1983

Exploring Voluntary Arbitration of Individual Employment Disputes

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Changes in law, technology, and philosophy have, as a practical matter, undermined the rule that employment decisions can be made for a good reason, a bad reason, or no reason at all. The age of the employer's unreviewable power over its employees is over. Today,
employment decisions are subject to a patchwork review under antidiscrimination laws,\(^3\) and the rapidly growing body of common law restrictions.\(^4\) There are also calls for the adoption of state statutes.\(^5\) The question now is what processes and principles should be applied in reviewing those employment decisions which are no longer sheltered from judicial scrutiny.

I believe that at this stage in the evolution of employment law we should encourage the use of arbitration as a primary means of resolving disputes concerning dismissals of higher-level, white-collar employees. This can be accomplished by including arbitration clauses in individual employment contracts within the framework of existing laws.

This Article outlines an arbitration process which may be employed in individual employment contracts to achieve a fair disposition of disputes, with the maximum finality for an arbitration decision which is consistent with legal principles. Where finality is not possible, arbitration would be a condition precedent to formal legal processes. To assure fairness in the process, the employer would agree to pay the arbitrator’s fee and the employee’s attorney fees incurred in connection with the arbitration.

To facilitate discussion of the issues involved in this approach, a sample individual employment contract arbitration provision is discussed throughout this Article. This provision appears in full in the Appendix. Although I do not expect universal acceptance of the solutions offered, I believe that each of the subjects discussed should be addressed in any generalized approach to individual employment contract arbitration. If this proposal generates serious interest, it would be useful to hold a national conference to consider the details of a "model" individual employment contract arbitration clause.

I. PRELIMINARY CONSIDERATIONS

A. The Focus on "Higher Level" Discharge Cases

The changing political, social, and technological values of the last

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3. In addition to Title VII and ADEA, employees have protection from certain employer decisions under numerous federal and state statutes. For a listing of various statutes, see Note, Model Statute, supra note 2, at 393 n.23.

4. See At-Will Employment, supra note 2, at 180-89.

5. See, e.g., Mennemeier, Protection from Unjust Discharges: An Arbitration Scheme, 19 Harv. J. on Legis. 49 (1982); Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 Va. L. Rev. 481 (1976); Note, Model Statute, supra note 2. In addition to this scholarly support for state statutes, at least five states are considering statutory proposals to provide "just cause" protection. See id. at 404 n.82; see also Steiber, Protection Against Unjust Discharge: The Need for a Federal Statute, 16 U. Mich. J.L. Ref. 319 (1983) (proposing a federal statute for just cause protection).
half century have increased the legal responsibility of employers for their employees. Political processes have subjected employment decisions to legal restraint first, in the 1930's, with respect to employer anti-unionism and later, in the 1960's, with respect to race, sex, national origin, and age discrimination. These changes contributed to a shift in underlying social attitudes toward unfettered employer freedom of action — a shift which culminated in the growing body of common law decisions that require increased fairness in employer-employee relations. One does not have to analogize the employment relation to "property rights" to recognize the importance of the relationship and the social need to afford it some legal recognition. The nature of work has been changing since the turn of the century. The proportion of employees who work in white-collar jobs which involve professional, technical, and managerial activities has drastically increased. One analyst has suggested that within twenty years our blue-collar work force will be little larger than our current agricultural work force. In this growing area of white-collar employment, unionism — the traditional bulwark of worker protection — has had limited attraction. Workers who have felt the need for protection from arbitrary managerial decisions have banded together, if at all, under the ad hoc umbrella of discrimination class actions, rather than participate in the collective bargaining process.

Within this growing sector of the labor force, discharge is the primary managerial decision that triggers resort to the formal legal processes. Except in the pregnancy benefit and pension areas, other management decisions, such as assignment, payment, and fringe benefits, are rarely litigated. Discharge decisions, however, frequently lead to

7. See At-Will Employment, supra note 2, at 180-89 and cases cited therein.
9. Peter Drucker has predicted a decline in the blue-collar labor force to around 10% in 2005. BNA DAILY LAB. REP. (BNA), A-7, March 26, 1981.
10. In 1960, 8.6% of the 28.5 million white-collar workers were unionized. In 1978, 8.2% of the 49 million white-collar workers were unionized. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1979 & 1981). See also Angel, Professionals and Unionization, 66 MINN. L. REV. 383, 386-87 (1982) (discussing low rate of unionization among white-collar workers).
11. See, e.g., Bean v. Crocker Nat'l Bank, 600 F.2d 754 (9th Cir. 1979); Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1977).
litigation.\(^\text{15}\) This is especially true for workers over forty, covered by the Age Discrimination in Employment Act ("ADEA"),\(^\text{16}\) who may feel that the employer has not adequately recognized their long-term contribution to the institution.\(^\text{17}\)

It is therefore appropriate to focus the discussion of development of individual employment contract arbitration around the issue of discharge of a higher-level managerial, professional, or technical employee from a white-collar job.\(^\text{18}\)

**B. Advantages of Arbitration Over the Existing Legal Process**

Today, employment decisions are subject to review in a wide range of federal and state courts and administrative agencies.\(^\text{19}\) Recent changes in employment law under common law and statutorily based decisions suggest that these tribunals will face increased caseloads in the future. In addition, the general rise in litigiousness documented by the Chief Justice in his recent plea for arbitration\(^\text{20}\) suggests that this development will continue. This increase in litigation poses new and serious problems for employers and employees, including increased costs, delay, complexity, and uncertainty. I believe that contractual arbitration will avoid or minimize many of these problems and provide useful benefits for both employers and employees.

1. **Decreasing delay**—The ordinary processes of law, both in administrative agencies and courts, are slow.\(^\text{21}\) In addition to the strain on court calendars, delay causes hardship for both employers and employees. Employers face the risk of back pay awards which may increase during the time it takes to process cases. At the same time,


\(^{18}\) Both Professor Summers and Mr. Mennemeier would exclude higher-level employees from their proposed statutes for a variety of reasons. See Mennemeier, supra note 5, at 79-81; Summers, supra note 5, at 524-26. But these are precisely the employees whose propensity to litigate creates the greatest risk to the employer.

\(^{19}\) These include state civil rights agencies which have hearing powers, see, e.g., N.Y. EXEC. LAW § 295(7) (McKinney 1982), the Federal Equal Employment Opportunity Commission which does not, 42 U.S.C. §§ 2000e-4(g) to e-5 (1976), federal district courts which hear cases arising under anti-discrimination statutes, and state court proceedings on "new" tort and contract claims.


\(^{21}\) Id. See also Lewin, New Alternatives to Litigation, N.Y. Times, Nov. 1, 1982, at D1, col. 3, D2, col. 1 ("The average arbitration takes 141 days from filing to award, in contrast with the nationwide average of 20 months for a civil suit to get from filing to trial in the Federal courts."); Olson, Controlling Litigation Costs: Some Proposals for Reform, 2 LITIGATION, Summ. 1981, at 16.
the uncertainty and anguish of prolonged litigation has ruined the personal and professional lives of many employees. For every worker who has become a hero in litigation, there are many whose lives have been stultified by it. Because arbitration is less time-consuming than litigation, it reduces this risk for employees.

2. Decreasing costs—The costs of litigation are great. Attorney fees have dramatically increased during the past several years preventing many discharged employees from seeking relief because they need counsel at the moment when their income has been cut off. Even if an employee can afford an attorney, though, the prospect of a limited recovery may not justify the expense of a lawsuit.

From an employer's perspective, the costs associated with employment discrimination suits, including damages and the employee's attorney fees, may also be great. For example, in Cancellier v. Federated Department Stores, the court upheld a $2.3 million jury verdict which consisted of attorney fees, compensation, and punitive damages. Such verdicts may be even more burdensome if employees bring class actions, and potential liability is expanded beyond individual employees.

Arbitration of the type suggested below solves these difficulties. Litigation expenses for employees would be reduced because employers would pay for the arbitrator and the employee's attorney fees. At the same time, the employer will avoid unduly large individual verdicts because the arbitration agreement limits liability to lost wages and fringe benefits, and reduces the risk of class action litigation.

3. Decreased complexity and uncertainty—The rapidly changing nature of employment law makes it difficult for employees and employers to determine what type of activity is improper. Furthermore, the calls for new legislation raise problems of increased regulation in the workplace. The possibility of another regulatory agency only accentuates this complexity. Arbitration can develop and apply substantive principles concerning wrongful discharge in higher-level jobs, thereby reducing the need for statutory protection. Arbitration thus may further the objective of fair treatment for employees, without establishing a more elaborate legal process.

22. See, e.g., Hochstadt v. Worchester Found. for Experimental Biology, 545 F.2d 222 (1st Cir. 1976) (illustrating how concern over alleged discrimination caused deterioration in personal relationships); see also Burger, supra note 20, at 275.


25. 672 F.2d 1312 (9th Cir. 1982). The court awarded $1.9 million to three employees in addition to $400,000 in attorney fees. Id. at 1315.

26. See infra sec. III G-H.

4. Increased neutrality—Employment litigation may be perceived by both employers and employees as involving biased decision-makers. A jury largely composed of retired or older persons may be viewed as unfair by an employer defendant in an age discrimination case. A jury largely composed of whites may seem unfair to a black seeking relief under the old Civil Rights Act. I suspect that juries are more likely to find for employee plaintiffs in cases of egregious employer conduct: thus, employees may lose before juries where the claim is meritorious but does not involve extreme employer misconduct. Arbitration minimizes these difficulties because the arbitrator is chosen by the parties who may exclude those likely to be overly biased against them.

5. Other advantages—In addition to the advantages discussed above, employers may find other important benefits from arbitration. The availability of arbitration may reduce the perceived need for unionization among higher-level employees. This is particularly true when an employer uses arbitration as a final step in an internal grievance procedure. From the perspective of a discharged employee, these internal procedures may work more satisfactorily if they are administered with a realistic expectation of a genuine outside review by an arbitrator. In addition the comparative confidentiality of arbitration, reduces the risk that the employer will acquire a reputation for unfair treatment of employees. Some employees may be less hesitant to assert claims in the informal process than through the public forums of litigation.

II. Standards of Fairness in the Arbitration Process

In collective bargaining relationships, the details of the arbitration process are hammered out between the union and the employer against a background of half a century's experience. In non-unionized private sector employment, there is no organization analogous to the union to represent employee interests in developing arbitration procedures. Therefore, the employer and its lawyers have a comparatively free hand in drafting the details of an arbitration clause. Because job applicants are likely to want a job more than discussions about a forum in which to assert rights if they are fired, the employer frequently will be able

29. See generally Brown, Limiting Your Risks in the New Russian Roulette — Discharging Employees, 8 EMPL. REL. L.J. 380, 399-401 (1982-83) (discussing benefits and use of arbitration as final step in grievance procedure for unorganized employees); Coulson, supra note 27, at 407, 409-10 (discussing degree to which non-union employers use grievance mechanisms, including arbitration).
30. See Lewin, supra note 21.
to obtain an arbitration clause of its own design. Under these circumstances, some employers may seek to unfairly narrow the legal rights of employees in the arbitration clause.

This temptation should be tempered by two legal principles which limit the employer's contractual power to restrict the employee's rights. The first is a general requirement of fairness which will modify any arrangement that the courts believe is overreaching or "unconscionable." Thus, an implied covenant of good faith may be read into the contract. This principle is likely to be applied where an arbitration clause is drafted by the employer and presented to the prospective employee on a "take it or leave it" basis. The clause may be considered a contract of adhesion to be construed against the employer.

The second principle is more specific. Employees generally may not contract away statutory rights intended for their protection lest these rights prove illusory. The employer's superior position, which gave rise to statutory protection for employees, cannot be exercised by contract to extinguish these rights. If the rule were otherwise, legislation designed to benefit the weaker party could be easily nullified. There is some leeway in waiving statutory rights, however, where the courts are convinced that the transaction is fair.

These principles require that any arbitration process developed by the employer manifest sufficient fairness toward the employee to justify serious modification of employee rights before a court will give finality or even deference to it. This standard of fairness may not provide equivalent protection for employee interests which might emerge through unionization, but in the absence of worker organizations, it is the only

32. Although in recent years there has been a growth of interest in the rights of non-union employees, it has not crystallized into an organizational form. See Feliu, supra note 12, at 175-76.
34. Cf. Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir. 1982) (holding that California law recognizes implied covenant of good faith in employment contracts); Magnan v. Anaconda Indus., 37 Conn. Supp. 38, 429 A.2d 492 (1980) (employer breaches covenant of good faith if it engages in fraud, deceit, or misrepresentation).
35. See, e.g., Stopford v. Boonton Molding Co., 56 N.J. 169, 184, 265 A.2d 657, 665 (1970) ("A contract should not be read to make the employer's plan a mere ephemeron and the promise to pay a pension upon performance of the fixed terms a mere illusion.").
37. See Note, Model Statute supra note 2, at 392.
38. See Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982) (employee voluntarily signed retirement agreement).
39. For a more detailed discussion of the effect of arbitration on employee legal rights, see infra sec. IV.
standard available to evaluate employer-drafted arbitration clauses.

III. PROVISIONS OF A "MODEL" AGREEMENT

Sections I and II outlined the advantages of arbitration for higher-level employees and their employers and the standard of fairness by which courts will measure such a process. Section III will examine the details of a "model" arbitration agreement.40

A. Subject Matter

Any controversy or claim arising out of or relating to the termination of the employee by the employer, including any claim based in whole or in part on federal, state, or local laws, whether statutory or common law, shall be settled by arbitration in accordance with this agreement.

Discharge cases are likely to be most troublesome to the employer. They pose the greatest risk of liability, especially in connection with high-level jobs. Employees have less to lose in discharge cases and are thus more likely to litigate the fairness of discharges than other claims. Therefore, in the opening stages of development of individual arbitration, it is appropriate to limit the arbitration clause to discharge cases.

Another reason to focus on discharge cases is the need to develop standards of fairness in white-collar discharge cases. Professor Summers has argued that the principles of "just cause" developed by labor arbitrators can be applied to nonunion situations as well.42 To the extent his assertion applies to high-level jobs, I do not believe just cause principles developed in "blue-collar" cases are readily transferable. Our concepts of "just cause" for termination have evolved out of experience with blue-collar workers under collective bargaining arbitration.41 Most of these cases deal with jobs which can be precisely defined; the employer can document failure, identify concretely where the employee performance is inadequate, and measure whether the employee has improved. In high-level jobs, it is difficult to define the work with precision. The employer's judgment of success or failure is often subjective. It may

40. A model arbitration clause is set out in full in an appendix to this Article. Those provisions that refer to time periods or dollar limitations do not include suggested limits. It is intended that the parties negotiate over the appropriate terms.
41. See generally D. BEELER, DISCIPLINE & DISCHARGE 1-29 (1978) (discussing various arbitration decisions involving "just cause" under collective bargaining agreements).
be based on conditions — such as market forces — which are beyond the control of the employee. Thus, notions of employee fault developed in "blue-collar" cases may be inapposite. In many white-collar discharge situations, the employer may have expected better results than were obtained by the employee. One issue at arbitration will be whether that expectation was "fair." We have little experience with such issues. The commonly accepted principle of notifying the employee of inadequate performance, and of "equal treatment" of similarly situated employees may, therefore, be inappropriate when the requirements of the job cannot be precisely defined. 43

B. Standards to be Applied

The Arbitrator shall determine whether the termination was lawful under federal, state, and local statutory and common law which is applicable to the dispute. In addition, the Arbitrator shall determine whether the termination was reasonable under the contract and under applicable company policies.

Some employers may wish to confer authority upon the arbitrator to enforce only those standards that courts and agencies would otherwise implement. Under this view, the arbitrator would assume the responsibilities of federal and state courts and agencies administering statutory and common law. This is different from the approach to arbitration in collective agreements which limits the arbitrator to the "law of the shop," not the "law of the land." 44

Arbitration in collective agreements is a substitute for a strike over the administration of the agreement. 45 The arbitration clause under consideration here, however, is a substitute for litigation. Parties are free to submit legal disputes to arbitration. 46 They may direct the ar-

43. See, e.g., Valentino v. U.S. Postal Serv., 674 F.2d 56, 70-71 (D.C. Cir. 1982) (discussing difficulty of applying statistical analyses to high-level positions); see also Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947, 959-64 (1982) (discussing different treatment of upper-level jobs under Title VII); Mennemeier, supra note 5, at 78-79 (1982) (discussing definition problems in higher-level jobs).

44. Most collective contracts limit the arbitrator to the "interpretation and application" of the contract. This language is the basis for the Supreme Court decisions requiring that an award "draw its essence" from the contract. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); see also United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 567-68 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580-82 (1960).


bitrator to apply *only* public law to their dispute by a provision stating:

**The Arbitrator shall apply all law, federal, state, and local statutory and common law which is applicable to the dispute.**

Under this view, an employer in a state such as Alabama would only be subject to review under federal statutory standards because state law does not restrict the employer’s power to fire at will. In Michigan, New Jersey, and many other states, the same contract language would require the arbitrator to apply the state’s statutory and common law as well.

Although some employers may prefer language which substitutes arbitration for existing tribunals, most employees would believe that this language leaves them without sufficient protection. The law of employment is in transition. There may be situations where the old rules, or no rules, apply. The employee's interest would be better served by permitting the arbitrator to go beyond existing law and exercise his or her sense of justice and fairness. A clause designed with this goal might read:

**The Arbitrator shall determine whether the termination was just and reasonable under all the circumstances.**

The employer would consider the phrase “‘just and reasonable’” to be too open-ended. Without any limiting language, an arbitrator might decide that a given action was “reasonable” or “unreasonable” and never inquire into its legality. Such decisions would provide little protection from subsequent litigation. Nonetheless, employers may find an advantage in language which is broader than the “application of the law” standard, yet more restrictive than the “just and reasonable” clause. The advantage lies in the enhanced appearance of fairness if the parties adopt standards which go beyond formal legal requirements.

where the arbitrator applied a legal interpretation pursuant to a clause which provided that:

In the event that any provision of this agreement is found to be in conflict with any State or Federal law now existing or hereinafter enacted, it is agreed that such laws shall supersede the conflicting provisions without affecting the remainder of these provisions.

672 F.2d at 1255. The court set aside the arbitrator's decision without discussion of the arbitrator's authority to interpret the law. The court considered the arbitrator limited to interpreting the contract. *Id.* at 1257-58. The court, however, was concerned only with the arbitrator’s authority as defined in typical collective bargaining agreements, and did not purport to lay down any abstract principle on the question of whether the parties had the power to submit a legal issue to arbitration. *Id.* at 1252-54. In my view the clause did just that.

47. *See, e.g.*, Bender Ship Repair, Inc. *v.* Stevens, 379 So. 2d 594 (Ala. 1980).
This enhanced fairness reduces the risk that the arbitration clause will be viewed by courts merely as a facade to force an impermissible waiver of the employees' legal rights. The arbitration clause set out at the beginning of this section achieves such a balance by requiring the arbitrator to apply legal principles, and the standards developed in the rest of the contract and established by the policies of the employer. The arbitration clause must be in writing to be enforceable under the United States Arbitration Act\(^{49}\) and similar state law.\(^{50}\)

**C. Management Flexibility**

The employer reserves the right to assign and reassign the employee to a job; to define the work to be performed, the manner in which it shall be performed, the equipment and support personnel which shall be provided, the supervision to be provided; and to evaluate employee performance under such standards as the employer chooses.

No definite term of employment is offered. The employer reserves the right to discharge any employee after a determination that:

i) the employee failed to meet employment performance standards; or

ii) business needs will be furthered by said termination.

The Arbitrator may decide if the employer did make the stated determination and if it was reasonable in so doing.

The existence or application of this agreement to arbitrate shall not alter or expand the rights of either party under this agreement.

Many large employers have personnel manuals which states procedures and practices which, for practical purposes, are incorporated into individual employment contracts.\(^{51}\) These handbooks attempt two seemingly inconsistent objectives. They retain flexibility for management in decisions with respect to job assignments, promotions, transfers, and terminations; however, they also assure the employees of fair treatment in connection with such decisions.

The employee is apt to interpret the promise of "fair" treatment

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50. See, e.g., CAL. CIV. PROC. CODE § 1281 (West 1982); MICH. COMP. LAWS ANN. § 600.5001 (1968); N.Y. CIV. PROC. LAW § 7501 (McKinney 1963).

as a promise of "favorable" treatment. Many workers believe that job security tends to accumulate over time regardless of the details of the contractual relationship. Therefore, if the employer does not intend to provide such protection, it should precisely state the flexibility that it wishes to preserve. The clarification of the employer's interest in flexibility will disabuse employees of any notion that they have or are accruing job security which has not been offered. This clarity may drive some employees away, yet these employees would have otherwise come to work with false expectations. The proposed management flexibility clause provides such precision and allows the arbitrator to determine whether the employer acted properly in exercising its rights.

D. Written Decisions

The Arbitrator shall submit with the award a written opinion which shall include findings of fact and conclusions of law.

The arbitrator should be required to write an opinion explaining the reasoning behind his decision as is commonly done in labor arbitration under collective bargaining agreements. These decisions should be published. Although there are some advantages to a quick decision at the close of a hearing, three considerations make written opinions desirable.

First is the vital need to develop acceptable standards of fairness. Labor arbitration decisions concerning "just cause" in "blue-collar" jobs that have commanded assent are helpful guides in administering labor relations systems. A serious effort in this direction should now be made for "high-level" jobs. This will not be easy. A recent study of racial discrimination cases dealing with such jobs concludes that existing standards for evaluation of performance are inadequate. Publication of arbitration decisions in this area will facilitate the process of making fair decisions in the first instance.

Secondly, the opinion may be persuasive to the losing party, thus making the decision more binding in fact. A written opinion may reduce resentments which could otherwise trigger further reactions by the individuals involved. It may also reduce the prospect that the losing employee will seek judicial review or that the losing employer will resist the award.

The third reason why written opinions are important is that they

52. See, e.g., Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981); Gonsalves v. Caterpillar Tractor Co., 634 F.2d 1065 (7th Cir. 1980), cert. denied, 451 U.S. 920 (1980).
53. See Brown, supra note 29, at 390-92.
54. See F. ELKOURI & E. ELKOURI, supra note 46, at 365-88.
provide the maximum legal finality for a decision. An arbitration decision without a reasoned opinion will produce finality in only the most limited class of claims. A well-reasoned opinion may carry a greater degree of finality in fact and in law.56

E. Selection of Arbitrator

The employer will contact the former employee's attorney to identify the arbitrator, or, failing that, to institute the procedure for identification of the arbitrator. If no attorney is named, the employer will directly contact the former employee.

If the parties cannot agree on an Arbitrator, they shall select an arbitrator from the lists from the American Arbitration Association, the Federal Mediation and Conciliation Service, or the appropriate state Mediation or Arbitration Service.

If the employer chooses the arbitrator, a question of the arbitrator's impartiality may be raised. Even if the employee has an opportunity to participate in the selection of the arbitrator, a question of fairness exists. The employee may not have knowledge of the backgrounds and views of various persons who may be recommended to serve as an arbitrator.57 Therefore, the employee will be at a disadvantage in the selection process. This could undermine the finality of an award. This issue is avoided if the employee retains counsel prior to the selection of the arbitrator. The courts are more likely to give the arbitration decision deference if the employee has an opportunity to be represented by counsel at all stages of the process, including selection of the arbitrator.58

It may seem strange to suggest that the employer advise its employees to retain counsel, yet in today's litigious world, the higher-level employee is apt to seek an attorney in any event. Thus, the employer loses little in including references to employee's counsel in the arbitration clause. The clause should provide that after the employee has given notice of a desire to arbitrate, a period of time will be provided during which the employee may retain counsel. Thereafter, the arbitrator should be selected.

56. For a discussion on finality under the proposed arbitration clause, see infra sex. IV.
Selection by agreement between the employee and the employer obviously is the most desirable situation. Where no such agreement is possible, then the parties should refer to the existing lists of arbitrators of the American Arbitration Association or other conciliation services. As a last resort, the parties may place the selection of the arbitrator in the hands of a judge. 59

F. Qualifications of Arbitrator

The Arbitrator shall be an attorney who is admitted to practice law in one of the states of the United States of America.

The arbitrator should be a lawyer because federal and state law must be applied to the termination. Lawyers have no monopoly on fairness or reasonableness, but they do have greater expertise than non-lawyers in applying statutes, writing decisions, and acting as if they were judges. If the parties are willing to submit their dispute to arbitrators with different qualifications, they are, of course, free to do so.

G. Arbitration Fees and Costs

The arbitrator’s fees and expenses shall be paid by the employer.

In collective bargaining arbitration, the parties divide the cost of arbitration, in part, to avoid bias by the arbitrator towards the party paying the fee. In individual arbitration, however, it is appropriate that the employer pay the arbitrator. The employer is avoiding the risk of a jury trial and extensive financial liability. Under these circumstances, to tax the employee with the burden of paying for a private judge might seem overreaching. The risks of an arbitrator leaning toward the employer may be addressed in other ways, such as by requiring publication of written opinions and the emergence of a "plaintiff’s bar."

H. Attorney Fees

A reasonable attorney fee and expenses will be paid by the employer to the attorney selected by the employee for performing legal services in the conduct of arbitration under this contract. This fee shall be based on the regular hourly rates of

the attorney for equivalent work. The fee and expenses to be paid by the employer shall not exceed ___ dollars in any event. A detailed bill for services and expenses shall be submitted to the employer by the attorney for the employee upon receipt of the Arbitrator’s award. The Arbitrator shall retain jurisdiction to resolve any dispute concerning attorney fees and expenses.

The employer should agree to pay the employee’s reasonable attorneys’ fees in connection with the arbitration regardless of the outcome of the proceeding. This guarantees the employee the right to invoke the arbitration process when the employee has lost a major source of income. It is a quid pro quo for the limited liability and other benefits that the employer gains.

This provision gives an advantage to employees which even the Civil Rights Acts do not afford. The anti-discrimination laws provide that the employee’s attorney is paid by the employer only if the employee prevails. 60 Under these acts, the employee must find an attorney who is prepared to gamble on the case if the employee cannot afford to pay. By agreeing to pay reasonable attorney fees in connection with arbitration, the employer removes that risk and assures that the employee will be represented at all stages of the arbitration process, including the selection of the arbitrator. This, in turn, enhances the likelihood of procedural fairness in the arbitration process and finality in the result. The agreement may also impose some maximum dollar limits, require that the employee’s counsel submit statements of regular hourly rates and hours expended, and provide that attorney fee disputes are to be determined by the arbitrator.

Attorney and arbitrator fee guarantees raise the question of the amount of an employer’s additional cost to arbitrate as opposed to litigation. A rough estimate of the additional fees suggests that it is worth the extra expense to arbitrate because litigation fees, if the employee prevails, are likely to be significantly higher.

The cost of an arbitrator may be assumed to be $500 a day. 61 Using the formula of two study days for one hearing day, the arbitrator will charge up to $3,000 plus expenses for a two-day hearing. The cost of the employee’s attorneys’ fees will be less in arbitration than in a drawn-out proceeding in the federal courts under ADEA, Title VII, or 42 U.S.C. § 1981. 62 Based on a fee of $100 per hour for five days

62. Attorney fees will vary depending on prevailing area rates. See Chrapliwy v. Uniroyal,
plus expenses, the attorneys' fees could amount to $5,000. Thus, the
clear additional cost that can be identified is roughly $8,000 to have
the case presented to an arbitrator. An average of $8,000 per case is
a bargain for the employer who would otherwise be subject to ADEA
(and it is likely that most of these upper-level job cases will involve
persons over forty years of age) where the risk of liability is compounded
by the right of a plaintiff to have a jury trial, an "opt in" class ac-
tion, and pendant state claims.\textsuperscript{63}

There is a risk to employers associated with this proposal. Without
arbitrator and attorney fee guarantees, some employees might not
challenge what they consider an unfair dismissal. The arrangement sug-
gested here may encourage them to arbitrate where otherwise they would
do nothing. This risk must be weighed by employers against the benefit
of some employees arbitrating where they would otherwise litigate.
Without the guarantee there is an increased risk that some employees
will file a discrimination claim, to invoke the attorney fee provisions
of the civil rights laws.

Some employers may consider this risk to be of less consequence
than the possible encouragement of arbitration which the attorney fee
provision creates. These employers will probably omit the attorney fee
provision, and let experience spell out the dimensions of the risk. These
employers, however, should consider that there is presently an incen-
tive under the Civil Rights Acts to litigate either in a federal court
or before a state civil rights agency\textsuperscript{64} — a process which could cost
much more than the attorney fees in arbitration.\textsuperscript{65} The suggested at-
torneys' fees provision will cancel that incentive.

\textbf{I. Discovery}

Prior to the hearing, the parties shall exchange a list of
witnesses to be called. The employer will supply to the

\textsuperscript{63} See, e.g., Chancellier v. Federated Dep't. Stores, 672 F.2d 1312 (9th Cir. 1982) (awarding
$2.3 million jury verdict, including $400,000 in attorney fees); Ginsberg v. Burlington Indus.

\textsuperscript{64} See, e.g., New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) (holding attorney
fees available under Title VII for work before State Civil Rights Agency); Chrapliwy v. Uniroyal,
Inc., 670 F.2d 760, 767 (7th Cir. 1982), petition for cert. filed, 50 U.S.L.W. 3949 (U.S. May
19, 1982) (No. 81-2135) (allowing attorney fees for time spent persuading federal government
to enforce Executive Order 11,246 3 C.F.R. 339 (1965)). In Sullivan v. Bureau of Vocational
Rehabilitation, 663 F.2d 443 (3d Cir. 1981), the court held that, to qualify for attorney fees
under Title VII, a plaintiff must meet two requirements. First, the plaintiff must succeed on
the merits. Second, the proceeding in which the plaintiff was successful “must be causally linked
to the prosecution of the Title VII complaint.” 663 F.2d at 452. The court allowed attorney
fees for the arbitration based on Sullivan's facts. Yet the court explicitly stated that attorney
employee's attorney a copy of the employee's personnel file, and a copy of the personnel files of no more than ____ other employees whose records are relevant in the proceeding. All such files will be maintained in a confidential manner by the employee and attorney, shall be used only for preparation of the arbitration case, and shall be returned to the employer at the close of the hearing.

In Alexander v. Gardner-Denver Company,66 the Supreme Court indicated that the lack of discovery in arbitration was one factor which made it an inadequate process for disposing of Title VII claims.67 Alexander suggests that we consider the timing, nature, and purpose of discovery in the arbitration process.68 In a discharge case, the employer is interested in learning who the employee intends to call as a witness and how those persons will testify. The employee is interested in information which may be of assistance including internal memoranda and personnel files of the employee and of other persons whom the employee believes were treated more favorably. It may be useful to include in the arbitration clause a list of materials which will be exchanged prior to the hearing. At the hearing, the arbitrator may require the production of specific material.

J. Relief

If the Arbitrator finds that the employee was terminated in violation of the law or this agreement, he shall order reinstatement and back pay for time lost, less sums earned elsewhere or paid in lieu of employment by the employer during the period after discharge and before arbitration. At the option of the employer, which may be exercised within ten days of the receipt of the award, the employee shall not be reinstated, but shall be paid backpay in lieu of reinstatement, in the amount of or measured by ____.

The starting point for the analysis of relief is that which is commonly set forth in collective bargaining agreements and under statutory

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fees may not be awarded "merely because, without more, the plaintiff succeeded in obtaining relief in a contemporaneous arbitration proceeding." Id.

67. Id. at 57-58.
68. See id.
standards. Under these standards, the arbitrator would be empowered to award reinstatement and back pay. Because of the complexity inherent in "high-level jobs," however, it is useful to explore other forms of relief.

Reinstatement requires a special examination in the case of high-level jobs. This examination is compelled by the common sense recognition that close interpersonal relations are essential for the successful performance of some such jobs — particularly those involving extensive interaction with other persons in managing, directing, advising, and coordinating. Not all jobs are sensitive, and not all terminated employees would, if reinstated, be prone to failure because of the sensitivities in the situation. This risk is so significant, however, that reinstatement should not be automatic with respect to these jobs. I believe it should be optional.

The option could be exercised by the arbitrator. This would, however, add a major issue to the hearing process and would involve guesswork by the arbitrator. The option could not be left with the employee because the employee would almost always elect reinstatement. Therefore, the option is best left with the employer. This is appropriate if the agreement provides for fair compensation to an employee who is not reinstated. This fair compensation might be measured in terms of number of years of back pay. The option provision should also allow the employer to propose alternatives to reinstatement in the same job — such as a transfer — after the award is in.

Calculation of back pay should include fringe benefits along with wages. One very important fringe benefit for higher-level employees is the cost to the employee of duplicating the tangible facilities which the employer routinely supplied, such as: office space, secretarial help, computer time, and access to specialized literature.

IV. EFFECT OF ARBITRATION ON EMPLOYEE'S LEGAL RIGHTS

The agreement should provide that the arbitrator's decision is final and binding to the extent permitted by law. The phrase "final and binding" reflects the employer's desire for an end to the dispute. The qualifying phrase, "to the extent permitted by law," recognizes that an arbitrator's decision may not be binding with respect to certain claims under anti-discrimination statutes.

The decision of the Arbitrator shall be final and binding between the parties as to all claims which were or could have been raised in connection with the termination, to the full ex-
tent permitted by law. In all other cases, the parties agree that the decision of the Arbitrator shall be a condition precedent to the institution or maintenance of any legal, equitable, administrative, or other formal proceeding by the employee in connection with the termination, and that the decision and opinion of the Arbitrator may be presented in any other forum on the merits of the dispute.

1. Effect on state law claims—The final and binding clause will operate with respect to state breach of contract claims. Whether the final and binding clause will operate with respect to state tort law claims is a more complex question. Tort claims which are related to the contractual relationship such as defamation, conspiracy, and invasion of privacy will be subject to the clause.

The tort of intentional infliction of emotional distress can be argued to be akin to assault, where the public interest may preclude private disposition. Yet, if the “tort” of infliction of emotional distress is beyond the scope of a “final and binding” arbitration clause, the value of such a clause is nullified because such a claim can be made in every termination case. Many workers invest both their professional and personal lives and reputations in their work. They depend on their jobs and their performances as employees for a good part of their self-identity. Therefore, virtually every involuntary termination will inflict emotional distress on the employee. To exclude this tort from the finality accorded to the arbitration agreement will, in effect, nullify the agreement. The question whether to subsume this tort under the arbitration clause should be decided on the grounds of contemporary policy, not on the basis of labels and analogies which derive from the forms of action. As a matter of policy, I would opt in all such cases to give full effect to arbitration. The arbitration clause suggested here should be construed to encompass all tort claims which are not based on the violation of elementary standards of physical decency.

2. Effect on statutory claims—Alexander v. Garnder Denver

70. See, e.g., Ormsbee Dev. Co. v. Grace, 668 F.2d 1140, 1146-47 (10th Cir. 1982), cert. denied, 103 S. Ct. 84 (1983).


72. See Note, Modern Contract Theory, supra note 8, at 451.

73. The types of tort claims which might not be covered by the clause include the following cases: Contreras v. Crown Zellerbach Corp., 565 P.2d 1173 (Wash. 1977) (employee wrongfully accused of stealing and subjected to continuous humiliation because of racial slurs); Kissinger v. Mannor, 92 Mich. App. 572, 285 N.W.2d 214 (1979) (employee’s request for replacement while he went to the bathroom denied; subsequent request to change clothing also denied; court allowed claim for intentional infliction of emotional distress).
Co. holds that there can be no valid and binding prospective waiver of rights under Title VII. The same rule is applicable to ADEA and other civil rights type claims. The arbitration involved in Alexander was part of a collective agreement signed by the union. The agreement to arbitrate was never signed by the employee. That might distinguish Alexander from the individual contract under consideration here.

Even if Alexander is distinguishable, it is unlikely that courts would uphold an agreement in advance of any dispute not to assert statutory rights. These statutes were enacted to improve the economic position of members of disadvantaged groups vis-a-vis employers. The courts will not allow the superior bargaining power of the employer to obliterate these rights. Busy judges, however, are not adverse to having their work done by others. Therefore, they may uphold a contract provision requiring arbitration as a condition precedent to the trial of employment discrimination claims. Moreover, the courts may, consistent with Alexander, accept a role as a reviewer of arbitration decisions, rather than undertake a full de novo examination of the allegations. The relationship between individual contract arbitration and the civil rights litigation involves three issues: an exhaustion of contract remedies problem; a problem of when the cause of action arises; and the appropriate policies to be considered in establishing the relationship between the statute and arbitration.

a. Exhaustion of Contract Remedies—As a matter of both policy and expediency, busy federal and state courts would prefer to see a trial held in another forum, rather than before the judge. When the parties have agreed to arbitrate, it is both fair and expedient to require them to honor their agreement and exhaust their contractual remedy. This approach is necessarily tempered by the principle that advance contract waivers of statutory rights are prohibited or at least disfavored. Therefore, any judicially imposed requirement of exhaustion should be subject to two conditions.

First, the contract remedy must in fact be available. The employer

76. 415 U.S. at 39-42.
77. The inherent delays in both administrative and judicial processing of the claims make it unlikely that a court trial date would be reached before an arbitration decision, even without such a clause.
78. 415 U.S. at 60 n.21.
asserting the exhaustion doctrine must indicate its willingness to waive time or other limitations in the contract and to cooperate in carrying out the arbitration. If the employee has failed to invoke arbitration within the time limits in the contract, and brings a law suit, this rule leaves the employer with the option of insisting on arbitration or defending the legal action. Second, the employer must agree that the time spent in the arbitration will not be included in calculating time limits which may be involved in subsequent litigation. Under these conditions, the court may either stay or dismiss without prejudice a premature suit by an employee.

b. When a cause of action arises under discrimination laws—Most discrimination laws require that employees file complaints within a specified period from the alleged discriminatory act. 82 In discharge cases under an arbitration clause, there are at least three dates which may begin the time period: the date when the employer informs the employee that a decision to terminate has been made; the date of termination; and, the date when the arbitration award upholding the termination is issued.

The Supreme Court has held that knowledge of the termination decision is the relevant "occurrence" which commences the running of the limitations periods. 83 If the employee resorts to existing arbitration or grievance mechanisms, the period will not be tolled. 84 Under this rule, an employee must file his discrimination complaint within 180 days of the notice that he has been terminated, regardless of how long the arbitration process continues. Thus, the employee is forced to file a "protective complaint" within the statutory period.

The Supreme Court has not, however, foreclosed the possibility that an employer may explicitly agree that the limitations period will commence at some later date. 85 Under such an agreement the parties may provide that the time would commence at receipt of the arbitrator award. Neither party would wish to have a judicial or administrative proceeding conducted simultaneously with the arbitration. Moreover, if the employer wishes to make the termination decision tentative until after arbitration, the arbitration agreement may expressly waive the employer's right to object to a delayed filing. 86

Even if the employee must file a protective complaint, however, it does not follow that the administrative processing of the complaint

82. Title VII, for example, requires that an employee file a claim within 180 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e) (1976) (extending period to 300 days where employee is required to resort to state procedures).
84. Id. at 261; see also I.U.E. v. Robbins & Myers, 429 U.S. 229 (1976).
86. Zipes v. Trans World Airlines, 102 S. Ct. 1127 (1982) (holding that time periods are subject to waiver, equitable tolling or equitable estoppel).
must take place. The parties may agree that administrative proceedings which had been instituted pursuant to statute shall be stayed pending the decision of the arbitrator. Such an agreement may well be honored by overworked Civil Rights agencies.

This type of provision would protect the employer from the costs and inconvenience involved in litigation beyond filing a motion to stay administrative or judicial proceedings, and avoid subjecting the employer to formal discovery during the pendency of the arbitration decision. If the outcome of the arbitration is favorable to the employee, there will probably be no litigation because the employer will provide appropriate relief. If the outcome is favorable to the employer, the employee may choose to drop the matter rather than pursue the litigation. If the employee does pursue the matter, the cloud of an adverse arbitration decision will follow him or her to the lawyer’s office and to the judge’s chamber.

c. The policy question— Although the employee involved in an individual arbitration may be in an inferior bargaining position vis-a-vis the employer, his or her position is not as weak as that of the blue-collar worker with limited education. When dealing with well-educated workers, it is appropriate to hold them more closely to their bargains, at least in a procedural sense.

Therefore, if the arbitration process is fair on its face, whether or not the decision of the arbitrator is “final,” it makes sense to treat arbitration as a condition precedent to litigation in terms of 1) judicial economy, 2) holding the parties to their bargain, and 3) encouraging the voluntary resolution of employment disputes. This approach is consistent with the principle of preserving the employee’s ultimate litigation rights under protective statutes.

Even though the courts have held that arbitration does not bar a subsequent litigation of the discrimination issue under Title VII, the parties rarely take “two bites at the apple.” There are relatively few instances known to the American Arbitration Association of situations where employers have lost a discrimination claim in arbitration and gone on to litigate under Title VII. Thus, an award against an employee

89. See, e.g., Strozier v. General Motors Corp., 635 F.2d 424 (5th Cir. 1981).
has often been accepted in fact, even though not binding in law. In light of this experience it is probable that the 'condition precedent' clause will terminate most cases even though the arbitration award may not legally foreclose a subsequent discrimination suit.

3. Law applicable to the agreement— The United States Arbitration Act ("USAA"), may be applicable to agreements discussed in this Article, except for contracts of employment of certain classes of workers in interstate commerce. This exception has been narrowly construed, thus many employees are subject to the USAA. Some parties, however, may either choose or be forced to resort to the State Arbitration Act applicable to the transaction. This might be the act of the jurisdiction in which the employment contract was agreed to and carried out, if they are the same. If they are different, another choice of law problem arises due to the differences in arbitration acts in various states, their absence in some states, and variations in state law with respect to the significance of the arbitration agreement and award. Therefore, to secure a stable body of law, the drafters of the arbitration clause might look to the New York Arbitration Act as the law to be applied. This is suggested in the standard form agreements of the American Arbitration Association.

CONCLUSION

Arbitration in collective bargaining agreements has proved to be a major social innovation which has enhanced the quality of employment for millions of workers. Collective bargaining has not, however, taken hold among large numbers of employees in the growing white-collar sector. Yet, these workers have similar interests and need to be treated fairly. Moreover, because of the huge social investment in education of many of these employees, society has an interest in seeing that they are fairly treated. The suggested arbitration clause provides such protection as well as an opportunity to develop standards of fairness in connection with these higher-level jobs. I think that energies expended

94. See, e.g., Aberthaw Constr. Co. v. Centre County Hosp., 366 F. Supp. 513 (M.D. Pa. 1973) (holding that agreement to arbitrate must be liberally construed in favor of arbitration), aff'd, 503 F.2d 1398 (3d Cir. 1974); see also Shearson Hayden Stone, Inc. v. Liang, 493 F. Supp. 104, 106 (N.D. Ill. 1980) ("Once a dispute is covered by the Act, federal law applies to all questions regarding validity and enforceability."), aff'd, 653 F.2d 310 (7th Cir. 1981).
95. See Bernhardt v. Polygraphic Co. of Am., 218 F.2d 948 (2d Cir. 1955), rev'd on other grounds, 350 U.S. 198 (1956) (holding high level employees not excluded); see also Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972); Dickstein v. DuPont, 443 F.2d 783 (1st Cir. 1971).
in developing such a clause are worthwhile, and that a public conference should be called to discuss the process.

We cannot now see the shape of the future structure of employee relations in these higher-level jobs. Perhaps a statute of the type proposed by Professor Summers will emerge as the preferred solution; perhaps labor organizations will appear more attractive to white-collar employees as employers are moved by common law developments to adopt a more hard-line approach; we may even live with the present patchwork of law. What is clear, however, is that the arbitration option deserves to be explored thoroughly as the law intrudes further into the employment relationship. When discussing collective bargaining arbitration, the late Harry Shulman wanted to leave the law out, but let the lawyers in.97 That option is not open to us. We must live with both the law and lawyers. In this setting, voluntary arbitration may well be preferable to legislation.

APPENDIX
MODEL ARBITRATION CLAUSE

1. Subject matter

Any controversy or claim arising out of or relating to the termination of the employee by the employer, including any claim based in whole or in part on federal, state, or local laws, whether statutory or common law, shall be settled by arbitration in accordance with this agreement.

2. Standards to be applied

The Arbitrator shall determine whether the termination was lawful under federal, state, and local statutory and common law which is applicable to the dispute. In addition, the Arbitrator shall determine whether the termination was reasonable under the contract and under applicable company policies.

3. Management flexibility

The employer reserves the right to assign and reassign the employee to a job; to define the work to be performed, the manner in which it shall be performed, the equipment and support personnel which shall be provided, the supervision to be provided; and to evaluate employee performance under such standards as the employer chooses.

No definite term of employment is offered. The employer reserves the right to discharge any employee after a determination that:

i) the employee failed to meet employment performance standards; or,

ii) business needs will be furthered by said termination.

Under this clause, the Arbitrator will have jurisdiction to decide if the employer did make the stated determination and if it was reasonable in so doing.

The existence or application of this agreement to arbitrate shall not alter or expand the rights of either party under this agreement.

4. Written decisions

The Arbitrator shall submit with the award a written opinion which shall include findings of fact and conclusions of law.
5. **Selection of Arbitrator**

a. Within ____ days after (notification of a decision to terminate) or (termination) of the employee, the employee who wishes to invoke this clause shall so notify the employer in writing. Thereupon, the employee shall have ____ days in which to advise the employer of the name of the attorney who will represent the employee in the arbitration proceedings.

b. The employer will contact said attorney to identify the Arbitrator, or, failing that, to institute the procedure for identification of the Arbitrator. If no attorney is named, the employer will directly contact the former employee.

If the parties cannot agree on an Arbitrator, they shall select an Arbitrator from the lists from the American Arbitration Association, the Federal Mediation and Conciliation Service, or the appropriate state Mediation or Arbitration Service.

6. **Qualifications of the Arbitrator**

The Arbitrator shall be an attorney who is admitted to practice law in one of the states of the United States of America.

7. **Arbitration fees and costs**

The Arbitrator's fees and expenses shall be paid by the employer.

8. **Attorney fees**

A reasonable attorney fee and expenses will be paid by the employer to the attorney selected by the employee. This fee shall be based on the regular hourly rates of the attorney for equivalent work. The fee and expenses to be paid by the employer shall not exceed ____ dollars in any event. A detailed bill for services and expenses shall be submitted to the employer by the attorney for the employee upon receipt of the Arbitrator's award. The Arbitrator shall retain jurisdiction to resolve any dispute concerning attorney fees and expenses.

9. **Discovery**

Prior to the hearing, the parties shall exchange a list of witnesses to be called. The employer will supply to the employee's attorney a copy of the employee's personnel file, and a copy of the personnel files of no more than ____ other
employees whose records are relevant in the proceeding. All such files will be maintained in a confidential manner by the employee and attorney, shall be used only for preparation of the arbitration case, and shall be returned to the employer at the close of the hearing.

10. Relief

If the Arbitrator finds that the employee was terminated in violation of the law or this agreement, he shall order reinstatement and back pay for time lost, less sums earned elsewhere or paid in lieu of employment by the employer during the period after discharge and before arbitration. At the option of the employer, which may be exercised within ten days of the receipt of the award, the employee shall not be reinstated, but shall be paid back pay in lieu of reinstatement, in the amount of or measured by blank.

Back pay, as defined in this agreement, shall include the cost of all fringe benefits and of the use of facilities, space, and equipment normally provided to the employee by the employer.

11. Effect of arbitration on employee's legal rights

The decision of the Arbitrator shall be final and binding between the parties as to all claims which were or could have been raised in connection with the termination, to the full extent permitted by law. In all other cases, the parties agree that the decision of the Arbitrator shall be a condition precedent to the institution or maintenance of any legal, equitable, administrative, or other formal proceeding by the employee in connection with the termination, and that the decision and opinion of the Arbitrator may be presented in any other forum on the merits of the dispute.