

American Arbitration Association Issues New Rules  
For the Resolution of Employment Disputes

June 1996

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Recently, the American Arbitration Association (AAA) released a new set of procedural rules titled The National Rules for the Resolution of Employment Disputes (Employment Dispute Rules or Rules). These new Rules apply to the resolution of individual employment disputes, where employers have included AAA arbitration provisions in individual employment contracts or in Alternative Dispute Resolution (ADR) sections of employment policies, personnel manuals and employee handbooks. Employers that fail to follow the new Rules are at risk that the AAA will withhold its arbitration services or that a court or administrative board will find that the arbitration agreements or ADR policies are invalid.

The Employment Dispute Rules are intended to promote the private resolution of disputes that arise during the course of employment and would otherwise be subject to litigation in court, including alleged wrongful termination, sexual harassment and discrimination based on race, color, religion, sex, national original, age and disability. *The Rules do not apply to disputes arising out of collective bargaining agreements.* The AAA "Labor Arbitration Rules" remain in effect for AAA arbitrations provided for in collective bargaining agreements.

The AAA has stated that, effective on and after January 1, 1997, the AAA will handle employment cases arising outside the context of collective bargaining agreements using *only* the new Employment Dispute Rules. Between now and then, employers should review their existing employment agreements and ADR policies or plans with a view toward making revisions that comply with the new Rules. The Rules state that employers intending to refer employment disputes to AAA-administered arbitration must notify the AAA of their intention and provide the AAA with a copy of the ADR policy or plan within 30 days of its effective date.

**Substantive Revisions to Existing Employment  
Agreements and ADR Policies or Plans May be Required**

Employers may need to make substantive revisions to their employment agreements or ADR policies or plans to comply with the standards in the new Rules. For example, the new Rules:

- Permit the arbitrator to grant employees the same relief that would have been available had the matter been heard in court, including compensatory damages for emotional distress or punitive damages.

- Incorporate minimum "due process" standards, including authority for the arbitrator to order discovery, require the parties to identify witnesses in advance, bifurcate liability and damage issues, and determine the relevance and materiality of the evidence offered.
- Provide for an equal division of the expenses of arbitration, including arbitrator fees, and AAA service fees, unless the arbitrator directs otherwise in the award.

### **Background**

The AAA published the new Rules to encourage the use of ADR procedures and to provide safeguards for a fair, equitable and private forum for the resolution of workplace disputes. The Rules are intended to afford due process rights comparable to the courts, but without the delays of extensive litigation and the "backlog" associated with some administrative agencies and courts.

The Rules were initially developed by a committee of employment lawyers, plaintiff's attorneys, retired judges and full-time arbitrators. After a successful one-year pilot project in the state of California, the AAA decided to institute the Rules nationally. (The California rules differ slightly from the new Employment Dispute Rules. Employers that adopted the California Rules have until January 1, 1997, to modify their employment agreements and ADR policies or plans to incorporate the new Employment Dispute Rules.)

Employers can provide for AAA arbitration by incorporating a specific reference to the Rules in individual employment contracts, personnel manuals, policy statements, employment applications or other arbitration agreements. Ad hoc employment disputes can be referred to AAA arbitration when the employer and the employee agree to conduct the arbitration under the new Rules.

### **Comparison With the AAA's "Labor Arbitration Rules"**

In many important respects, the new Employment Dispute Rules parallel the AAA's Labor Arbitration Rules. Like the Labor Arbitration Rules, the Employment Dispute Rules, create an arbitration process that is not subject to technical pleading requirements or legal rules of evidence.

There are, however, a few important differences. For example, the Employment Dispute Rules contain the following provisions that are not included in the Labor Arbitration Rules:

- The Rules govern in the event of inconsistencies between the Rules and the employment agreement, ADR plan or policy.

- The employer must notify the AAA in advance of its intent to incorporate the Rules in employment agreements or ADR policies or plans. The AAA further reserves the right to deny its services to employers who do not comply with this notification requirement.
- The AAA will suspend the administration of the arbitration for up to 30 days to permit a party to obtain a stay of arbitration from a court of law.
- AAA arbitrators are authorized to order whatever discovery they consider necessary for a "full and fair exploration" of the issues in dispute. This authority includes depositions, interrogatories and document production.
- The burden of proof and the burden of producing evidence is the same as if the claims had been brought in a court of law.
- A case management conference between the arbitrator and the parties and/or their representatives, must take place no longer than 30 days after the appointment of the arbitrator. The purpose of the conference is to expedite the proceeding by resolving a number of preliminary issues including discovery, rules of evidence and burdens of proof.
- The AAA will furnish unrepresented parties with the names of institutions that can offer arbitration assistance. Representation, however, is not mandatory.
- Arbitrators can grant any form of relief that would be available in a court of law, including reimbursement of the representative's fees and punitive damages.

#### **Similarities With NASD Arbitration Rules**

The Employment Dispute Rules are also similar to rules of arbitration promulgated by the National Association of Securities Dealers (NASD). One important difference, however, is that the NASD rules provide for a tolling of the applicable statute of limitations that would otherwise run or accrue on legal proceedings, when a duly executed submission agreement is filed by a claimant. Tolling continues under the NASD rules if the NASD retains jurisdiction over the arbitration proceeding. The AAA Employment Dispute Rules contain no such tolling provision.

Discovery is also different under the NASD rules. Under NASD rules, discovery is compulsory. Under the Employment Dispute Rules, discovery is contemplated, but its scope is subject to determination by the arbitrator.

### **AAA Also Promulgates Employment Mediation Rules**

Along with the Employment Dispute Rules, the AAA also promulgated new "Employment Mediation Rules" designed to facilitate the settlement of employment disputes. The AAA Employment Mediation Rules are substantially similar to the AAA Grievance Mediation Procedures, previously promulgated and applicable to collective bargaining agreements that provide for AAA-sponsored mediation and conciliation.

Morgan, Lewis & Bockius LLP has considerable experience with Alternative Dispute Resolution procedures. Interested parties should contact Charles P. O'Connor (202/467-7070), Mark S. Dichter (215/963-5291), Anita W. Coupe (212/309-6188), Michael L. Wolfram (213/612-2570) or Mark E. Zelek (305/579-0303) if they have any questions concerning the issues raised in this White Paper.