



ALTERNATIVES TO LITIGATION

Mandatory Employment
Arbitration Agreements

Walter &
Haverfield ^{LLP}
attorneys at law

Employment Arbitration/ADR

- Avoid court litigation for employment-related disputes (wrongful termination; discrimination/harassment, failure to hire/promote, etc.)
- Cost savings
- Procedural/administrative controls
- Statutes of limitations can be defined
- Right to file EEOC charge unaffected

Employment Arbitration/ADR

- Federal Arbitration Act (9 USC §2):
 - “A written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”
- Supreme Court “has construed the FAA as establishing a liberal policy in favor of arbitration.” *EEOC v. Waffle House* (2002).

Employment Arbitration/ADR

- *Circuit City Stores, Inc. v. Adams* (2001)
 - FAA covers all employment contracts with arbitration provision except those involving transportation workers directly engaged in interstate commerce, etc.
- *Gilmer v. Interstate/Johnson Lane* (1991):
 - Statutory claims (ADEA) are subject to FAA (“The Court has been quite specific in holding that arbitration agreements can be enforced without contravening [congressional policy].”)
- *EEOC v. Waffle House* (2002): EEOC not bound by employment arbitration agreement

Employment Arbitration/ADR

- Agreement should provide employees with meaningful opportunity to resolve claims in fair and cost-effective manner.
- Avoid over-reaching: danger of agreement being held unconscionable
- Procedural & substantive considerations

Employment Arbitration/ADR

- Design considerations
- Mutual assent/employee consent/mutuality
- Consideration (employment/continued employment)
- Arbitration & related costs (arbitrator fee, filing fees, etc.) should be fair to employee
- Restriction of remedies should be avoided

Employment Arbitration/ADR

- Clarify that administrative agency charges OK
- Procedural limitations on arbitration?
 - Limited discovery? Less formal procedure?
- Be upfront with employees
- ADR & arbitration
 - I.e., internal grievance steps prior to arbitration can enhance effectiveness

Employment Arbitration/ADR

- Mediation as ADR element?
- Drawbacks?
 - Implementation costs
 - Enforcement costs
 - Finality of arbitrator's decision
- AAA, NAM, JAMS
- AFA legislation



Employment Arbitration/ADR

Bill Hanna

Walter &
Haverfield LLP
attorneys at law