

## **Section III. Model Implementation Tools**

### **D. STEP-BY-STEP GUIDE TO USING ARBITRATION WHEN A DISPUTE ARISES**

This checklist assumes that the Company (a) attempted to resolve the problem by informal means prior to mediation but was unsuccessful in doing so; (b) had no mediation program or had a mediation program that either was not used in the subject dispute or did not succeed; and (c) is either willing to arbitrate, or has agreed with the employee to arbitrate the dispute (either prior to or subsequent to the dispute itself).

#### **Step 1. Party Proposes Arbitration**

- (a) Company Offers but Does Not Require Arbitration
  - i. Employee, orally or in writing, contacts a designated Company representative and requests arbitration either to resolve a dispute or to respond to a Company action against the employee.
  - ii. Employer proposes that arbitration be used once an employee asserts a claim.
  - iii. Company counsel decides if the dispute is suitable for arbitration from the Company's perspective.
  - iv. If so, notice to employee should contain:
    - notice that the Company will agree to arbitration
    - how to exercise option and whom to contact at Company
    - the right to consult with and be represented by counsel or another representative of choice in the arbitration process
    - the applicable period in which the employee must request arbitration
    - notice that if mediation was used unsuccessfully, the applicable statute of limitations was stopped during the mediation process and for 15 days after written notice of mediation conclusion
  - v. If not suitable for arbitration, no notice of arbitration availability is given to employee.
- (b) Company and Employee have Agreed to Arbitration
  - i. Company informs employee that employee's claim is subject to mandatory arbitration and provides or recites any documents previously signed by employee acknowledging mandatory nature of the agreement to arbitrate.

- ii. Notice given to employee specifies information at Step 1(a) (iv) above, except that arbitration use is mandatory.

### **Step 2. Parties Execute Arbitration Submission Agreement (Voluntary Arbitration Program Only)**

In a voluntary arbitration program, the parties must execute a submission agreement to employ arbitration. (See *CPR Post-Dispute Arbitration Submission Agreement*.)

### **Step 3. Notice of Claim Requirements**

In mandatory and voluntary arbitration programs, the employee must initiate the process within the applicable statute of limitations period with written notice to a person or department previously designated by the Company and to anyone alleged to be personally liable.

- i. Notice by employee or employee's attorney shall contain:
  - nature of claim
  - relevant facts
  - remedies sought
  - documents in support
  - address employee will use for notices
- ii. Employer must assert a defense or counterclaim within 30 days of the other's notice of same.
- iii. Employee asserts defenses to counterclaims within next 30 days.
- iv. Claims and counterclaims may be amended before selection of the arbitrator and thereafter with the arbitrator's consent. Replies due 30 days after amendments.
- v. Notice by either party is delivered by:
  - U.S. mail, return receipt requested
  - by hand to a person at \_\_\_\_\_ department of Company  
by fax to \_\_\_\_\_ Company department
  - by Federal Express, etc., to \_\_\_\_\_ department
  - to employee at the address designated by employee

### **Step 4. Employee and Company Seek Counsel or Representative of Choice**

### **Step 5. Relation of Arbitration to Litigation**

- i. Parties can pursue statutory rights expressly preserved by law in courts or administrative agencies.
- ii. Parties will not commence and shall discontinue any other litigation or agency action that is related to the dispute being subject to arbitration.
- iii. Parties can move a court to compel arbitration or for temporary relief in aid of arbitration.

### **Step 6. Parties Select an Independent Impartial Arbitrator**

- i. By prompt mutual agreement.

- ii. If no agreement, parties request CPR (or other organization) to nominate candidates for arbitrator
  - CPR provides at least 5 candidates, admitted to the bar not less than 10 years, screened for conflicts with background, qualifications and rate of hourly compensation requested by the arbitrator
  - Parties independently numerically rank candidates within 10 days or all are presumed equally acceptable
  - CPR selects highest ranked candidate
  - if tie, CPR selects
  - if no candidate selected, CPR appoints arbitrator

#### **Step 7. Challenges to Impartiality of Arbitrator**

- i. Arbitrator reveals any circumstances possibly affecting neutrality or impartiality. (If the arbitrator's practice consists predominantly of representing employers or employees that must be disclosed but shall not constitute grounds for challenge.)
- ii. If impartiality is challenged by a party for cause:
  - arbitrator may withdraw
  - other party may agree to challenge
  - CPR will decide, if parties are in disagreement

#### **Step 8. How Parties' Counsel Fees Will Be Paid**

Each party is required to bear its own counsel fees under CPR's procedure. However, in a voluntary program the Company may wish to encourage participation by assuming a share of these fees.<sup>5</sup>

#### **Step 9. Arbitrator Schedules Hearing**

- In county where employee was principally employed
- Otherwise agreed by both parties
- Otherwise as directed by arbitrator for good reason

#### **Step 11. Arbitrator Supervises Pre-Hearing Discovery**

- Parties voluntarily exchange documents and information
- Employee can request personnel record (not pre-employment reference checks)
- One deposition per each side permitted 30 days before hearing.
- Other discovery, as agreed by parties or approved by arbitrator for substantial, demonstrable need
- Discovery disputes resolved by arbitrator

#### **Step 12. Subpoenas**

- Counsel can issue subpoenas for witnesses/documents to extent permitted by applicable law
- Party can request arbitrator to issue

- Arbitrator can issue to extent permitted by applicable law

### **Step 13. Arbitration Hearing Conducted and Evidence Submitted**

- Each party bears burden of persuasion on claims and counterclaims
- No formal rules of evidence except:
  - work product
  - attorney-client
  - privilege arising from offers of compromise
- Testimony is under oath or affirmation
- A record may be made of the proceeding by either party if record is supplied to the opponent
- Parties may vary procedure, in writing, before the . arbitrator renders an award

### **Step 14. Confidentiality**

- Proceedings and record are confidential except:
  - where both parties agree in writing
  - as appropriate in subsequent proceedings between parties
  - in response to government inquiry once other party is notified so that party can assert objections.
- Arbitrator can issue protective orders.
- Arbitrator assembles record documents and award and maintains for one-year after the award, unless otherwise agreed.

### **Step 15. Arbitrator Issues Award Within 30 Days of Close of Hearing**

- Evidence presented and applicable law shall control the disposition of each dispute.
- Arbitrator's award can grant any relief a court could grant.
- Award Requirements:
  - written & signed duplicates to each party
  - with express findings of fact on each issue
  - with rationale for money damages or relief
  - with discussion of authority and conclusions of law if any legal issues were in dispute
  - based on evidence presented and law argued by parties
  - in compliance with the **CPR Procedure**, and either the Federal Arbitration Act or state arbitration law, whichever is applicable
- Arbitrator may award reasonable attorney's fees and costs for frivolous or harassing claims.
- Arbitrator may award reasonable attorney's fees and costs for delay, lack of cooperation and confidentiality breaches.

### **Step 16. Finality of Award**

- The award shall be final and binding on both parties, unless the CPR procedure had been modified to provide that the employee may elect

within thirty days not to be bound by the Award. In that event, the employee is given sixty days to bring an action in court.

- ii. The award may be vacated or modified only on statutory grounds. Under federal and most state law, arbitration awards may be modified for calculation errors or vacated only for partiality, bias or fraud by the arbitrator.
- iii. The award may be converted to a judgment of a court.