]

At the other end of the spectrum, alternative dispute resolution also refers to mandatory, binding arbitration. Arbitration is generally an adversarial process conducted in a more judicial type setting. In recent years, employers have increasingly implemented mandatory arbitration programs to deal with employee disputes, including federal employment discrimination claims. Requiring employees to submit statutory employment discrimination claims such as Title VII,[3] Americans with Disabilities Act (ADA)[4] and Age Discrimination in Employment Act (ADEA)[5] claims to arbitration has resulted in controversy because, unlike voluntary, informal alternative dispute resolution policies, arbitration renders a final binding decision by a third party. Thus, arbitration imposes a decision on the parties rather than allowing the parties to devise their own solution.

In the traditional labor relations setting, the practice of arbitrating grievances arising under collective bargaining agreements is well established. This practice exists due to the national policy favoring collective bargaining and industrial self-government, thus promoting industrial peace.[6] Even in the traditional labor relations context, however,

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2 Richard A. Bales, "Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Agreements," 47 *Baylor L. Rev*. 591, 594 (Summer 1995).

3 Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1964).

4 42 U.S.C. §§ 12101-12213 (1990).

5 29 U.S.C. § 621 *et seq*. (1967).

6 Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 735 (1981).

the Supreme Court has placed limits on the enforceability of arbitration provisions contained in collective bargaining agreements to the extent that they implicate individual employees' statutory rights.[7]

The arbitration of statutory employment discrimination claims has raised a number of practical and legal issues. The federal courts are addressing these issues in a host of cases as employers attempt to implement various alternative dispute resolution systems featuring arbitration. Because of the almost constant stream of federal court decisions in this still developing area, this chapter will address various issues that have arisen thus far and provide a basis for understanding and anticipating the types of concerns that are inherent in this dynamic area of the law.

Among the issues to be addressed is the timing of the agreement to arbitrate. Is the arbitration provision a pre-dispute waiver of rights contained in a collective bargaining agreement, an employee handbook, or an employment application? Or was arbitration agreed to after the claim arose, thus constituting a post-dispute waiver of the right to a judicial forum? Post-dispute voluntary arbitration agreements occur when the parties decide to use arbitration *after a dispute arises*. Such agreements do not often result in litigation, because the parties' decision to arbitrate is viewed as voluntary and informed. On the other hand, pre-dispute mandatory arbitration agreements occur when the parties waive their right to a judicial forum before the dispute arises; for example, the arbitration provision may be contained in an employee handbook. The pre-dispute versus post-dispute arbitration agreement debate often centers on whether employers should have the right to insist on an agreement to arbitrate statutory claims as a condition of employment. This chapter focuses primarily on issues raised with respect to pre-dispute arbitration agreements.[8]

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7 Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Wright v. Universal Maritime Service Corp., 119 S. Ct. 391 (1998).

8 Other issues include whether the statutory claim is precluded from arbitration by the statute under which the claim arose, or by the policies underlying the statute; whether the arbitrator is authorized to award all remedies recoverable in a court of law and whether there are adequate procedural safeguards in place; procedural issues such as