CHAPTER TWO: Structural Overview

Features of Corporate Design

Classically, an employment ADR system may be characterized as having three parts: (1) internal efforts at resolution through discussion, negotiation, peer review, ombuds facilities or other advisory and facilitative techniques; (2) intervention by a third, neutral, party using non-adjudicative tools such as voluntary mediation or neutral merits evaluation; and (3) adjudicative intervention in the form of binding arbitration. Several of the companies studied illustrate this classic three-stage structure.

For example, Anheuser-Busch describes its program as "a three-level process designed to resolve workplace disputes at the lowest possible level" and features "Level 1: Local Management Review," "Level 2: Nonbinding Mediation," and "Level 3: Binding Arbitration."

Alcoa offers a program for disputes that cannot be resolved informally and directly that is a classic three-step structure: a review of the problem by senior management; then nonbinding mediation; and finally binding arbitration. The program is voluntary – employees may choose to ignore the program and sue if they wish – and is offered to employees after a dispute has arisen rather than as a condition of employment. But an employee who chooses the dispute resolution program waives access to a judicial forum.

Bank of America has a three-step program through which associates with concerns relating to work, management practices or business ethics can request assistance. Associates are

directed to seek resolution for these concerns with management, and then with Personnel. If Personnel is unable to resolve the issue, the associate may be referred to the Ombudsman, which is the final internal level of appeal. The Ombudsman is an internal program and reports to Personnel. However, the Ombudsman is free to interview any party in the company and review all documentation relevant to a case. The Ombudsman has no power to overturn a manager's action, but does have the ability to escalate a recommendation for resolution to very senior management.

Masco has an "Open Door Policy," encouraging communication with the immediate supervisor or human resources professionals; after that stage, the company requires the use of mediation, and then mandatory, final and binding arbitration.

McGraw-Hill offers a four-step program, titled "FAIR" (for Fast And Impartial Resolution), three steps of which come into play after its "Open Door Policy" has failed to resolve an employee's concern. Step One, "Investigation," involves the employee's filling out an "Agreement to Participate Form," in which the employee sets forth efforts taken to resolve the dispute, and the results thereof. The employee also agrees at this time to waive court action. Within 45 days the employee receives "a decision in writing." (This first step may be waived if the dispute involves a legally-protected right, such as discrimination or harassment.) Step Two is mediation and Step Three is final and binding arbitration.

For its Field Sales employees whose employment with the company has been separated, Philip Morris offers a company ombudsman, followed by voluntary mediation and mandatory, final and binding arbitration.

Johnson & Johnson's "Common Ground" Program, like Shell's, is mandatory but does not culminate in arbitration. The three parts of the program are "Open Door," "Facilitation" and "Mediation." "Open Door" encourages employees to discuss problems with their supervisor, their supervisor's boss, human resources personnel, or with "whatever level of management is necessary to resolve the issue." Although no documentation is needed to commence this stage, "Open Door" must be attempted before moving on to the next stage. "Facilitation" involves a designated individual who will ensure that all options of communication have been exhausted. "Mediation" introduces a trained neutral to assist the parties in reaching a mutually acceptable resolution. Employees are notified that, "if none of these steps resolves your dispute with the Company, you are free to pursue legal action in court."

As employment systems have developed in sophistication, this classic three-part structure has become blurred. What used to be called "stepped" programs – implying that employees would be encouraged to exhaust the first "step" before "graduating" to the second "step" – have given way to a smorgasbord of processes available to employees, frequently in any sequence.

CIGNA offers employees a mandatory program that comprises an "internal" and an "external" component. The employee must choose between two internal processes: the "Speak Easy Process" and the "Peer Review Process" – either, but not both. The Speak Easy Process consists of Phase I – where an employee discusses the problem with a manger/supervisor – and Phase II – a review of issues with an Employee Relations Speak Easy Consultant. The Peer Review Process has three steps: Step I with the supervisor/manager, Step II with the next higher level of management, and Step III with either the head of the division or a Peer Review Panel of five trained specialists including supervisors and exempt and non-exempt employees. Decisions

of the Peer Review Board are binding on the company. Complainants dissatisfied with these processes are required to request arbitration, if the issue would otherwise be heard in court. Employees seeking arbitration may request mediation first, which the company may agree to at its discretion.

GE Corporate has a five-level system, and employees are expected to go through each level before proceeding to the next. At Level Zero, employees are encouraged to engage in "Informal Problem Solving" with a manager, a human resources representative, other higher-level managers or an ombudsperson. Employees unable to resolve the concern through these processes enter Level One, requiring submission of a written statement to an administrator (with copies to the manager and human resources representative); the submission will be followed by a meeting with the immediate manager and a written response. (This step may be waived by mutual agreement.) At Level Two the employee submits a Resolve Submission Form to the program administrator, who arranges for a formal meeting with a higher level functional manager, again resulting in a written response by the manager. Level Three provides for mediation, and Level Four for arbitration.

Halliburton has no requirement of sequential use of its four "options"; an employee may use any option in any order. The "Open Door Option" provides immediate access to the chain of command from individual supervisor up through the organization, and including a Ombuds-administered "hot line" and human resources department. An "Internal Conference Option" contemplates a formal conference with an ombudsman and a company representative. Internal mediators are also available through this option. The "Mediation Option" offers the services of a trained mediator from independent provider organizations. The company also offers the

"Arbitration Option," which results in a final and binding decision and expressly provides any remedy the complainant may receive in a court of law.

As part of its employee handbook, MG Corp. issues a "Company Policy Statement on Mediation and Arbitration of Employment Disputes." The Policy Statement contemplates two procedures: mediation "in most cases" and mandatory binding arbitration.

Pfizer Inc. maintains an "open door" policy, pursuant to which all supervisory and management personnel, including all officers of the company, are available to any colleague to present any concerns, problems or complaints directly to, and ask questions directly of, senior personnel of the company. Employees are encouraged to approach supervisors in the first instance, but "if the supervisor cannot help or is part of the problem, the matter can be discussed wuth the next higher level of supervision or, if necessary, the operating unit head." Corporate Human resources is also available to any employee on any matter. The policy explicitly provides that "No one will be retaliated against for raising what they believe to be an honest issue or concern."

Rockwell International offers a four-step process that starts with the employee and the manager directly talking to resolve the problem. In Step Two, a Human Resources representative meets with the employee, the manager and other relevant parties to attempt to resolve the issue. If the issue remains unresolved, the employee has the option of proceeding to a Peer Review Panel (which will review facts and issue a remedy that is binding on the company) or, with respect to certain claims, to binding arbitration.

In Shell's "Resolve" program, employees are first offered "Early Workplace Resolution," which may involve a meeting with the person complained of, assistance from a

supervisor, or intervention by Human Resources or upper management. Next, employees are offered a toll-free hotline to the "Shell Ombuds," who can "confidentially answer questions, offer support and advice, or refer [the complainant] to internal or external processes and resources, as needed." The third step is mandatory mediation, and the fourth step is voluntary arbitration. Thus there is no waiver of any legal right by employees. The company notes:

> Mediation of your individual claim is required before you may proceed to Arbitration, or to litigation on either an individual or class basis. This is a condition of employment at Shell. If the conflict is not satisfactorily resolved through External Mediation and the conflict involves a legally protected right, you may request Arbitration or proceed to litigation.[1]

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> The spirit of this requirement is to underscore the company's commitment to resolving conflict quickly and equitably within the Shell Resolve program. The intent is not to take away any rights but to provide the parties every opportunity and incentive to resolve problems without costly and disruptive litigation.

1 It is noteworthy, too, that the arbitration offered by Shell in its original Resolve program was final and binding only at the *employee's* option. The program materials explain: "The Company will agree to be bound by the arbitrator's decision if that decision is acceptable to you. If you're dissatisfied with the arbitrator's decision, you're free to take your case to court, and the arbitrator's decision will not be binding on any of the parties." A similar approach is taken by Texaco, as noted below. However, Shell recently decided to modify its program in certain respects, including discontinuing its practice of permitting the employee to determine the binding nature of arbitration. See Appendix D.

Texaco's program, named "Solutions," has four steps.[2] Employees are first encouraged to discuss their problem with either the immediate supervisor or the person to whom that supervisor reports. Those unsatisfied, and those reluctant to engage in such a discussion, initiate Step Two by providing the business unit or department head with a complete written description of the situation and a proposed solution. The employee may request a written response or the formation of a review committee comprising a peer, a manager and a senior Human Resources representative. That committee provides its recommendation to the business or department head, who in turn provides a written decision to the employee. Step Three is mediation with a jointly selected neutral. Step Four is arbitration, which may or may not be binding on the parties at the choice of the employee. As the company explains:

> "If you are not satisfied with the arbitrator's decision and you reject that decision, you are free to pursue the matter through other legal avenues and the arbitrator's decision will not be binding on either you or the company. If you do accept the arbitrator's decision in its entirety, that solution will be binding on both you and Texaco as a final resolution of the matter."

2Effective October 9, 2001, Texaco merged with Chevraon Corporation. The program described in this study was superceded by a program for the merged entity, ChevronTexaco Corporation. The "Solutions" program nevertheless remains in effect with respect to claims raised by Texaco employees prior to October 9, 2001.

Employees may consult with the Texaco Ombuds person at any time during this process. The process can be entered at any stage; employees are not required to exhaust one step before availing themselves of another.

United Parcel Service (UPS) offers a five-step program, designed to provide "ways to minimize the possibility of an antagonistic and adversarial atmosphere when problems arise in the workplace." Step One is an "Open Door," in which employees, while encouraged to bring problems to their supervisor, "have the right to bring your concerns to anyone you choose." Concerns may be raised orally or in writing, and use of this step is mandatory. In Step Two, "Facilitation," employees are required to contact their Region Employee Relations Manager who will ensure that Open Door options have been explored, help to resolve the dispute internally, and otherwise facilitate satisfactory closure. Dissatisfied complainants may (but are not required to) progress to Step Three, "Peer Review." At this stage, the employee and a company representative present both sides of the dispute to a panel of three employees – two selected by the complainant and one by the company. The panel recommends a non-binding solution, which can include both non-monetary and monetary relief. Step Four, Mediation, is mandatory, but Step Five, final and binding Arbitration, is optional.

UBS PaineWebber's "FAIR" program offers four options: Open Door, Human resources' Issue Resolution Office, Mediation and Arbitration. The "Open Door" option encourages employees to speak directly to the individual at issue, or to their supervisors, or to an officer denominated the "Human Resources Generalist." The Issue Resolution Office reviews the problem, facilitates resolution, and advises and guides the employee through other processes

available. Mediation is conducted by an independent outside professional, and must be agreed to by both parties. Arbitration, too, is optional.

The U.S. Air Force offers a wide variety of ADR tools, including facilitation, mediation, early neutral evaluation and access to ombuds, in its Employment ADR Program for non-military employees. As a federal agency the Air Force is prohibited from engaging in binding arbitration unless it is agreed to as part of a negotiated grievance procedure in a collective bargaining agreement. Facilitation, the most used technique, is offered on an *ad hoc* basis in various nationwide installations, with central guidance in the form of "best practices." Air Force personnel are trained in interest-based negotiation for this purpose. Mediation, the second most-used technique, is conducted pursuant to standard practices for intake, ethical standards, and treatment of settlement agreements, by a uniformly trained corps of practitioners.[3] Notwithstanding a requirement that all Air Force installations have a champion and system for resolution of workplace disputes, and that the Air Force has a number of agreements with labor unions that provide for the use of ADR as an option prior to undertaking other dispute resolution procedures, the agency takes the position that all ADR use is voluntary.

The U.S. Postal Service offers a unique one-step program called REDRESS ("Resolve Employment Disputes Reach Equitable Solutions Swiftly"). Employees contacting the EEO office are offered a choice between counseling and mediation through the REDRESS program. Participation in the program is voluntary on the part of employees; managers or supervisors, however, are required to participate in the program if the employee selects it. The REDRESS

3 The Air Force reports that, since 1993, it has provided mediation training to more than 1,400 Air Force personnel.

Program aspires to address not the dispute, but rather the interpersonal relationship that gave rise to the dispute, through immediate reference to a specially trained mediator. This approach, termed "transformative mediation," seeks to "reap the long-term benefits of improved workplace climate" by encouraging dispute participants to recognize the legitimacy of each other's issues, and empowering them to come to a different, more functional, working relationship with each other. The experience of the mediation results not simply in the resolution of the dispute, but in disputants who themselves are more informed and skilled in managing the working relationship, thus reducing the likelihood of continued workplace tension.

Design Considerations

It is apparent that design questions arise within each of these programs. Many of these design questions may be summarized in five categories: scope, cost, incentives/rewards, attributes of the program, and implementation. Here are the five design choices, and how they affect any systems design:

Scope: This addresses two concerns: (1) which employees will be covered by the program, and (2) which claims will fall within the purview of each stage of the program.

Scope of Participants: Anheuser-Busch's program applies to "all banded salaried and nonunion hourly employees" of the company and its subsidiaries. Employees terminated prior to the program's effective date may use the program at the company's discretion.

CIGNA's processes are available to all employees, except that certain highly-compensated employees are not eligible for the Peer Review Process.

GE Corporate's Resolve procedure covers all non-represented Corporate employees assigned to US-based Corporate components.

Halliburton's program is applicable to all employees of Halliburton companies except (a) those living outside the United States and not governed by United States law, and (b) those covered by a collective bargaining agreement that does not include the program.

Masco's Open Door Policy and Dispute Resolution Policy covers "[a]ll non-unionized full-time and part-time employees of the Company ... – there are no exceptions."

Philip Morris offers its Open Door Policy – access to immediate, higher level management and region or headquarters Human Resources – to all employees. The three-stage Dispute Resolution Program – Ombudsperson, Mediation and Arbitration – is offered to Field Sales employees to resolve issues involving their separation from the company. Voluntary mediation is nevertheless available to any employee upon mutual agreement.

The Rockwell program is available to "Affected Employees," defined as "an employee who believes he or she has been directly affected by an action taken or not taken by the Company in violation of Company policy or procedure." However, disputes in which the Affected Employee is a Vice President or equivalent, or higher-level employee, are not subject to the Peer Review Panel.

Texaco's program covers all U.S., non-represented, regular Texaco employees, except for those who have released all claims when opting for an enhanced level of benefits pursuant to the terms of the company's separation pay plan.

UBS PaineWebber's FAIR program is accessible to all United States-based, domestic employees, including those in Puerto Rico, who work for UBS Paine Webber Inc. and their subsidiaries and affiliates in the United States and Puerto Rico, and any other UBS PaineWebber entities created after the effective date of the program, unless such entities are expressly

excluded. It is not available to expatriates or other international employees. Registered employees are bound by the rules of the National Association of Securities Dealers to take all claims, except those alleging statutory discrimination, to mandatory binding NASD arbitration, if less formal resolution is not successful

The U.S. Postal Service's REDRESS program is available to all employees, the vast majority of whom are members of a collective bargaining agreement.

Scope of Claims: Most programs include all claims that are cognizable before the federal Equal Employment Opportunity Commission. Some also include claims at common law, such as wrongful termination. Most programs exclude claims under the Fair Labor Standards Act, the National Labor Relations Act, State Workers Compensation Schemes, and ERISA or other similar pension and benefit programs. Some companies permit any claim to be asserted in low-level stages, but require that arbitration be reserved only for claims cognizable at law, for which damages might be awarded in court.

Alcoa's three-step program addresses any employment-related dispute that involves legally-protected rights other than workers' compensation, unemployment compensation, benefit, retirement and OSHA matters.

Anheuser-Busch is an example of a company that distinguishes scope of claims by level of dispute mechanism: Employees may raise "all work-related problems and disputes" at the "Local Management Review" level; mediation and arbitration are reserved for "employment-related claims regarding termination and/or alleged unlawful or illegal conduct on the part of the company."[4]

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CIGNA permits any work-related question or concern to be heard in the first of its two internal processes, the "Speak Easy Process." The Peer Review Process is limited to interpretation or application of company policies, rules or practices. The Peer Review Panel cannot change such policies, rules or practices; pay levels; schedules; performance appraisals; or business decisions. Nor can it grant monetary relief. Arbitration is reserved for issues that "are legal and would otherwise be heard in court."

GE Corporate permits assertions of any work-related problem, concern or issue until the levels of mediation and arbitration, which are limited to "Employment-related claims against the Company or individual managers acting within the scope of their GE employment that a court in the local jurisdiction (location) would have the authority to decide under applicable municipal, state or federal statute, regulation or law." A similar distinction is made in Halliburton's program, where employees may bring a broad range of claims in informal processes, but mediation and arbitration are reserved for "legally protected rights."

Johnson & Johnson employees can raise "almost any dispute" in Open Door and Facilitation, but "only legally recognizable claims may be submitted to Mediation." Its explanation of included and excluded claims provides a model for other companies:

> The following disputes are covered by all three methods available under the Program: wages or other compensation due; breach of contract; wrongful

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> Expressly excluded are claims under an ERISA benefit plan; workers' compensation; safety requirements; unemployment compensation; alleged breach of an employee's non-competition, no-solicitation, fiduciary or confidential obligations; claims involving patents, trademarks or intellectual property; claims against a manager for conduct not within the scope of employment; claims covered by the NLRA; and claims seeking to establish, modify or object to company policies and procedures (except to the extent discrimination is alleged). These exclusions are typical of most programs.

discharge; discrimination on the basis of race, color, sex, sexual orientation, religion, national origin, disability or age; harassment; retaliation; defamation; infliction of emotional distress; whistleblowing claims; termination; violation of Company policies; and any other legally protected rights. In the case of a claim for denial of benefits under the Johnson & Johnson Employee Benefit Plan, any and all claim filings and appeal procedures must be undertaken and exhausted before the Program can be utilized.

The Program does not cover disputes relating to: claims for workers' compensation or unemployment benefits and claims by the Company for injunctive and/or equitable relief for unfair competition, use of trade secrets or confidential information, or to enforce the terms of a Non-Compete, Secrecy, Non-Solicitation, or other employment-related agreement. The Program does not affect the exclusive remedies provided under the applicable workers' compensation statute. The Program does not apply to challenges to the business decisions of the Company, such as decisions to restructure, reorganize, downsize or divest a business or to offer any Voluntary Separation or Early Retirement Programs, unless such decisions or programs violate the employee's legally protected rights.

Masco also exempts "any dispute, which, in an express written agreement between the Company and the employee, specifically provides for a judicial or other remedy."

McGraw-Hill includes a broad range of disputes in its program, "as long as it relates to your job performance or job responsibilities." Excluded are disputes arising from employment agreements, talent contracts, ERISA matters or workers' compensation, and disputes relating to a member of a union.

Shell's Resolve program covers claims of perceived discrimination, retaliation or harassment; disagreements with application of company policies, practices or rules; personality conflicts that affect job performance; allegations of unfair disciplinary action or job termination; and other employment-related claims. Excluded are claims for workers' compensation and unemployment benefits, claims covered by other existing processes (such as an employment benefit plan or relocation program), and challenges to the company's authority to make business decisions or develop policies affecting terms and conditions of employment.

Rockwell's arbitration stage is restricted to claims that the company and employee have mutually agreed to arbitrate, and for which a court would be authorized to grant relief. Excluded from arbitration are claims involving workers' compensation, unemployment compensation, unfair competition and disclosure of trade secrets, and claims whose resolution is governed exclusively by a collective bargaining agreement. Layoff decisions are not subject to the Peer Review Panel. Any issue involving the construction or application of a benefit plan covered by ERISA is excluded from the entire process.

Users of Texaco's program can assert claims relating to discipline, discharge or layoff violation of company policies, discrimination, harassment, work-related conflicts affecting job performance, or any other actionable employment-related claim. Excluded are claims that seek to change company policy or challenge its validity, claims that are time-barred or previously

raised and determined, claims subject to other review procedures (such as performance appraisals, employee benefits, workers' compensation and home appraisals under the company's relocation program), unfair competition, and class actions.

UBS PaineWebber's program permits "almost any dispute" to be raised; examples of excluded claims are workers' compensation and other benefits, unfair competition, trade secrets, violation of non-compete agreements, violations of employment agreements, and certain wage-hour claims. The parties must agree before mediating or arbitrating any dispute, and arbitration is reserved for "disputes involving legally protected rights."

UPS employees may raise any work-related matter through Open Door and Facilitation. Peer Review and Mediation are reserved for disputes involving legally protected rights, as well as those involving application of company policies, procedures, rules and practices that affect employment. Arbitration is for legally protected rights only . The only explicit exclusions from the program are workers' compensation and unemployment insurance claims.

The U.S. Air Force's ADR Program covers all types of workplace disputes, including EEO complaints, Unfair Labor Practice claims, Merit System Protection Board complaints, Negotiated Grievances, Administrative Grievances and other workplace disputes that may not be actionable. However, each claim is reviewed by management to determine whether it is appropriate for ADR. As a federal agency, the Air Force is subject to the Administrative Disputes Resolution Act of 1996, 5 U.S.C. 571, *et seq*. Section 572(b) requires agencies to consider not using a dispute resolution proceeding if one or more of the enumerated conditions exist. These include situations where a definitive or authoritative determination is needed for precedential value, significant government policy considerations are involved, the matter

significantly affects persons or organizations who are not parties to the proceeding, a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record, or the agency must maintain continuing jurisdiction over the matter with the ability to alter the disposition as circumstances change. In addition, some subjects of workplace disputes are governed by government-wide rules that are not amenable to variations by agreement. An example of such a dispute would be a job classification appeal, which involves job standards set by the Office of Personnel Management. Finally, ADR is not used to address conduct that is punishable under the Uniform Code of Military Justice or adverse administrative actions against military personnel.

Although the U.S. Postal Service's program is initiated by an employee's contacting an EEO specialist, in practice the claims addressed under the program are not limited to EEO claims. Program administrators report that many workplace issues that are likely not actionable under the EEO are nevertheless addressed and resolved through the program. Claims that are not within the program and for which mediation is unavailable include those as to which an active criminal investigation exists and those under the jurisdiction of the Department of Labor (e.g., worker's compensation) or the Office of Personnel Management (e.g., disability retirement). Certain sexual harassment claims may be subject to reporting requirements prior to mediation.

Cost: Particularly at the later stages of mediation and arbitration, employment dispute resolution processes can involve costs, including for neutral and administrative fees. Designers must decide whether an employee should pay all or part of these costs, and if so to what end and at what point during the process. Some companies require employee payment of a small portion of the cost of mediation; others require some payment toward arbitration fees.

Alcoa requires the employee to pay a $100 processing fee to initiate mediation, and a $200 fee to initiate arbitration. The fee "represents a small portion of the cost of these procedures, but ensures that everybody is committed to the process and takes it seriously."

Anheuser-Busch charges employees requesting mediation $50 and those requesting arbitration $125, and pays all other administrative costs and fees, as well as the employee's salary for the time spent at the proceeding (up to seven days in the case of arbitration).

CIGNA requires that employees seeking to challenge the results of internal dispute processes pay a one-time fee of $100. The company will pay all further costs of arbitration, but employees are offered an opportunity to split the neutral's fees if they choose to do so. Irrespective of their choice, the arbitrator is not told the source of the fees.

At GE Corporate, a $50 initiation fee is charged at each of levels Three (mediation) and Four (arbitration); the company covers all administrative costs associated with those proceedings.

Halliburton requires employees seeking mediation to pay a $50 fee, and those seeking arbitration also to pay a $50 fee unless they have already paid a mediation fee. The company pays all other costs.

MG Corp. states that, "[n]ormally, the mediator's charges are divided equally between the parties. However, we will propose or agree in appropriate cases that the company will bear more than one half the cost of the procedure." As for arbitration expenses, the Arbitration Procedure imposes on the employee "a portion of the reasonable expenses of the arbitration up to the lesser of (a) one-half of these expenses, or (b) an amount equal to two (2) days of the Employee's gross annual cash compensation (including bonuses, commissions and related cash

compensation) during the twelve (12) months immediately preceding the notice of claim.... The Employer shall bear the remainder of these expenses and the Arbitrator shall not be informed whether or not the Employee has made such election."

Field Sales employees seeking mediation or arbitration through Philip Morris' Dispute Resolution Program must pay an initial filing fee of $150. The company pays the balance of the filing fee and the remainder of the arbitration expenses (unless the employee chooses to pay more). Employees who request mediation are responsible for one-half of the mediator's daily fees and expenses.

Rockwell requires that employees split arbitrators' fees 50-50 with the company, explaining that "[t]his is done because both the employee and Rockwell want to ensure that the arbitrator will be objective and impartial. If the arbitrator were paid by Rockwell alone, an employee might question that arbitrator's objectivity."

Texaco requires employees to share the cost of mediation, up to an amount equal to one day's base pay. Arbitration costs are absorbed by the company if the arbitrator rules in the employee's favor, and otherwise are split (with the employee's share capped at an amount equal to two days' base pay).

UBS PaineWebber offers to pay the entire cost of any agreed-upon mediation, and up to 75% of arbitration expenses, as long as the proceedings are conducted under the auspices of AAA, JAMS or another mutually agreed-upon source.

Companies requiring no employee fee include Johnson & Johnson, Masco, Shell, UPS, the U.S. Air Force and the U.S. Postal Service.

Costs at these stages are not restricted to payment for the third-party neutral; frequently employees feel the need to seek legal counsel, either to consult prior to bringing a claim or to participate in mediation and arbitration proceedings.[5] Although most programs require employees to bear their own legal costs, some provide assistance in the form of a subsidy or legal expense "pool."

Companies requiring all parties to pay their own legal expenses include Anheuser-Busch, CIGNA, Johnson & Johnson, Masco, Rockwell International, Texaco, UBS PaineWebber, UPS and U.S. Air Force. (The Air Force notes, however, that in instances where attorney fees could be recovered if the dispute were successfully litigated, such fees may be included as part of a settlement agreement.)

GE Corporate does not reimburse employees' attorney fees until the mediation and arbitration level. The company "will reimburse the employee up to $2,500 for attorneys' fees incurred for mediation, provided that a complete settlement of all claims is reached at mediation. If the claim goes to arbitration and the arbitrator decides in the employee's favor, the arbitrator may include attorney fees in the award, if permitted by law."

Halliburton provides a monetary benefits up to $2,500 per 12-month period for use by employees in obtaining legal assistance. After a $25 deductible for each dispute, the company pays 90% of the employee's attorney's fees and expenses up to the $2,500

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5 Several companies have a policy that they will not be represented by an attorney at a mediation or arbitration unless the employee chooses to be so represented.

limit. Payments are made directly to the attorney. The Plan pursuant to which these payments are available is governed by ERISA.

Philip Morris offers a Dispute Resolution Benefits Plan to its employees covered by the program. The Plan will pay, among other things, 80% of a participant's attorney's fees up to $1,000 for each dispute. It is an employee benefits plan governed by ERISA.

Shell offers a Legal Assistance Plan, featuring modest deductible and co-payment requirements to be applied for employee's legal costs. Against a maximum benefit of $2,500 per year per employee, this plan requires employees to pay a deductible of $50 per conflict and a further 10% of the balance. For example, with respect to a legal bill of $1,000, the employee pays $50 deductible and 10% of the $950 balance – or $95. The Company pays the remaining $855.

Administrators concede that the notion of encouraging employee legal representation is often regarded as counterintuitive. However, they note that the involvement of competent plaintiff's counsel often makes proceedings more efficient, increases employee sophistication in assessing options, makes administrative matters (such as selection of neutrals) easier, and results in greater employee satisfaction.

It is an open question whether highly compensated employees (such as securities brokers) should be offered the same legal assistance benefits as lower paid employees -- that is, whether employees who can more easily afford legal representation respond to the plan the same way less compensated employees do. It should also be remembered that some courts have looked with disfavor on an employee's being made to pay anything towards the cost of mandatory binding arbitration, irrespective of the employee's ability to pay. These courts reason that such arbitration constitutes a waiver of a right of access

to the judicial form, for which no (direct) payment is required, and that an alternative to a judicial forum should impose no obstacle to access that the statutory forum does not impose.

Incentives/Rewards: The distinction between an "incentive" and a "reward" is important for designers to consider. An "incentive" is an aspect of the design that encourages disputants to avail themselves of the program. A "reward" is a consequence of effective use of the program. Thus (for example) a program might provide incentives – such as assurances of confidentiality and safeguards against retaliation – to encourage employee participation, while offering rewards – such as recognition or commendation – to encourage supervisor and management participation.

Cost allocation is not only a structured decision; it is also an incentive to use. Questions of how, when and why to make financial outlays in connection with the program can be strategic and even tactical, because how and to what extent employees should incur costs in connection with program usage can encourage employee participation. Imposing no cost for employees to access the program at the earliest moment will presumably increase utilization and yield early indication to management of problems, at a point when they may most easily be addressed.

An employee fee may ensure that the employee has a stake in the outcome of the mediation or arbitration process, and enters into it deliberately. However, a company's paying a disproportionate share of the neutral fees and expenses will likely have the effect of encouraging employee involvement. Indeed, some companies (like GE Corporate) even condition the offer on the mediation's success. Thus, employees are not merely dissuaded from incurring the added cost of proceeding to arbitration; they are

affirmatively rewarded for resolving the matter at the mediation stage, resulting in a higher likelihood of voluntary settlement of the dispute.

Attributes: Each of the three classic stages – direct early management, non-adjudicative intervention and adjudication – presents certain challenges and questions as to procedures and design. On the first stage, decisions must be made whether an ombuds office shall be maintained; whether a hot-line will be provided to encourage employee complaints; whether anonymous complaints will be accepted or even encouraged; whether employees must exhaust one level of review before proceeding to the next; and so on. At the mediation stage, the questions include whether mediation should be a prerequisite to arbitration; whether to require other options to be exhausted prior to mediation; how to identify mediators acceptable to all parties; how and when to involve union representatives; whether to train internal mediators; and what mediation rules or procedures shall be followed. Finally, at the arbitration stage the system designer must consider whether arbitration is voluntary or mandatory; whether an agreement to engage in arbitration should be made prior to or in response to a particular dispute; whether an arbitrator's award will be binding on the employee, on the employer, or both; how arbitrators will be selected; and what rules and procedure will be followed.

Implementation: Even the most sophisticated employment dispute resolution program is ineffective unless it is utilized. This involves getting endorsement and enthusiastic support of all levels of management, as well as recognition and full involvement from the workforce. Questions of how to communicate the program to employees, and how to ensure that front-line supervisors are aware of and execute the program properly and fairly, are also important.

The Halliburton brochure describing the employment disputes program prominently features an encouraging endorsement by Dave Lesar, President and Chief Operating Officer: "It's important our employees know that the [Dispute Resolution Program] is a place where they can go for assistance with disputes in the workplace." Philip Morris lists a group of "Good Reasons To Use The Open Door Policy," and the first reason listed is because "Management is committed to it."

The U.S. Air Force supplied unique endorsement in a memorandum to all installation commanders from the Commander of Air Force Materiel *requiring* that "each installation commander will establish an ADR champion for workplace disputes." A second memorandum from the Commander, noting that "center commanders and the AFGE local union presidents are charged to work together to promote the development, deployment, and use of an effective ADR program for workplace disputes," was co-signed by the President of the union.

As part of the national installation of its REDRESS program, the U.S. Postal Service trained thousands of employees in communication skills, mediation and conflict resolution. Among those involved were EEO professionals, human resources personnel, union officials,

labor relations staff, and other interested stakeholders. Two-hour briefings were given in every site immediately prior to implementing the program, to ensure employee awareness and understanding of the program.

In this context, brief but emphatic mention should be made of the vital importance of consensus-building during the design process. The experience of many companies counsels that the broader the input in making these design decisions, the more effective

the implementation of the program will be. For example, management and employees who indicate initial concerns about the program should be aggressively invited to assist in designing it, thereby ensuring that each sector of the corporate constituency has a stake in the program's success and reasonable objections have been raised, analyzed, and addressed in a way that obviates them – and "unreasonable" objections have been identified and can be managed.