

Pitfalls and Tips:

Arbitration of Employment Discrimination and Retaliation Claims

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Arbitration of Employment Discrimination and Retaliation Claims

I. Introduction

In light of the strong liberal policies underlying the Federal Arbitration Act (“FAA” or the “Act”), 9 U.S.C. §1 et seq., and the series of United States Supreme Court decisions enforcing mandatory arbitration plans, increasing numbers of employers have implementing agreements for arbitration of employment claims in handbooks, hiring and personnel documents. A significant number of company-sponsored employment arbitration plans (an “employer sponsored plan”) require that disputes be brought before the American Arbitration Association (AAA), which has implemented specific rules for employment disputes. The expedited nature of the AAA arbitration process, and the absence of jury trials, is very appealing. However, arbitration also has a few detriments from the employer’s perspective.

This outline provides insights in defending companies in the gamut of single plaintiff/claimant employment claims in AAA arbitrations, ranging from discrimination, retaliation, wage and hour, to whistleblower and wrongful discharge claims before the AAA. The premise of this presentation is that the company has adopted and implemented a legally binding employer sponsored plan for arbitration before the AAA of employment claims. And although the Supreme Court has made it clear that the FAA mandates the enforcement of class action waivers in certain circumstances, see *AT&T Mobility v. Concepcion*, 563 U.S. ___, 131 S.Ct. 1740 (2011), we focus here on arbitration process from start to finish in the single plaintiff context, including: how to compel arbitration when an employee covered by an arbitration plan nevertheless files a lawsuit; how to initiate proceedings before the AAA; how the AAA arbitrator is selected and tips in the “strike” selection process; what to expect at the initial Arbitration Management Conference; how to deal with discovery before the arbitrator; the advantages and disadvantages of filing dispositive motions before an arbitrator; what to expect at the arbitration hearing; and what you should know about the arbitration award.

This outline assumes that the company has adopted a legally enforceable arbitration program. Under the AAA’s Employment Arbitration Rules and Mediation Procedures (hereinafter, the ‘AAA Rules’), a company promulgating an arbitration plan that requires proceeding before the AAA must provide the AAA with a copy of its Employer Sponsored employment dispute plan at least 30 days before the effective date of the plan. AAA Rule 2.

II. How to Respond When Your Client Has Been Served with a Lawsuit

Offentimes a plaintiff’s counsel is not aware that the employer and a plaintiff have agreed to arbitration of the plaintiff’s claims before the AAA. To avoid incurring the costs of a motion to compel, try to educate your adversary and provide opposing counsel with a copy of the arbitration plan, documentation supporting that it is binding on the plaintiff, and information on how to proceed with filing for arbitration. Certain AAA company-sponsored plans provide that the claimant must file a demand; others provide that the company may submit the plaintiff’s demand to initiate the opening of the file before the AAA.

Experienced plaintiff’s counsel will often recognize that arbitration will be compelled, and do not fight that battle. If so a stipulation of dismissal or stay of proceedings, with prejudice except to enforce any arbitration award, will be required, often with a provision that defendant waives any defense of statute of limitations which was not available as of the date of filing of the lawsuit provided that the claimant’s counsel files with the AAA demanding arbitration within a finite and short period of time.. However, if a claimant refuses

to submit to arbitration or otherwise contest the arbitration agreement, you will need to file a motion to compel arbitration. As a practical matter, it may be wise to document your efforts to reason with the adversary prior to filing the motion.

III. How to File and Win a Motion to Compel Arbitration

A. The Liberal Policies Underlying the Federal Arbitration Act

The basis for a successful motion to compel arbitration lies in the liberal policies underlying the FAA, and the series of United States Supreme Court decisions that have interpreted it. Congress enacted the FAA to “reverse centuries of judicial hostility to arbitration agreements, . . . to allow parties to avoid ‘the costliness and delays of litigation,’ and to place arbitration agreements ‘upon the same footing as other contracts . . .’” *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220, and n. 6, (1985). As a result, the United States Supreme Court has held in numerous decisions that state laws that disregard and otherwise attempt to affect the enforcement of valid arbitration agreements will be preempted by the FAA. See, e.g., *Perry v. Thomas*, 482 U.S. 483 (1987); *Volt Info. Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Preston v. Ferrer*, 552 U.S. 346 (2008); *AT&T Mobility v. Concepcion*, no. 09-893, 563 U.S. ___, 131 S.Ct. 1740 (2011); *Nitro-Lift Technologies, L.L.C. v. Howard*, no. 11-1377, 568 U.S. ___, 133 S.Ct. 500 (Nov. 26, 2012).

Note that the substantive provisions of the FAA apply in both state and federal courts and, as such, enforcement of an arbitration agreement can be sought by application to either state or federal court. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); also see *Vaden v. Discover Bank*, 556 U.S. 49, 71 (2009) (“Section 2 of the FAA, which does bind the state courts, renders agreements to arbitrate ‘valid, irrevocable, and enforceable.’ This provision ‘carries with it duties [to credit and enforce arbitration agreements] indistinguishable from those imposed on federal courts by FAA §§3 and 4.’). However, in order to seek enforcement of an arbitration agreement in federal court, there must be a separate jurisdictional basis (other than the FAA) for doing so. See *Woodmen of the World Life Ins. v. Manganaro*, 342 F.3d 1213 (10th Cir. 2003); *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581-582 (2008); *Vaden v. Discover Bank*, 556 U.S. 49, 71 (2009) (holding the FAA “requir[es] [for access to a federal forum] an independent jurisdictional basis’ over the parties’ dispute.”)

1. The FAA applies to employment contracts other than those with transportation workers

The FAA governs arbitration in contracts involving interstate commerce. 9 U.S.C. §1. The Act specifically excludes from coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. §1.

The Supreme Court has held that, in light of the FAA’s specific exclusion of employment contracts of transportation workers, it is clear that Congress intended to include employment contracts within the FAA’s coverage. See *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (upholding an arbitration clause in an employment contract which required arbitration of all claims related to employment, including claims of discrimination and tort). Note, however, the EEOC is not bound to arbitrate and can pursue an enforcement suit, including “victim-specific judicial relief” such as reinstatement, back pay and compensatory or punitive damages. See *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279 (2002) (where the Court ruled that the EEOC, which was not a party to the employment contract, was not bound by the arbitration provision, and could pursue its remedies in court).

2. Agreements to arbitrate must be upheld and enforced unless certain grounds are shown

Section 2, the FAA's key substantive provision, states:

A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §2.

In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Supreme Court established that the FAA applied to contracts executed under state law. The Court explained: "In enacting §2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . . Congress has thus mandated the enforcement of arbitration agreements." 465 U.S. at 10 (*emphasis added*). "Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." 465 U.S. at 7. However, "a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement." 465 U.S. at 16. By the same token, a party cannot avoid arbitration by challenging the validity of a contract as a whole, as opposed to specifically challenging the arbitration clause. See *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006).

The court, in reviewing an application concerning the enforceability of an arbitration agreement, must determine: (1) whether there is an agreement to arbitrate; (2) whether the claim falls within the scope of the agreement; and (3) if federal statutory claims are asserted, did Congress intend those claims to be non-arbitrable. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). A court must also consider the principle that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." 473 U.S. at 626.

The first question – whether there is an agreement to arbitrate – is a question of state law, and the state-by-state comparison is beyond the scope of this outline. In general, the requirements are black letter: offer; acceptance (assent); and consideration. See, e.g., *First Options, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). While arbitration plans differ, there are several variants of establishing acceptance/or assent of the agreement to arbitrate: express written agreement by the employee; distribution/notification to employees of the agreement to arbitrate/plan with the opportunity to opt-out; and in some states, incorporation of the plan in a distributed handbook, where assent is shown by the employee's work after receipt of the plan/handbook. See, e.g., *Manigault v. Macy's East, LLC*, 318 Fed. Appx. 6 (2nd Cir. 2009) (compelling plaintiff's sexual harassment and retaliation claims to arbitration even where she did not sign an acknowledgement form; assent may be established through conduct); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002) (court upholds validity of an arbitration program where employees had opportunity to opt out of program; "When, as here, inaction is indistinguishable from overt acceptance, we may conclude that the parties have come to agreement.").

Even after the *Conception* decision, courts will still be able to prohibit enforcement of arbitration agreements under traditional state law contract defenses, including unconscionability. Thus, arbitration agreements should be reviewed on a state by state basis for the jurisdictions where the employer operates. The

watershed California Supreme Court, *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 93 (2000), remains instructive as a measuring stick of the potential reach of procedural and substantive unconscionability under California law and as a template of “Don’ts” to avoid denial of enforcement of an arbitration clause. Post *Concepcion* the California courts tug of war continues there and elsewhere. See, e.g., *In re Checking Account Overdraft Litigation*, 684 F.2d 1269 (11th Cir. 2012) (South Carolina unconscionability doctrine not preempted by *Concepcion* and the FAA, because the South Carolina application of the doctrine does not create a scheme inconsistent with the FAA. Instead it focuses only on the one-sidedness of an agreement); *Compare Quilloin v. Tenet Health System Philadelphia, Inc.*, 673 F.3d 221 (3rd Cir. 2012) (holding that arbitrator, not court, should decide whether arbitration agreement contained an implied class action waiver by its silence).

The second question – whether the claim falls within the scope of the agreement to arbitrate – is driven by the terms of the arbitration agreement. A well-crafted arbitration will include “all employment related disputes” as within the scope of covered claims. To avoid possible invalidation of the plan, the agreement to arbitrate should carve out of its scope, claims for workers’ compensation, unemployment compensation benefits, claims under the National Relations Act, or any other claims that, as a matter of law, the parties cannot agree to arbitrate. The arbitration plan document should also include language that nothing in the arbitration agreement shall be interpreted to mean that employees are precluded from filing complaints with the Equal Employment Opportunity Commission and/or any state or local anti-discrimination agency, and the National Labor Relations Board.

The third question is well settled: federal statutory employment related claims can be the subject of mandatory arbitration. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (federal employment-based discrimination claims can be subject to compulsory arbitration pursuant to a written arbitration agreement); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (except for transportation workers such as seamen or railroad workers, the FAA covers all contracts of employment and that the Act may be used to compel arbitration of employment-related state law claims).

3. Applications to stay proceedings and for orders compelling arbitration

On application of a party to an arbitration agreement, the FAA requires the federal district courts “in which [a] suit is pending” to stay any proceedings where suit has been brought upon “any issue referable to arbitration under an agreement in writing for such arbitration,” so long as the court is satisfied that the issue involved is referable to arbitration. 9 U.S.C. §3.

Section 4 of the FAA permits “[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration” to petition any United States district court for an order compelling such arbitration to proceed “in the manner provided for in such agreement.” Note, however, that in order to petition the federal court under section 3, there must be a jurisdictional basis separate from the FAA. *Vaden v. Discover Bank*, 556 U.S. 49, 66 (2009) (“a party seeking to compel arbitration may gain a federal court’s assistance only if, “save for” the agreement, the entire, actual “controversy between the parties,” as they have framed it, could be litigated in federal court.) Thus, oftentimes, lawsuits asserting only state-law based employment claims brought in state courts require that the motion to compel be brought there.

In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), the Supreme Court reiterated the mandate placed on the courts under the FAA when faced with a motion to compel arbitration. “By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. §§3, 4.” 470 U.S. at 218. This is so even with regard to “pendent arbitrable claims ... where the result would be the possibly inefficient maintenance of separate proceedings in different forums.” 470 U.S. at 217.

“The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is ‘piecemeal’ litigation, at least absent a countervailing policy manifested in another federal statute. . . . By compelling arbitration of state-law claims, a district court successfully protects the contractual rights of the parties and their rights under the Arbitration Act.” 470 U.S. at 221.

IV. How to Initiate Arbitration Proceedings Before the AAA

A. Authorization for the AAA to Administer the Arbitration

In order to proceed with an arbitration before the AAA, the parties must either “agree to arbitrate under [the AAA’s Employment Arbitration Rules and Mediation Procedures (hereinafter, the ‘AAA Rules’)]” or “provide [in their arbitration agreement] for arbitration by the AAA” and initiate an arbitration under the AAA Rules, therefore authorizing the AAA to administer the arbitration. See AAA Rules, Rule 3.

B. Request for Arbitration

The AAA Rules provide that arbitration “shall be initiated” either by the parties’ submission of a joint request for arbitration or, in the absence of a joint request for arbitration, by the filing of a written notice by the initiating party (the “Claimant”) “of its intention to arbitrate at any office of the AAA within the time limit established by the applicable statute of limitations.” See AAA Rules, Rule 4. The AAA Rules require the written notice to include the “names, addresses, and telephone numbers of the parties; a brief statement of the nature of the dispute; the amount in controversy, if any; the remedy sought; and requested hearing location.” AAA Rules, Rule 4(b)(i)(1). The AAA has available for download from its website, www.adr.org, the “Employment Arbitration Rules Demand for Arbitration” (hereinafter the “Demand”), which may be utilized as the written notice.

C. Fees

The AAA Rules provide that for an employer sponsored plan, the maximum fee to be paid by the claimant on filing is \$195. Some employer sponsored plans provide for an even smaller filing fee on the part of the claimant.

Another hallmark of an employer-sponsored arbitration plan is that, with the exception of a small filing fees not exceeding \$195, the employer will pay the balance of all AAA administrative fees, all of the Arbitrator’s fees and all of the hearing room expenses. The AAA Rules specifically provide, that for an employer sponsored plan, “All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator, shall be borne by the employer.” Specific arbitration programs can add to or subtract from this provision, but note in many jurisdictions the placement of an undue financial burden on the claimant could serve as a basis for invalidating the program.

D. Answers and Counterclaims

The Respondent “may file an Answer with the AAA within 15 days after the date of the letter from the AAA acknowledging receipt of the Demand[,] [which] Answer shall provide the Respondent’s brief response to the claim and the issues presented.” AAA Rules, Rule 4(b)(ii). “If no answering statement is filed within the stated time, Respondent will be deemed to deny the claim. Failure to file an answering state-

ment shall not operate to delay the arbitration.” AAA Rules, Rule 4(b)(ii). Additionally, the Respondent may, within the same time limit and with the appropriate filing fee, assert a counterclaim; the Claimant would then have 15 days from the “date of the letter from the AAA acknowledging receipt of the counterclaim” to file an Answer to the counterclaim, or else be deemed to deny the counterclaim. AAA Rules, Rule 4(b)(iii)-(iv).

Either party may assert additional or different claims or counterclaims before the appointment of an arbitrator by “filing a written statement with the AAA and simultaneously provid[ing] a copy to the other party(s), who shall have 15 days from the date of such transmittal within which to file an answer with the AAA.” AAA Rules, Rule 5. However, once an arbitrator has been appointed, “a party may offer a new or different claim or counterclaim only at the discretion of the arbitrator.” AAA Rules, Rule 5.

E. No Technical Pleading Requirements

“The form of any filing in these rules shall not be subject to technical pleading requirements.” AAA Rules, Rule 4(c)

V. Selection of an Arbitrator

A. Qualifications of Neutral Arbitrators

The AAA Rules require that neutral arbitrators serving under the AAA Rules are experienced in employment law and “have no personal or financial interest in the results of the proceeding in which they are appointed and shall have no relation to the underlying dispute or to the parties or their counsel that may create an appearance of bias.” AAA Rules, Rule 12(b). The AAA Case Manager will solicit from the company’s counsel the identities of any related corporate parties, and from both counsel the identities of all likely witnesses at the arbitration.

B. Number of Arbitrators

The parties’ arbitration agreement may provide the number of arbitrators that shall hear the dispute. AAA Rules, Rules 12(a). However, “[i]f the arbitration agreement does not specify the number of arbitrators or the parties do not agree otherwise, the dispute shall be heard and determined by one arbitrator.” AAA Rules, Rule 12(a).

Note also that the FAA similarly provides that “unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.” 9 U.S.C. §5.

C. Appointment of Arbitrators When Specified in Arbitration Agreement

Additionally, the parties’ arbitration agreement may name an arbitrator or specify a method for appointing an arbitrator, which “designation or method shall be followed.” AAA Rules, Rule 13(a). For example, a plan may provide for alternative strikes by the parties on a panel proposed the AAA, with the parties bound by the remaining arbitrator, or having the right to seek a second panel.

As a side note, the FAA also provides: “[i]f in the agreement provision be made for a method of naming or appointing an arbitrator . . . such method shall be followed . . .” 9 U.S.C. §5.

The AAA must be notified of the appointment of an arbitrator by the appointing party. See AAA Rules, Rule 13(b). Any appointing party may also request “a list of members of the National Roster from which the party may . . . make the appointment.” AAA Rules, Rule 13(b). Additionally, if the arbitration agreement provides that an arbitrator must be appointed within a specific period of time and “any party fails to

make the appointment within that period, the AAA shall make the appointment.” AAA Rules, Rule 13(c). “If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 15 days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.” AAA Rules, Rule 13(c).

D. Appointment of Arbitrators When Arbitration Agreement Does Not Specify

However, in cases where the parties have not appointed an arbitrator or otherwise provided a method of appointment, “the arbitrator shall be appointed in the following manner:

- i. Shortly after it receives the Demand, the AAA shall send simultaneously to each party a letter containing an identical list of names of persons chosen from the Employment Dispute Resolution Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.
- ii. If the parties are unable to agree upon an arbitrator, each party ... shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable.
- iii. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the power to make the appointment from among other members of the panel without the submission of additional lists.

AAA Rules, Rule 12(c).

As a side note, even where the AAA has not been selected to administer the arbitration, the FAA grants the court the authority to designate and appoint an arbitrator when the arbitration agreement does not contain provisions for the appointment of an arbitrator upon the application of any party. 9 U.S.C. §5. The court-appointed arbitrator is required to act under the parties’ agreement “with the same force and effect as if he ... had been specifically named therein[.]” 9 U.S.C. §5.

E. Tips on Selection of Arbitrator

The AAA Case Manager will distribute each prospective Arbitrator’s c.v. and background to the parties. Since AAA proceedings are confidential, developing information about a prospective arbitrator’s proclivities can be difficult. Consult with your client about any past experience with each prospective arbitrator, and reach out to colleagues to get information about other company’s experiences with a prospective arbitrator.

In general, be cautious about choosing arbitrators with a background in substantive labor negotiations or of service as a designated arbitrator for grievances under CBAs. Arbitration should be determinative, not facilitative. You are trying to identify an arbitrator who will follow the law and hold the claimant to proving the elements of her claims. Grievance arbitrators often have the authority under the CBA to determine whether the discipline to be imposed is warranted, and tend to apply a “fairness” test to decision-making.

Arbitrator’s fees also vary and clients may be less inclined to choose an arbitrator whose hourly rates are markedly higher than the balance of the panel. The AAA discloses each prospective arbitrator’s hourly rates, as well as his/her “cancellation policy”, with the roster of prospective arbitrators. Review the prospective

arbitrator's cancellation policy carefully. Most arbitrators require the payment of a significant portion of their prospective arbitration fee in the event of an adjournment of a hearing less than 30 days before the start date.

VI. The Initial Arbitration Management Conference

After the selection of the arbitrator (and not later than 60 days thereafter), "an arbitration management conference shall be held among the parties and/or their attorneys ... and the arbitrator(s)." AAA Rules, Rule 8. The conference is usually held by telephone conference call unless the parties have agreed otherwise. AAA Rules, Rule 8.

Among the matters considered at the conference are:

- i. the issues to be arbitrated;
- ii. the date, time, place, and estimated duration of the hearing;
- iii. the resolution of outstanding discovery issues and establishment of discovery parameters;
- iv. the law, standards, rules of evidence and burdens of proof that are to apply to the proceeding;
- v. the exchange of stipulations and declarations regarding facts, exhibits, witnesses, and other issues;
- vi. the names of witnesses (including expert witnesses), the scope of witness testimony, and witness exclusion;
- vii. the value of bifurcating the arbitration into a liability phase and damages phase;
- viii. the need for a stenographic record;
- ix. whether the parties will summarize their arguments orally or in writing;
- x. the form of the award;
- xi. any other issues relating to the subject or conduct of the arbitration;
- xii. the allocation of attorney's fees and costs;
- xiii. the specification of undisclosed claims;
- xiv. the extent to which documentary evidence may be submitted at the hearing;
- xv. the extent to which testimony may be admitted at the hearing telephonically, over the internet, by written or video-taped deposition, by affidavit, or by any other means;
- xvi. any disputes over the AAA's determination regarding whether the dispute arose from an individually-negotiated employment agreement or contract, or from an employer-promulgated plan

AAA Rules, Rule 8. "The arbitrator shall issue oral or written orders reflecting his or her decisions on the above matters and may conduct additional conferences when the need arises." AAA Rules, Rule 8.

TIP: Try to have the arbitrator set in place reasonable limits on length of written submissions at the outset and on the number of submissions (*e.g.*, one dispositive motion, one pre-hearing memorandum, one post-hearing memorandum), and page limits on each. Since the company is paying for the Arbitrator on an hourly basis, avoid having your client's costs driven up unnecessarily by lengthy and repetitive filings by your adversary.

VII. Dealing with Discovery in Front of an Arbitrator

"The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the

issues in dispute, consistent with the expedited nature of arbitration.” AAA Rules, Rule 9. However, if the parties have agreed in their arbitration agreement to limit discovery, there will be grounds to oppose any discovery sought beyond those limitations.

For example, the arbitration plan may require mandatory disclosures by the parties, similar to that under Rule 26, and then attempt to set limits on other written and deposition discovery. Some plans seek to limit written discovery to one set of interrogatories or document requests (limited in number) but require mandatory disclosure of documents the party intends to rely upon at arbitration. Other plans may seek to limit the number of depositions per party. There are numerous variations. However, to avoid challenges, all plans should provide that the Arbitrator may permit additional discovery beyond that set forth in the plan upon a showing of substantial need, and if the discovery is not overly burdensome and will not unduly delay the arbitration. You may need to check the law of the jurisdictions in which you will attempt to enforce your program to see if there are specific requirements as to what language must be included.

Unless there is a dispute relating to discovery, parties are not required to notify the AAA regarding discovery-related matters; however, once there is a dispute, “the parties should notify the AAA of the dispute so that it may be presented to the arbitrator for determination.” AAA Rules, Rule 9.

TIP: Try to urge the Arbitrator to limit discovery and to expedite the timing of the arbitration. Almost all employer-sponsored arbitration plans have languages that support the proposition that one of the objectives of arbitration is expeditious resolution of the dispute. Use that language, buttressed by AAA Rule 9 on the “expedited nature of arbitration.”

TIP: Urge that overly broad and far-reaching discovery requests will not enable the parties to complete discovery by the date of the arbitration hearing.

TIP: Review the arbitration agreement carefully. It may allow the Arbitrator to use the provisions of the Federal Rules of Civil Procedure in ruling on discovery disputes. In any event, try to use the deposition and interrogatory limits in the Federal Rules as the outer limits for any single claimant arbitration.

VIII. Difficulty of Obtaining Summary Judgment

One principal difference between litigating employment disputes in the courts and before the AAA in arbitration lies in the use and cost-effectiveness of summary judgment practice. Although summary judgment is the favored, if not the favorite tool, of management in litigation, it is disfavored by many arbitrators, even though permitted under the AAA Rules.

The AAA Rules permit the filing of a dispositive motion “if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.” AAA Rules, Rule 27. However, even if a party files such a dispositive motion, it is on a rare occasion that the motion will prevail. Often a AAA arbitrator will deny management’s summary judgment motion and proceed with the arbitration in order to give the Claimant their “day in court.” While this may weigh against a client’s decision to proceed with the expense of the preparation and filing of a dispositive motion, oftentimes the Arbitrator will provide guidance on whether he/she will seriously entertain summary judgment during the initial case management conference call.

Note there are other valid reasons to file a summary judgment motion (if you can do so in good faith), even if the arbitrator may not be inclined to grant it as to all counts. If there are numerous counts alleged, you may be able to reduce the claims and simplify the case for arbitration. You can also draw out your opponent’s evidence and arguments and educate the arbitrator as to what the case is about. However, as noted, all such motions must be grounded in a good faith basis for the filing.

IX. How to Subpoena Witnesses for Arbitration

The AAA Rules permit “[a]n arbitrator or other person authorized by law to subpoena witnesses or documents . . . upon the request of any party or independently.” AAA Rules, Rule 30.

In matters where the arbitration is not being administered by the AAA, the FAA authorizes “[t]he arbitrators selected either as prescribed in this title or otherwise . . . [to] summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.” 9 U.S.C. §7. The FAA also permits a party to petition the United States district court for the district in which the arbitrator is sitting for an order compelling the attendance of a witness who refuses or neglects to obey the summons. 9 U.S.C. §7. However, if the federal court lacks jurisdiction to hear the application, such an application must be brought to the applicable state court.

It is important to also note that, “[u]nless otherwise agreed by the parties or as provided under applicable law, the expenses of witnesses for either side shall be borne by the party producing such witnesses.” AAA Rules, Rule 45. Thus, unlike some federal district courts, arbitrators often require the company to produce a corporate representative witness for deposition in a AAA arbitration at the company’s expense, even though a federal district court might require the plaintiff to travel at its expense to the corporate headquarters for that deposition.

X. The Arbitration Hearing

A. Date, Time, Location, and Postponements

The date and time of the arbitration is usually set at the initial Arbitration Management Conference. Ordinarily the arbitration hearing date is firm, unless both parties agree to postpone the hearing, or the arbitrator exercises his or her discretion, which may be permitted “upon the request of a party for good cause shown” or “on [the arbitrator’s] own initiative.” AAA Rules, Rule 24. The AAA Rules allow the parties to modify “any period of time by mutual agreement.” AAA Rules, Rule 37. Further, except with respect to the time for making the award, the AAA Rules provide that “the arbitrator may for good cause extend any period of time established by these Rules.” AAA Rules, Rule 37.

AAA arbitrators, who book their calendars for hearings based on the dates set during the initial case management call, may be reticent to change a date. One tip is to try to elicit two or three alternative hearing dates during the initial case management conference, and offer to get back to the AAA case manager on the requested date within a few days.

Since an arbitration hearing is less formal than a trial, it is usually held in a conference room, much like a deposition. If possible, it may be beneficial to you and to your client to request that the hearing be held in a conference room in your firm.

Company-sponsored plans usually will not require a claimant to pay any more in filing fees for an arbitration than the filing fee for a state or federal court lawsuit in their venue. Indeed, many company-sponsored plans require only a de minimis fee paid by the claimant (generally capped at no more than \$150). Thus, the company will be the party paying the AAA for its arbitration management services, and also paying the arbitrator for his or her services on an hourly basis. And importantly, if the hearing is adjourned and a cancellation fee is due the AAA and/or the Arbitrator, that fee will be borne by the Company. Review the Arbitrator’s cancellation policy in advance of the initial case management conference call.

B. Stenographer, Interpreter, and Oaths

Unlike in court proceedings, a party that wishes to have a stenographic record of the proceeding must “make arrangements directly with a stenographer[,] ... notify the other parties of these arrangements at least three days in advance of the hearing,” and pay the cost of the record. AAA Rules, Rule 20. If the parties agree, or the arbitrator determines, that the transcript is an official record of the proceeding, “it must be provided to the arbitrator and made available to the other parties for inspection . . .” AAA Rules, Rule 20. Similarly, if an interpreter is needed, the party requesting the interpreter “shall make all arrangements directly with the interpreter and shall assume the costs of the service.”

The arbitrator, who is required to take an oath of office prior the first hearing, may also require witnesses “to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.” AAA Rules, Rule 25.

C. The Attendance of Parties, Witnesses, and Other Persons at Hearings

The arbitrator has the authority to exclude non-party witnesses from the hearing during the testimony of other witnesses, and to decide whether any person, who is neither a party nor a witness, may attend the hearing. AAA Rules, Rule 22.

“Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement.” AAA Rules, Rule 29. However, such absence shall not be the sole basis of an award; “[t]he arbitrator shall require the party who is in attendance to present such evidence as the arbitrator may require for the making of the award.” AAA Rules, Rule 29.

D. Confidentiality of the Proceeding

The AAA Rules require the arbitrator to “maintain the confidentiality of the arbitration” and grant the arbitrator authority to “make appropriate rulings to safeguard that confidentiality,” “unless the parties agree otherwise or the law provides to the contrary.” AAA Rules, Rule 23.

E. Opening the Proceedings

“A hearing may be opened by: (1) recording the date, time, and place of the hearing; (2) recording the presence of the arbitrator, the parties, and their representatives, if any; and (3) receiving into the record the Demand and the Answer, if any.” AAA Rules, Rule 28. The arbitrator may also request from each party a statement clarifying the issues involved. AAA Rules, Rule 28.

Some arbitrators will require a pre-hearing submission brief; others will not. Most arbitrators do not expect and will not entertain a lengthy oral opening statement.

F. Rules Concerning Conduct at the Hearing

“With the exception of the rules regarding the allocation of the burdens of proof and going forward with the evidence, the arbitrator has the authority to set the rules for the conduct of the proceedings and shall exercise that authority to afford a full and equal opportunity to all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute.” AAA Rules, Rule 28.

Since the arbitrator has the responsibility of conducting the proceedings “with a view toward expediting the resolution of the dispute,” the arbitrator may, in his or her discretion, “direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.” AAA Rules, Rule 28, 30.

1. Burden of proof and production

The parties bear the same burdens of proof and production as “would apply if their claims and counterclaims had been brought in court.” AAA Rules, Rule 28.

2. Examination of witnesses

“Witnesses for each party shall submit to direct and cross examination.” AAA Rules, Rule 28.

3. Presentment of evidence

The arbitrator has the authority to permit a party, when deemed appropriate, to present evidence by alternative means “including web conferencing, internet communication, telephonic conferences and means other than an in-person presentation of evidence.” AAA Rules, Rule 28. However, “[s]uch alternative means must still afford a full and equal opportunity to all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and when involving witnesses, provide that such witness submit to direct and cross-examination.” AAA Rules, Rule 28.

Documents and other physical evidence offered by any party may be received in evidence by the arbitrator, and the “names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of the record.” AAA Rules, Rule 28.

4. Stenographic record

Under AAA Rules, a court reporter at the arbitration is the exception, not the norm. AAA Rule 20 provides: “Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing.” The Rule further provides that “The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.”

G. Rules Concerning Evidence

“The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute.” AAA Rules, Rule 30. The arbitrator is “the judge of the relevance and materiality of the evidence offered,” and “conformity to legal rules of evidence shall not be necessary.” AAA Rules, Rule 30.

“All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any party or arbitrator is absent, in default, or has waived the right to be present, however “presence” should not be construed to mandate that the parties and arbitrators must be physically present in the same location.” AAA Rules, Rule 30.

The parties may also agree, or the arbitrator may direct, that “documents or other evidence may be submitted to the arbitrator after the hearing All parties shall be afforded an opportunity to examine such documents or other evidence and to lodge appropriate objections, if any.” AAA Rules, Rule 30.

H. Close of Hearing

“The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.” AAA Rules, Rule 33. Alternatively, the hearing may be declared closed at

a later date if briefs are to be filed. AAA Rules, Rule 33. Absence the parties' agreement otherwise, the clock begins to run on the time limit within which the arbitrator must render an award upon closing of the hearing. AAA Rules, Rule 33.

During the pre-arbitration conference call, the Arbitrator should decide whether post-hearing briefs are required (or will be permitted), and whether closing statements will be entertained and if so the time limit for doing so.

I. Reopening of Hearing

“The hearing may be reopened by the arbitrator upon the arbitrator’s initiative, or upon application of a party for good cause shown, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed in the contract, the arbitrator may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to make an award.” AAA Rules, Rule 34.

XI. The Arbitration Award

A. AAA’s Requirements for the Award

An arbitration award, which must be in writing and signed by the arbitrator (or the majority of the arbitrators, if more than one), must be made within 30 days from the close of the hearing or, “if oral hearings have been waived, from the date of the AAA’s transmittal of the final statements and proofs to the arbitrator.” AAA Rules, Rule 39(a), (c).

The arbitrator “shall provide the written reasons for the award unless the parties agree otherwise ... [and] [i]t shall be executed in the manner required by law.” AAA Rules, Rule 39(c). “The arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney’s fees and costs, in accordance with applicable law. The arbitrator shall, in the award, assess arbitration fees, expenses, and compensation as provided in Rules 43, 44, and 45 in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA, subject to the provisions contained in the Costs of Arbitration section [of these Rules].” AAA Rules, Rule 39(d). However, in order to establish an enforceable arbitration plan, the AAA and arbitrator’s fees, other than a minimal amount equivalent to a court filing fee, must be borne by the company.

The award is final and binding. AAA Rules, Rule 39(g).

B. Consent Award

Alternatively, “[i]f the parties settle their dispute during the course of the arbitration and mutually request, the arbitrator may set forth the terms of the settlement in a consent award.” AAA Rules, Rule 39(e).

C. Publication of the Award

The award will be publicly available “on a cost basis,” although “the names of the parties and witnesses will not be publicly available, unless a party expressly agrees to have its name made public in the award.” AAA Rules, Rule 39(b).

D. Grounds for Modification of the Award

A party may, on notice to other parties and within 20 days after the transmittal of the award, request that the arbitrator “correct any clerical, typographical, technical, or computational errors in the award.” AAA Rules, Rule 40. The arbitrator may not reconsider or redetermine the merits of any claim that has been decided. AAA Rules, Rule 40.

The other party has 10 days to respond to such a request, and the arbitrator “shall dispose of the request within 20 days after the transmittal by the AAA to the arbitrator of the request any responses thereto.” AAA Rules, Rule 40. These time frames may be modified in accordance with any applicable law that requires a different procedural time frame. AAA Rules, Rule 40.

E. Confirmation of the Award

Any party to the arbitration may seek an order confirming the award within one year after the award is made, and the court “must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of Title 9.” 9 U.S.C. §9. Unless the agreement specifies the court that shall enter such an order, the application may be made “to the United States court in and for the district within which such award was made,” and the court will have jurisdiction over the adverse party following the service of the notice of the application on that party “as though he had appeared generally in the proceeding.” 9 U.S.C. §9.

The AAA Rules provide that “[p]arties to these procedures shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction.” AAA Rules, Rule 42. Note, however, that an independent basis for federal jurisdiction (other than the FAA) is required to confirm an arbitration award in federal court. *See Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Vaden v. Discover Bank*, 556 U.S. 49, 50 (2009).

Section 9 also provides the notice and service requirements with respect to the adverse party.

F. Vacation, Modification, or Correction of the Award

Parties applying to vacate, modify or correct an award must serve a notice of motion “upon the adverse party or his attorney within three months after the award is filed or delivered.” 9 U.S.C. §12. Section 12 also authorizes the court to “make an order to stay the proceedings [of an adverse party to enforce the award] in an action brought in the same court,” which order shall be served with the notice of motion. 9 U.S.C. §12.

The FAA limits the grounds upon which an arbitration award may be vacated to the following:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. §10(a)(1)-(4). Additionally, the FAA grants the court the authority to direct a rehearing by the arbitrators if the award has been vacated “and the time within which the agreement required the award to be made has not expired.” 9 U.S.C. §10(b).

The FAA also authorizes the court, upon the application of any party to the arbitration, to make an order modifying or correcting the award in the following circumstances:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. §11(a)-(c). “The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.” 9 U.S.C. §11.

G. Appeals

The FAA also permits appeals to be taken from an order confirming or denying confirmation of an award, or modifying, correcting, or vacating an award. 9 U.S.C. §16(a)(1)(D)-(E).

