Pre-Employment Dispute Arbitration Agreements: Yes, No and Maybe

Walter J. Gershenfeld
COMMENTARY

PRE-EMPLOYMENT DISPUTE ARBITRATION AGREEMENTS: YES, NO AND MAYBE

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I. INTRODUCTION

The relatively straightforward world involving statutory rights (civil rights and other protective labor legislation) and collective bargaining or individual rights has been dramatically affected by the *Gilmer v. Interstate/Johnson Lane Corp.* decision and its progeny. Previously, an agreement to arbitrate a dispute did not result in terminating the union or individual right to proceed subsequently under statutory auspices. Under *Gilmer*, finality of arbitration could become the norm, at least in individual cases. The *Gilmer* decision will be discussed below in the context of pre-employment agreements.

Both statutory and non-statutory claims under pre-employment arbitration agreements will be covered in this Article. After briefly reviewing the earlier approach to pre-employment arbitration agreements,
I will consider the *Gilmer* decision in relationship to the recent Dunlop Commission\(^3\) and Protocol Task Force\(^4\) recommendations, positions of appointing agencies and approaches by regulatory bodies. The differences between statutory and non-statutory cases will be discussed and recommendations made for both the present situation involving pre-employment dispute arbitration agreements and a possible future scenario based on legislative and/or court change. Emphasis will be placed on quality standards for employment arbitration and the effect of their presence or absence on mandatory employment arbitration.

II. EARLIER PRE-DISPUTE AGREEMENTS OR REQUIREMENTS

A. Collective Bargaining

Collective bargaining agreements requiring arbitration of grievances are the most common type of pre-employment arbitration agreement and are routinely accepted by the courts. This is particularly true since the 1960 trilogy of Supreme Court cases emphasized the primacy of negotiated arbitration agreements as the appropriate approach to the resolution of workplace disputes.\(^5\)

The relationship between labor-management contractual disputes and existing law became an issue under the National Labor Relations Act in cases involving both an alleged contractual violation as well as an alleged unfair labor practice. The National Labor Relations Board ("NLRB") created a doctrine of deferral in the *Spielberg Manufacturing Co.*\(^6\) case—which was later amplified in other cases—calling for acceptance of arbitral decisions in certain types of cases, so long as enumerated conditions were met.\(^7\) These conditions included the requirements that the arbitrator had addressed the statutory issue, the hearing was fair and, in an attractive turn of phrase, the outcome was not

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7. See id. at 1082.
"repugnant" to the Act. The standards support arbitration finality but leave the door open for the NLRB to preserve statutory rights when these rights require protection.

Stronger protection of statutory rights occurred in another case, but it left room for arbitration to play an important role. Alexander v. Gardner-Denver Co. arose under Title VII of the Civil Rights Act of 1964 ("Title VII") and involved a racial discrimination claim which had been denied by an arbitrator. The Court affirmed an individual's right to proceed with a statutory action, however—in what is usually termed the "Famous Footnote 21"—also stated that an arbitrator's decision could be afforded "great weight." Thus, Gardner-Denver preserved statutory rights and Spielberg provided an important role for arbitration while maintaining NLRB review, if needed. Recently, however, a federal circuit court has introduced the possibility that a Title VII case going to arbitration under a collective bargaining agreement may not qualify for a statutory appeal. On March 12, 1996, the Fourth Circuit rejected the Gardner-Denver approach when it held a voluntary agreement to arbitrate as providing finality.

Federal employees have a choice of forum. Claims of contractual and/or statutory violation can be taken to arbitration (assuming a collective bargaining agreement is present), the Merit System Protections Board or the Cognizant Anti-Discrimination Agency if a statutory claim is present. State and local employees generally have the same type of choice.

B. Other Arbitration Arrangements

Individual employment arbitration agreements, typically between executives and companies, have been in existence for some time. Although no meaningful count is available, it is assumed that the number of such agreements was relatively small until recently.

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8. Id.
11. See Alexander, 415 U.S. at 42.
12. See id. at 59-60.
The same holds true for company or group-wide plans calling for arbitration of employment disputes which are made available to employees in non-union companies. The plans were often criticized, particularly by the labor movement, because they failed to provide a fair system for adjudication of disputes and attempted to circumvent union organization.

The securities industry is the first instance where a nationwide set of non-union employers in one industry organized themselves to provide arbitration for the resolution of disputes in their field. The arbitration plan was basically concerned with customer-broker disputes. Its terms, however, also applied to all employees of member firms of the New York Stock Exchange who were required to agree to take employment disputes to arbitration as a condition of employment.

Thus, pre-employment dispute agreements to arbitrate exist under a variety of circumstances. For a number of reasons, there are pressures for continued growth in the use of arbitration for the resolution of these disputes. Baseline pressures include cost and case overload at agencies such as the Equal Employment Opportunity Commission ("EEOC"). Other sources of these pressures will be considered next.

III. COMMISSION, COURT, LEGISLATIVE, AND OTHER SUPPORT FOR THE USE OF ARBITRATION IN EMPLOYMENT DISPUTES

A. Legislation and Court Decisions

The federal government played a major role in creating the climate which produced the Court's decision in Gilmer. The Administrative Dispute Resolution Act of 1990\textsuperscript{16} (now expired) permitted federal agencies to use Alternative Dispute Resolution ("ADR") procedures if the parties agreed.\textsuperscript{17} The Civil Rights Act of 1991,\textsuperscript{18} the Americans with Disabilities Act\textsuperscript{19} and subsequent legislation encouraged the use of ADR procedures. Nevertheless, the Gilmer decision surprised many observers because of its rationale. The Court relied on the Federal Arbitration Act

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of 1925\textsuperscript{20} which was written to encourage arbitration of contractual disputes.\textsuperscript{21} Some observers believe it was not meant to include employment cases. However, others perceive its employment case limitation to apply solely to the transportation field. In any event, the Court found that Mr. Gilmer, whose complaint had to do with alleged age discrimination, had signed the arbitration agreement known as a U-4.\textsuperscript{22} The Court reasoned it did not have to reach the question of applicability of the U-4 agreement to an employment dispute since Mr. Gilmer's contract was not between him and his employer but between him and a trade association.\textsuperscript{23}

Interested observers split vigorously on the decision. Some members of the plaintiffs' bar perceive it as an unwarranted intrusion of government in denying statutory rights to individuals. On the other hand, members of the defendants' bar hail it as the wave of the future, particularly if certain limitations on arbitral authority are present.

Lower courts, in some cases, extended \textit{Gilmer} to other protective-labor situations provided certain criteria were met, such as an appropriate arbitration agreement, adequate communication about the nature of the employment arbitration agreement from the employer to the prospective employee and essential fairness. The application of the Federal Arbitration Act to employment agreements will sooner or later reach the Supreme Court for a head-on decision. Meanwhile, the nature of confusion among lower courts concerning extension of \textit{Gilmer} is summed up in the following two cases.

The Ninth Circuit refused to compel arbitration in a case involving alleged sexual harassment in \textit{Prudential Insurance Company of America v. Lai}.\textsuperscript{24} In that case, the employees signed a U-4 agreement, but the court found that the employees had not been given background information and were not knowledgeable about the contract they had signed.\textsuperscript{25}

On the other hand, the Southern District of New York found the U-4 agreement applicable to compel arbitration.\textsuperscript{26} There, the court

\begin{footnotes}
\footnotetext[20]{\textsuperscript{9} U.S.C. 24, \S\S 1-16 (1994).}
\footnotetext[21]{See \textit{id.} \S 2; see also \textit{Gilmer v. Johnson/Interstate Lane Corp.}, 500 U.S. 20, 24 (1991).}
\footnotetext[22]{See \textit{Gilmer}, 500 U.S. at 23.}
\footnotetext[23]{See \textit{id.} at 25 n.2.}
\footnotetext[24]{42 F.3d 1299, 1305 (9th Cir. 1994).}
\footnotetext[25]{See \textit{id.}}
\end{footnotes}
emphasized that, barring fraud, a person who signed a contract was presumed to understand what was being signed.27

Overall, it is fair to say that the eighties and nineties witnessed a gradual erosion of the employment-at-will doctrine. The bases for rejection of the doctrine were contracts, express or implied (such as may be found in an employees' handbook), public-policy violation and, perhaps surprisingly, occasional findings by courts that a given dismissal lacked essential fairness. In fact, by 1989 some forty-five states had found an exception to the employment-at-will doctrine.

One effect of the growing interest in employment cases turned into an unsuccessful attempt to have the states adopt legislation addressing employee terminations. The National Conference of Commissioners on Uniform State Laws, with the assistance of interested parties, drafted a Model Employment Termination Act.28 The legislation was meant to apply to employers with five or more employees and adopted a good-cause requirement for terminations.29 The standards were largely those found in the Uniform Arbitration Act30 (a 1995 proposal from the same group which has facilitated states in modernizing their arbitration law) and in arbitrations administered by an appointing agency, such as the American Arbitration Association. The standards included equality in choice of an arbitrator and advocate as between plaintiff and defendant and some form of discovery. The proposed legislation did not provide any remedy beyond reinstatement and/or back pay.

The legislation has not as yet been adopted in any state, except to a partial degree in Montana. It clearly acted as a forerunner to Dunlop Commission and Protocol Task Force deliberations, and I turn to these as an important part of the background for the current situation involving employment disputes in non-union settings. Quality standards for employment arbitration will be considered in some detail because of their effect on mandatory arbitration.

27. See id. at *3.
29. See id. § 1(2).
Pre-Employment Dispute Arbitration Agreements

B. Dunlop Commission

The Dunlop Commission encouraged private dispute-resolution systems as an alternative to litigation.\(^3\) It specifically recommended forbidding pre-employment agreements to arbitrate public-law claims (and, by inference, any employment claim, except on a voluntary basis).\(^3\) At the same time, it urged the parties to consider binding arbitration of claims after they arose.\(^3\) The Commission suggested that employer plans calling for arbitration of employment disputes comply with quality standards as follows:

- a neutral arbitrator who knows the laws in question and understands the concerns of the parties;
- a fair and simple method by which the employee can secure the necessary information to present his or her claim;
- a fair method of cost-sharing between the employer and employee to ensure affordable access to the system for all employees;
- the right to independent representation if the employee wants it;
- a range of remedies equal to those available through litigation;
- a written opinion by the arbitrator explaining the rationale for the result; and
- sufficient judicial review to ensure that the result is consistent with the governing laws.\(^3\)

Some observers believe this portion of the Dunlop Commission Report may turn out to be its most important contribution.

C. Protocol Task Force

The Commission Report was followed by an attempt to bring interested parties together to find an ADR approach to the rapidly mounting backlog of civil rights cases. The groups involved included representatives of management and labor in the American Bar Associa-

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\(^{32}\) See id. at 33.

\(^{33}\) See id.

\(^{34}\) Id. at 31.
tion’s Labor and Employment Law Section, as well as individuals from the American Arbitration Association, American Civil Liberties Union, Federal Mediation and Conciliation Service, National Academy of Arbitrators, National Employment Lawyers’ Association and the Society of Professionals in Dispute Resolution. In the resulting Due Process Protocol issued May 9, 1995, the groups noted their disagreement on two subjects. They failed to reach unanimity as to whether or not an agreement to arbitrate could be valid pre-dispute, and what constituted a knowing agreement to arbitrate.

While the group considered various forms of ADR including mediation, the emphasis here will be on their arbitration recommendations. Some of the recommendations regarding representation and costs include: that employees should have access to a representative of their choice; that claimants and their representatives will determine the method of payment for the representative, although the task force recommended employer compensation for at least some part of the charges for low-wage individuals, and that payment of arbitration cost is a matter for the parties to work out or the arbitrator will determine the allocation of arbitration fees. Other considerations with respect to the arbitrator involve: information about a prospective arbitrator’s six most recent cases; that arbitrators should be knowledgeable about arbitration and statutory requirements in the employment field; that arbitrators should be free of bias for either party, although the parties should be able to select an arbitrator who does not meet these qualifications if the parties so desire; the arbitrator should be able to award whatever relief is available under the law; and the scope of review should be limited. Finally, they recommended “[a]dequate but limited pre-trial discovery . . .”

36. See id. at 37.
37. See id. at 37-38.
38. See id. at 37.
39. See id.
40. See id. at 39.
41. See id. at 38.
42. See id.
43. See id. 38-39.
44. See id. at 39
45. See id.
46. Id. at 38.
IV. APPOINTING AGENCY ROLES

The Federal Mediation and Conciliation Service is primarily concerned with aspects of labor-management relations. Nevertheless, they have provided arbitration panels for employment disputes in non-union firms over a period of approximately ten years. The practice was halted in 1995, and never amounted to more than fifty such panels in any one year.

Two large appointing agencies handling both union and non-union cases, the American Arbitration Association ("AAA") and JAMS/Endispute ("JAMS"), illustrate the questions and issues raised by the potential growth of employment cases. The emphasis is on potential growth since the AAA, for example, still numbers the cases in the hundreds.

Initially, the relatively few employment cases administered by the AAA were treated as commercial cases. Unless the parties agreed otherwise, this meant the arbitrator’s first day of hearing was pro bono, no written opinion was expected, and arbitrator fees paralleled commercial fees.

Commercial fees are generally lower than labor-management fees inasmuch as commercial arbitrators are theoretically part-timers who arbitrate on an occasional basis.

As the number of cases began to grow in the nineties, the AAA created a separate employment panel and employment rules. Knowledge of labor-management relations and arbitration were not deemed sufficient to qualify for the new panel unless the individual could also display a background in employment law. Some labor-management arbitrators concluded that their knowledge of employment law was not the main reason for their lack of utilization in employment cases. The problem stemmed from the hesitation of plaintiff attorneys to use arbitrators accustomed to the limited remedies in labor-management arbitration and with defendant attorneys who were unhappy with the application of just cause by labor-management arbitrators.

The current AAA National Rules for the Resolution of Employment Disputes emphasizes the relative independence of employment cases from commercial disputes. Cases may be initiated jointly or by either party based on either an employment agreement or an employee handbook.

47. See AMERICAN ARBITRATION ASS’N, EMPLOYMENT DISPUTE RESOLUTION RULES (1993).
48. See id. at 12.
Although a case can be submitted under a mandatory pre-employment arbitration agreement, the AAA retains the right under the Rules to reject cases not meeting their due-process standards.\textsuperscript{49} William Slate, president of the American Arbitration Association, was quoted in the \textit{Wall Street Journal} as saying the AAA was "unlikely to refuse involuntary cases."\textsuperscript{50} However, a report on an employment ADR conclave held by the AAA in September 1995 noted most appointing agencies, including the AAA, would reject cases "which delete existing remedies from those which an arbitrator may award."\textsuperscript{51} This foreshadowed the AAA's California rules, essentially becoming its national norm.

The AAA rules require a prospective arbitrator to disclose anything which might create a presumption of bias.\textsuperscript{52} Since advocate arbitrators are on the panel, the AAA indicated that will identify their advocacy roles in biographies sent to prospective parties. The rules provide for discovery,\textsuperscript{53} a deposit for arbitrator payment prior to the hearing\textsuperscript{54} and for the AAA to negotiate or set an arbitrator fee.\textsuperscript{55}

The AAA, JAMS and other dispute providers came under fire from the National Employment Lawyers' Association, an organization of plaintiff attorneys, which announced a plan to "boycott private justice providers that continue to hear involuntary cases after Nov[ember] 1," 1995.\textsuperscript{56} The boycott will primarily apply to the AAA and JAMS, both of which hear these cases.\textsuperscript{57} JAMS, which like the AAA is a nationwide provider of dispute resolution services, is a major ADR actor on the West Coast and dominates the arbitration market in California.\textsuperscript{58} It has responded to some of the issues raised by plaintiff attorneys; JAMS "will only take those cases in which an employee retains the same avenues as in court, including the right to obtain punitive damages for egregious behavior, pre-hearing discovery and representation by counsel."\textsuperscript{59}

\textsuperscript{49} \textit{See id.} at 12-13.
\textsuperscript{52} \textit{See American Arbitration Ass'n, supra note 47, at 7.}
\textsuperscript{53} \textit{See id.} at 14.
\textsuperscript{54} \textit{See id.} at 22.
\textsuperscript{55} \textit{See id.}
\textsuperscript{56} Jacobs, supra note 50, at B5.
\textsuperscript{57} \textit{See Jacobs, supra note 50, at B5.}
\textsuperscript{58} \textit{See Margaret A. Jacobs, Workers Call Some Private Justice Unjust, WALL ST. J., Jan. 26, 1995, at B1.}
\textsuperscript{59} \textit{Id.}
Furthermore, JAMS “implemented rules . . . that ‘recommend’ employers pay ‘all or most’ of the cost of the arbitrators and that they request written opinions from the arbitrators . . . .”\(^{60}\) In effect, JAMS accepts pre-employment agreements to arbitrate if the plan meets the *Due Process Protocol* standards.

Below is a table summarizing recommendations of the Dunlop Commission and Protocol Task Force, along with the status of the recommendations under AAA and JAMS rules. Aspects of the table will be discussed below and considered in the recommendations regarding mandatory arbitration which follow.

**Table 1**

**Arbitration Quality Standards — Nonunion, Statutory Cases**

<table>
<thead>
<tr>
<th></th>
<th>Dunlop Commission</th>
<th>Protocol Task Force</th>
<th>American Arbitration Association</th>
<th>JAMS/Endispute</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mandatory Arbitration</td>
<td>No</td>
<td>No position</td>
<td>Yes, if due process present</td>
<td>Yes, if minimum standards met</td>
</tr>
<tr>
<td>Neutral, Knowledgeable Arbitrator</td>
<td>Yes</td>
<td>Independent of bias</td>
<td>Panels may include advocates</td>
<td>Panels may include advocates</td>
</tr>
<tr>
<td>Choice of Advocates</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Discovery</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Written Opinion</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Remedies</td>
<td>Full range</td>
<td>Full range</td>
<td>Full range</td>
<td>Full range</td>
</tr>
<tr>
<td>Cost Sharing</td>
<td>Fair method</td>
<td>Equal or mutually acceptable or arbitrator determination</td>
<td>As provided in plan</td>
<td>As provided in plan Recommend equity</td>
</tr>
<tr>
<td>Appeal</td>
<td>Result consistent with governing law</td>
<td>Limited</td>
<td>Opinion may be used in court</td>
<td>Opinion not for court JAMS appeal possible</td>
</tr>
</tbody>
</table>

Major points of difference between the Dunlop Commission and the Protocol Task Force recommendations as compared to the AAA and JAMS include the acceptance of a case involving an involuntary party by an appointing agency, the use of advocates as neutral arbitrators and appeals.

\(^{60}\) *Id.*
A. Neutral, Knowledgeable Arbitrator

All concerned agree that an arbitrator should be knowledgeable about employment law, arbitration practice and neutral with regard to parties in a given case.

Clearly, individuals trained in employment law can become competent in arbitration and vice versa. There is, however, some disagreement as to what knowledge of employment law covers. Some authorities perceive a deep background in the field as required. Others believe it should be at the same level as labor-management arbitrators, i.e., sufficient knowledge to understand the nature of the field. Support for this position comes from the fact that labor-management arbitrators are frequently called upon to deal with statutory aspects of cases when they are only generally familiar with the statute.

For example, few labor-management arbitrators are knowledgeable with the specifics of state school codes or the Employee Retirement and Income Security Act of 1974 ("ERISA"). When the parties require the application of these laws to the terms of a collective bargaining agreement, they usually provide the arbitrator with sufficient information to make an informed decision. Similarly, one would expect the parties in a Title VII case to provide the arbitrator with the same type of information. One obvious problem is that the claimant may not be able to afford counsel and will depend on a general argument with regard to discrimination. Most experienced arbitrators can handle that type of situation without placing themselves in a position where they are helping one side to make its case. Nevertheless, the situation above argues that the Gardner-Denver approach of access to statutory procedures following arbitration may be needed for equity.

Neutrality raises a whole new set of questions. The acceptance of advocates on arbitration panels appears to be based on their knowledge of employment law and their lack of prior involvement with a given set of parties. I note that it took a generation for appointing agencies in labor-management cases to recognize that while the parties were always free to select an advocate as an arbitrator in a particular case, they were impacting the arbitration process negatively by listing such individuals on their panels.

The same holds true in employment cases. I have been informed by representatives of appointing agencies that advocates want to be listed as neutral arbitrators and hear employment cases. The agencies report this to be an implied threat—that if the advocates are not listed, they will take their employment case business to an appointing agency which will be more flexible. As will be seen in the recommendations below, I believe the only appropriate long term approach for appointing agencies is to close ranks and not list advocates as neutral arbitrators.

B. Choice of Advocates

We have come a long way from the situation where an employee was not permitted to select from outside the organization for an advocate. Two types of individuals were at times specifically barred from representing individuals in employment cases: lawyers and union officials. Modern plans routinely afford the complainant a choice of advocate; this is currently supported by appointing agency rules. Unions, which frequently opposed non-union arbitration plans, are beginning to identify claimant representation as a possible opportunity for union organization of the group involved.

C. Discovery

General agreement appears to be emerging that “reasonable” discovery is appropriate for employment cases. One problem is that the term “reasonable” will have different meanings for different parties.

D. Remedies

Both the Dunlop Commission and the Protocol Task Force believe the full range of statutory remedies must be available to an arbitrator. Appointing agencies have come to agree with this position.

E. Written Opinion

A written opinion, which adds to the cost of an arbitration, may in some cases require the approval of both parties. It raises the interesting question of what should happen if one party seeks a written opinion and is willing to pay for it separately. In any event, both the Dunlop Commission and the Protocol Task Force recognized the need for at least a summary opinion if the case involves application of a statute or is subject to review. Under these circumstances, it appears reasonable that either party should be able to request either a full opinion or a summary opinion. The question of cost will be addressed below.

F. Cost Sharing

In the past, employers routinely paid the cost of arbitration with the exception of the claimant’s direct expenses for representation. Some arbitrators have reported dissatisfaction with one party paying all expenses of the arbitration, and various new approaches have been tried, including giving the claimant an opportunity to pay up to one half of the cost of the arbitrator and/or arranging that the arbitrator not be aware of the source of payment by having a neutral body provide an escrowed payment.

Appointing agencies usually require the parties to pay one half the cost of administration of the case and the arbitrator’s charges unless the agreement or the employer’s plan provides otherwise. The hard fact is that an employer is free to insist on a claimant paying half the cost of an arbitrator, and the claimant may not be able to afford the payment. One solution would be to provide that the arbitrator assess the cost of the arbitration in some equitable fashion. Such assessment is not a task desired by many arbitrators.

63. See Kirsten J. McDonough, Resolving Federal Tax Disputes Through ADR, ARB. J., June 1993, at 38, 42.
64. See Due Process Protocol, supra note 62, at 39; COMMISSION, supra note 62, at 32.
66. See AMERICAN ARBITRATION ASS’N, supra note 47, at 11.
G. Appeal

The Dunlop Commission supported the right of parties to appeal the arbitrator’s decision in courts. The Protocol Task Force simply stated that review should be limited.\(^{67}\)

The Dunlop Commission approach is consistent with the NLRB use of deferral.\(^{68}\) That is, unless the law has been clearly violated by an Arbitrator’s decision, the arbitrator’s position should stand. On the other hand, the Protocol Task Force called for a limited review.\(^{69}\) Limited review can mean that charges such as fraud or lack of due process are the only reasons to set aside an arbitration decision, and statutory error is not a basis for judicial review. Some statutory review of employment cases is considered desirable by this writer.

V. GOVERNMENT AGENCY APPROACHES

Government agencies administering statutes have generally made it clear that they oppose (other than in connection with a collective bargaining agreement) any pre-dispute requirement that a matter involving the statute they administer be taken to arbitration on other than a voluntary basis.

In April 1995, the EEOC affirmed its commitment to ADR principles but specified that it would oppose pre-dispute agreements requiring an individual to go to arbitration in connection with a statute administered by the EEOC.\(^{70}\) The EEOC has had positive experience with outside mediators, although it does not have any funds for that purpose. Therefore its dispute resolution emphasis will likely center, at least for the immediate future, on voluntary, pro bono mediators.

Encouragement of voluntary arbitration in discrimination cases has occurred recently in Massachusetts.\(^{71}\) Following discussions with Arnold Zack, one of the co-chairs of the Protocol Task Force, the Massachusetts

\(^{67}\) See Due Process Protocol, supra note 62, at 39.

\(^{68}\) See COMMISSION, supra note 62, at 32; see also Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).

\(^{69}\) See Due Process Protocol, supra note 62, at 39.


Commission Against Discrimination announced it will offer voluntary arbitration (and mediation) of discrimination complaints.  

The NLRB has issued a complaint against an employer that required its employees to use mandatory arbitration in a nonunion firm. A regional office of the NLRB found that such a practice violated the National Labor Relations Act by impacting the right of employees to engage in protected, concerted activity and by limiting access to the NLRB.

It is now in order to synthesize the reported data and directly address the issue of desirability, from the point of view of this writer, of mandatory pre-dispute arbitration agreements in non-union organizations.

VI. RECOMMENDATIONS—MANDATORY ARBITRATION

A. Statutory Cases

Plaintiff attorneys believe that mandatory arbitration involving statutory disputes are illegal. This position was well laid out by Janice Goodman at an annual meeting of the Labor and Employment section of the New York State Bar Association. Ms. Goodman took the position that “mandatory arbitration agreements must fail as involuntary contracts where employees are forced to waive valuable constitutional and statutory rights under the threat of termination.” One aspect of this position is the argument that the Federal Arbitration Act covers all arbitration proceedings involving commerce and prohibits mandatory arbitration in connection with employment arbitration.

A strong stand on the opposite side was taken by Catherine B. Hagen and Kathleen B. Hayward. They argue that the FAA was basically limited to employment contracts involving transportation. Therefore, if that is insufficient, relevant state law may make mandatory

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72. See id.
73. See Bentley's Luggage, No. 12-CA-16658 (1994); see also Feds Oppose Requiring Workers to Arbitrate, 14 ALTERNATIVES TO HIGH COST LITIG. 39, 39 (1996) (discussing Bentley's Luggage facts).
77. See id. at 27-28.
arbitration under an employment contract legal.\textsuperscript{78} In their otherwise excellent review, the authors err in equating a collective bargaining requirement for a grievant to take a statutory case to arbitration with a mandatory pre-employment arbitration agreement. The problem, of course, is that an individual signing an individual agreement is not in the same position as the individual who is part of a bargaining unit in which the union has been specifically designated to act as the employees' agent in negotiating terms and conditions of employment.

My sense of the current situation is that we are moving toward \textit{Gilmer} as a norm, replacing the successive venues approach in \textit{Gardner-Denver}. With the EEOC backlog of over 100,000 cases hovering in the background, the Supreme Court appears to be saying that \textit{Gardner-Denver} reflected a time when the Court was concerned with justice under collective bargaining agreements when contract clauses causing de facto discrimination were not uncommon. In effect, the Court indicates that is no longer a significant problem, and there is no reason for not currently deferring to arbitration if the process is regular. The Court’s conclusion is reinforced by the effective use of arbitration in state and local court systems.

At this time, we have not as yet resolved the role of the FAA in employment cases in general. We have quality standards being adopted by appointing agencies in a piecemeal fashion. We do not have specific legislation at either the federal or state level requiring a complete set of quality standards. What we do have is a gradually evolving set of court decisions which apply to some but not the broad range of quality standards. Under these circumstances, I find little reason to move away from the \textit{Gardner-Denver} approach. We should not rush headlong into arbitration before we have cleared the path by effectuating quality standards and having appointing agencies recognize a primary responsibility to maintain neutrality in their panels for employment cases. The answer to the question posed in the title of this article is “No” to the use of mandatory, pre-arbitration agreements, given present circumstances.

I recognize that \textit{Gilmer} may well become the order of the day. If that eventuality occurs, I believe the NLRB and Dunlop Commission approach of permitting review of arbitration cases on a statutory basis makes sense. Depending on whether or not quality standards are in place, the answer to the question posed by the title of this paper becomes “Maybe.” If the quality standards have arisen osmotically by court

\textsuperscript{78} See id. at 28.
decision and appointing-agency policy, the courts would do well to consider these situations on a case-by-case basis as to whether or not mandatory, pre-employment arbitration is applicable. If some mix of legislation, appointing-agency action and court decisions have produced a satisfactory set of quality standards, including statutory review of an arbitrator's decision by the courts, the answer could become "Yes."

Parenthetically, I note that at least one pair of observers believe that employers who use mandatory arbitration agreements for statutory cases may find themselves unwittingly establishing a mechanism for what previously were employment-at-will cases.79

B. Non-Statutory Cases

In the past, employees dismissed in nonunion settings who come under a plan calling for arbitration of their cases have at times found the plans to be lacking in elementary justice. Limitations were present on such matters as the choice of an arbitrator and advocate, remedies available and other aspects of arbitral authority. Some observers felt it was improper for a neutral to become involved in arbitrating such cases. Others felt that the situation provided the only hope for a dismissed individual to have some access to industrial justice and thought the cases proper if the claimant wished to proceed under these circumstances. More and more, organizations are conscious of criticism of employer plans, and efforts have been made by the employers involved to make the plans more acceptable.

However, the issue of mandatory verses voluntary access to arbitration would not seem to arise if no statutory claim is present. Either the individual chooses to go to arbitration or not. Those are the available options. If additional fairness is perceived as desirable by claimants and their advocates, presumably that will have to wait for legislation providing for labor court and/or arbitration of dismissal cases under a statute which has quality standards built in.

A potential problem arises when an employee has elected not to proceed under the company's plan and chooses to go to court, probably seeking an equity determination. The employer holding the employee's signed agreement to arbitrate all employment-based claims may wish to effectuate the agreement. Should the employer be free to do so?

One reasonable presumption is that many individuals find today's job market a difficult one, and they will sign pre-employment agreements if it will help them obtain work. The signed pre-employment agreement may well be fully understood by the signatory, but it has been signed solely because the prospective employee believes no alternative is available.

In the absence of reasonable quality standards, I believe the courts should deny arbitration not desired by the dismissed employee. If the type of quality standards contemplated by the Dunlop Commission and the Protocol Task Force are present, particularly the right to appeal an arbitration decision on the grounds the individual initially wished to sue in court, a modest case can be made for an affirmative answer to the employer's desire to compel arbitration under a pre-employment agreement in a non-statutory case. Otherwise, the answer to the question posed earlier should be "No."