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## Statement of the Labor Policy Association Before the Commission on the Future of Worker-Management Relations Regarding Alternative Resolution of Private Disputes

Joseph F. Vella  
*Federated Department Stores*

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## Statement of the Labor Policy Association Before the Commission on the Future of Worker-Management Relations Regarding Alternative Resolution of Private Disputes

### Comments

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Hot Topic

"Future Worker Management"



STATEMENT OF THE LABOR POLICY ASSOCIATION

BEFORE THE

COMMISSION ON THE

FUTURE OF WORKER/MANAGEMENT RELATIONS

REGARDING

ALTERNATIVE RESOLUTION OF PRIVATE DISPUTES

BY

JOSEPH F. VELLA  
VICE PRESIDENT, EMPLOYEE RELATIONS  
FEDERATED DEPARTMENT STORES

SEPTEMBER 29, 1994

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## Summary of Conclusions and Recommendations

1. Private employers are looking for alternatives to the present system of settling employment disputes that relies on expensive, time-consuming formal litigation.
2. Alternatives to conflict and litigation should be encouraged as a matter of national policy. In view of the caseloads now confronting the federal courts, we urge the Commission to recommend that Congress not enact another employment law providing a cause of action in federal court without accompanying it with a fair and effective ADR system. Further, we urge the Commission to recommend that Congress review the existing employment laws to determine which ones are appropriate for the incorporation of ADR systems.
3. We urge the Commission to encourage the establishment of ADR procedures, with sufficient flexibility to address the legitimate differences in approach which may be taken by different organizations.
4. Regarding any private dispute resolution alternative, it should incorporate two basic principles—fairness and finality.
5. In-house open door and peer review systems are an excellent means of getting disagreements handled before they become full-blown disputes that require mediation, arbitration or litigation to resolve.
6. We believe mediation to be a viable option any time the parties agree to undertake it and that the Commission should recommend that Congress enact a law incorporating mediation systems in certain key employment statutes.
7. We support the Employment Dispute Resolution Act introduced by Senator Danforth and Rep. Gunderson that allows one party to require FMCS-supervised mediation shortly *before* a federal civil rights lawsuit can be filed.
8. While arbitration does not provide either plaintiffs or defendants every legal protection written in law, neither does a case which never gets to court in a timely fashion. Instead of focusing on the shortcomings of present arbitration systems, it is more important to ask whether the nation should continue to condone efforts to deprive employees of some alternative to resolve their complaint short of full blown litigation. If a fair neutral can resolve a dispute in a matter of days or weeks, one could argue that it is just as proper to require employees to use that system as it is to make them proceed only under existing statutory and administrative structures which may require months or even years.
9. We believe federal policy should encourage arbitration as an option, but that arbitration should not be mandated by Congress.
10. The federal government could establish guidelines ensuring that an arbitration system is fair. Once those principles are fulfilled, the employer should be allowed sufficient

leeway to design a system that best meets the needs of the particular situation. Determinations under such a system should be binding, subject to appropriate review.

11. Federal agencies resolving employment disputes should be encouraged to establish a system whereby the charging party and the employer have the option to have their dispute decided by a mutually acceptable arbitrator under the principles outlined in our statement. If they agree to that procedure, then the results should be binding.
12. ADR procedures would work well for Title VII, the Equal Pay Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Worker Adjustment and Retraining Notification Act. Mediation and arbitration is useful where there is a private right of action which can be resolved by the parties and there is no statutory requirement that the settlement be supervised by the agency.
13. ADR would also work well with statutes that are based upon the Fair Labor Standards Act, such as the wage-hour titles of the FLSA and the Family and Medical Leave Act. We believe that the statutes should be amended to provide that if an individual has brought an action against an employer and the dispute has been resolved through ADR, the Labor Department should have no power to supervise the settlement nor disapprove it.
14. ADR would not be appropriate for the National Labor Relations Act, Executive Order 11246, and the Occupational Safety and Health Act. These statutes have no private right of action, and the manner in which they have been administered has resulted in their caseloads being kept under control.
15. Consolidation of the various enforcement activities of the federal labor-related agencies would not be appropriate if it is nothing more than retitling the agencies with a common name or merely shuttling responsibility from one agency to another. Consolidation, however, might merit consideration if it were accompanied by changes in procedures that would dramatically improve the enforcement process, such as providing means to screen out charges without merit, making greater use of administrative tribunals, developing better means of ensuring fairness in political appointments to those tribunals, and devising more rational penalty/remedial schemes that would discourage litigation in search of high-stakes jury awards, among other things.

## Statement of Joseph F. Vella

On behalf of the Labor Policy Association (LPA), we appreciate the invitation to present this statement to the Commission on the Future of Worker/Management Relations regarding the use of alternative dispute resolution (ADR) to resolve employment disputes. This statement will cover the matters found in Chapter IV of the Commission's Fact Finding Report ("*Report*").

Appearing this morning representing the views of LPA, I am Joseph F. Vella, Vice President of Employee Relations for Federated Department Stores. Federated has utilized a variety of alternative dispute resolution procedures for resolving employment disputes, and we have tested and are now rolling out a peer review process at many of our locations. We hope that this statement and my experience with Federated's successful program will provide guidance on the appropriate use of ADR procedures by employees and employers to resolve disputes outside the more formal system of filing charges and lawsuits.

First, we will discuss the Commission's findings about the expansion of federal EEO laws and the implications of these developments for caseload and costs. Second, we will discuss various types of ADR procedures which we feel provide fair and more efficient alternatives to the present court/charge processing system. Third, we will discuss alternative ways posed by the *Report* to reorganize and restructure the federal enforcement system itself. These include: combining agencies; establishing a specialized labor court; and using worker-management committees for issues under OSHA, ERISA or WARN.

Several key points should be stressed at the outset. First, private employers are looking at alternatives to the present system which are fairer and more efficient in resolving disputes. There is great frustration on the part of both employees and employers that it often takes months or even years to resolve disputes before the EEOC or the courts. In response, many employers have instituted avenues of recourse before outside neutrals to resolve claims that may or may not be covered by an employment law. Also, there has been a high degree of employee acceptance of many internal programs that allow them to voice complaints and have them resolved either by management or by panels including their own peers.

We urge that alternatives to conflict and litigation should be encouraged as a matter of national policy. In view of the caseload now confronting the federal courts, we urge the Commission to recommend that Congress not enact another employment law providing a cause of action in federal court without accompanying it with a fair and effective ADR system. Further, we urge the Commission to recommend that Congress review the existing employment laws to determine which ones are appropriate for the incorporation of ADR systems. Finally, we urge the Commission to encourage the establishment of ADR procedures with sufficient flexibility to address the legitimate differences in approach which may be taken by different organizations.

## Discussion of Chapter IV/Employment Regulation, Litigation and Dispute Resolution

### 1. Introduction

We commend the Commission for recognizing that the expansion of employment discrimination statutes has placed a considerable cost burden on employers and employees. The *Report* properly asks "whether the current procedures meet the needs of ordinary workers who are the intended beneficiaries of such public programs."<sup>1</sup>

LPA's members are well aware that these laws have expanded greatly in the past few years. We agree with the *Report* that the federal labor laws have developed into a substantially different model than the one that existed when the National Labor Relations Act was the nation's primary labor law. These new models usually provide a private right of action and reject the NLRA model of a General Counsel with unreviewable discretion to issue complaints and pursue claims in court. At the same time, agency and court caseloads are increasing due to recent legislative changes that have increased the availability of compensatory and punitive damages.<sup>2</sup>

From our experience with the enforcement of these laws, we agree completely with the Commission's finding that:

Implementation and enforcement of these legal rights against noncomplying employers requires litigation in the ordinary courts and/or administrative proceedings before specialized agencies. The dramatic surge in employment law disputes over the last quarter century has raised questions about the burden and distribution of these legal costs. *At the same time, the complicated lengthy, and expensive processes involved make it difficult for many ordinary employees to pursue a claim through these administrative and court proceedings. This is especially true for low wage workers, and those who lack the*

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<sup>1</sup> *Report* at 106.

<sup>2</sup> American Bar Association officials have argued that "[t]he court system has developed big problems in the last two decades: There is too much law, too much litigation, too much acrimony, too much cost, and too much delay." Mitchell F. Dolin and Robert Saylor, "Twenty Years of Litigation," Vol. 20, No. 1 *Litigation*, Fall 1993, at 6, 66-67. The authors show that the federal and state trial and appellate courts have encouraged or even required nonjudicial resolution of lawsuits. Successful court-sponsored mediation is particularly common. This experience effectively rebuts arguments that mediation is not helpful once the parties are in a litigation posture.



*support of a union or other advocacy group in pursuing their legal rights.*<sup>3</sup>

The *Report* also correctly recognized that there is a "considerable cost" to the present litigation-based system.<sup>4</sup> Much of the cost is borne by the employers and employees who must pay legal fees and related expenses to pursue and defend their claims. And while some of that cost is borne "by employers who were guilty of violating the law."<sup>5</sup>

As much, if not more, of these legal expenditures are made by law-abiding employers defending themselves against non-meritorious claims and going through all the internal procedures and paperwork needed to demonstrate compliance.<sup>6</sup>

We are encouraged that the *Report* recognized that various ADR systems (such as mediation, arbitration or newer, more informal systems) are not "being utilized to their full potential for dealing with issues and resolving disputes that now are being regulated by law."<sup>7</sup> Thus, the Commission properly framed the issue as follows:

For all these questions [about ADR procedures], the issue is not just whether there are risks and costs to these private alternatives. *The more important issue is how these risks and costs of ADR compare with those now being experienced in the administration of employment law by courts and agencies.*<sup>8</sup>

Thus, when comparing various alternative models, we should bear in mind that under the present system, "[t]he employee-plaintiff has no other option but to expend the time and money needed for legal resolution of a claim."<sup>9</sup>

As the *Report* also stated, the "[e]mployer representatives who addressed the Commission on this topic accepted [the] fundamental principle that alternative procedures

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<sup>3</sup> *Report* at 105 (emphasis added).

<sup>4</sup> *Report* at 126.

<sup>5</sup> *Id.*

<sup>6</sup> *Report* at 126.

<sup>7</sup> *Report* at 127.

<sup>8</sup> *Report* at 127 (emphasis added).

<sup>9</sup> *Report* at 118.

must be fair and guarantee certain fundamental rights to employees."<sup>10</sup> We agree that an ADR procedure must fairly and effectively address employee claims. One of our primary purposes today in appearing before the Commission is to address the safeguards that could be built into possible ADR systems to resolve employment claims.

## 2. Evolution and Present State of Employment Regulation

LPA's members can well remember when labor law and regulation meant bargaining with the union, resolving charges filed with the National Labor Relations Board, and dealing with wage and overtime issues under the Fair Labor Standards Act. In today's regulatory world, however, NLRA cases are only a small part of the issues confronting corporate management and general counsel offices. We agree with the *Report* that there has been a dramatic increase in federal statutes and agencies over the past twenty-five years. As argued below, the NLRA enforcement model is an alternative that should be considered for use in other employment-related statutes.

We also agree that this increase has "creat[ed] a complex and expensive set of requirements for employers to administer and for employees in pursuit of their legal rights."<sup>11</sup> Not only did Title VII, the Equal Pay Act and the Age Discrimination Act of 1967 bring new workplace protections, court decisions read those statutes expansively. Further, protections were added by OSHA, MSHA and ERISA. In the midst of this expansion, state courts began to erode the employment-at-will doctrine, allowing new workplace tort and contract actions.

Most recently, several new statutes have been added, such as IRCA, WARN, the Polygraph Protection Act and the Americans with Disabilities Act (ADA). As noted below, the ADA alone has brought forth so many charges that it is having a great impact in increasing the EEOC's already tremendous backlog.

Another litigation growth area not mentioned in the *Report* is the increasing trend of unions as defendants in lawsuits. Unions now have to contend with a burgeoning number of duty of fair representation cases brought by their own members who are not satisfied that the union has properly represented their interests. Another unresolved area is the conflicting duty of the union representing its members generally, while still fulfilling its obligation to be involved in the reasonable accommodation of members who may have claims under the Americans with Disabilities Act. Often there is tension between existing seniority, absence and light duty policies, and the need to treat disabled employees differently from other bargaining unit employees. This tension, which is built into the ADA, is now beginning to show up in litigation and has yet to be effectively resolved by guidance from the EEOC and the NLRB.

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<sup>10</sup> *Report* at 118 and n. 19.

<sup>11</sup> *Report* at 109.

The *Report* also fails to point out that union violence often can lead to protracted litigation. As LPA has testified previously before the Commission, union violence should be curtailed by new legislation and increased use of NLRB injunctions. The need for such action is seen by the U.S. Supreme Court's recent action in vacating a \$52,000,000 criminal contempt fine against the United Mine Workers on the basis that such a fine is punitive and can be imposed only through criminal proceedings.<sup>12</sup>

Accordingly, as an exception to our general endorsement ADR procedures, LPA members feel strongly that stricter court and/or agency procedures are needed to curb violence and other wrongdoing committed outside the available dispute resolution procedures.

### 3. The Nature of Employment Regulation

LPA concurs with the *Report's* general conclusion that handling and resolving disputes under these various law enforcement vehicles requires "considerable financial expenditures from employers, the employees and the public."<sup>13</sup> As the *Report* states:

A conservative estimate is that for every dollar transferred in litigation to a deserving claimant, another dollar must be expended on attorney fees and other costs of handling both meritorious and non-meritorious claims under the legal procedure. Employers regularly spend much more than these direct costs of litigation to develop new personnel practices, operational procedures and equipment, and other measures to comply with regulations.<sup>14</sup>

LPA's members are in the forefront of developing such policies and want to make it clear that they support fair and even-handed enforcement of these laws. Thus, we support the Commission's conclusion:

Most employers and union representatives support the social goals of workplace laws and regulations but see them as highly complex and unresponsive to their needs. They would like to see a more service-oriented approach adopted to the administration and enforcement of workplace laws and regulations.<sup>15</sup>

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<sup>12</sup> *Int'l Union, United Mine Workers of America v. Bagwell*, No. 92-1625, 62 U.S.L.W. 4705 (June 30, 1994).

<sup>13</sup> *Report* at 109.

<sup>14</sup> *Report* at 110.

<sup>15</sup> *Report* at 111.



The Commission properly cited the statement of the Republican members of the House Education and Labor Committee that the Commission "should seek to untangle the legal web of regulation that has spawned a cottage-industry for lawyers, consultants, and employment policy specialists."<sup>16</sup>

We also agree with the *Report* that "law-abiding employers need protection against the unfair competition from non-complying employers' lower labor costs."<sup>17</sup> What is extremely disturbing, however, is that the existing laws do not give sufficient encouragement to the development of procedures to resolve employment disputes outside the "charge/agency/court litigation" arena. We would much rather expend resources on a fairer, simpler and quicker ADR procedure than pay our attorneys to engage in heavy-duty litigation.

#### 4. Trends in Employment Litigation

The findings in this section are among the most important in Chapter IV of the *Report*, because they strongly bolster a conclusion that the present system cannot adequately handle the caseload generated by federal and state employment-related actions. Moreover, the system is costly, too time-consuming, and often denies relief to the low-income employee most in need of protection.

The Commission correctly notes the great increase in both federal statutory litigation (five times greater than twenty years ago) and the increase in state wrongful discharge claims ("employees are now filing 10,000 or so wrongful dismissal suits annually, with a total of 25,000 such cases now pending").<sup>18</sup> Also, the Commission is right on point in stating that lawsuits filed in court are only "the tip of the legal iceberg," and that the administrative backlog in the federal agencies "imposes legal costs on the targeted employers, many of whom turn out to be fully in compliance with the law."<sup>19</sup> The EEOC's current caseload difficulties are a prime example, and set out below are the EEOC's most current enforcement statistics.

Obviously disturbing are the Commission's findings that access to legal relief is not uniformly distributed across the labor force, "especially under those laws that require the individual employees to initiate a lawsuit to secure a binding ruling."<sup>20</sup> The Commission, moreover, made the following conclusion:

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<sup>16</sup> *Report* at 111 n. 5.

<sup>17</sup> *Report* at 109.

<sup>18</sup> *Report* at 112.

<sup>19</sup> *Report* at 112.

<sup>20</sup> *Report* at 112.

Access to the legal relief through the courts is limited for the majority of employees whose earnings are too low to cope with the high costs and contingency fee arrangements of private lawyers.<sup>21</sup>

Indeed, even the prospect of high jury awards has its downside for the individual plaintiff: "[t]he overall pattern of jury awards . . . display[s] a rather lottery-like response to the harms inflicted on individual employees."<sup>22</sup>

Particularly troubling are the most current statistics on the EEOC's caseload released on September 9, 1994. The EEOC's difficulties may have reached the level of a crisis, as it is the lead agency enforcing some of our most important statutes—Title VII, the Equal Pay Act, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act. The EEOC's jurisdiction covers not only private employers, but also federal and state public employees. Further, on July 26, 1994, the ADA's coverage was expanded from the 264,000 employers with 25 or more employees to cover all 666,000 businesses with 15 or more employees.

This September 9, at the end of the third quarter of fiscal year 1994, the EEOC had an inventory of 92,396 charges awaiting investigation. *This represents a 30.6 percent increase over the 71,733 charges pending at the end of the third quarter of Fiscal Year 1993.* The EEOC also stated:

Since implementation of the ADA and the Civil Rights Act of 1991, which provides enhanced relief under EEOC-enforced statutes to victims of intentional discrimination, the agency's pending inventory has risen 100.1 percent. *Officials estimate it would take 17.9 months to process the charges in EEOC's current inventory, without any new incoming charges—an all time high for the 13 years that months of inventory have been tracked.*<sup>23</sup>

This increase in charges is reflected in the average workload of individual EEOC investigators, which grew from 62.98 cases in FY 1993 to 96.3 cases at the end of the third quarter of FY 1993. Thus, even before the recent upsurge in charges, on average, each investigator would have to resolve a case about every 3.8 days—working 7 days a week. Obviously, this is an impossible task and shows why the EEOC's backlog of cases is increasing at such a rapid rate.

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<sup>21</sup> *Report* at 113.

<sup>22</sup> *Id.*

<sup>23</sup> "EEOC's Pending Inventory Grows to Over 92,000 Charges," EEOC Press Release, September 9, 1994 (emphasis added).

A recent report by the General Accounting Office (GAO) confirms that the EEOC is facing a crisis in caseload management.<sup>24</sup> The GAO found that:

From 1989 to 1992, the number of ADEA charges that EEOC received for processing increased about 25 percent; the number of charges received for processing under other nondiscrimination laws increased about 26 percent. During this same period, EEOC's staff decreased 6 percent. For fiscal year 1993, the number of all charges received for processing, including those under the ADEA, increased another 25 percent over fiscal year 1992, with a staff increase of less than 2 percent.<sup>25</sup>

Based on this statistical evidence and discussions with EEOC officials, the GAO concluded that the time needed for the EEOC to process a charge will increase dramatically:

The amount of time a person may wait to have EEOC process a discrimination charge under the ADEA and the other discrimination laws *could more than double and approach 21 months by fiscal year 1996*. The current trend of steadily increasing workload without commensurate increases in resources is expected to continue. As a result, unless substantial changes occur in EEOC's responsibilities, policies, and/or practices, it is likely that processing times will increase.<sup>26</sup>

It is unrealistic at this time, however, to expect Congress to increase the EEOC's budget to any significant degree and provide sufficient additional enforcement resources to help clear its backlog. Indeed, in a surprise move, House and Senate conferees recently *reduced* the EEOC's appropriation to less than the amount that had been approved earlier by each body. EEOC's FY 1995 appropriation of \$233 million is almost \$13 million less than the amount requested by the Clinton Administration, and only \$3 million more than the agency's FY 1994 appropriation. Initially, the House had approved an appropriation of \$238 million and the Senate had approved \$240 million.

Obviously, at a time when the EEOC's charge intake has been increasing substantially, along with an attendant increase in the backlog of pending charges, the budget decrease will be a difficult pill for the EEOC to swallow. Congress' action also comes at a

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<sup>24</sup> *EEOC's Expanding Workload: Increases in Age Discrimination and Other Charges Call for New Approach*, Report to the Chairman, Special Committee on Aging, U.S. Senate, General Accounting Office Report No. GAO/HEHS-94-2, February, 1994.

<sup>25</sup> GAO Report at 9 (emphasis added).

<sup>26</sup> *Id.*

time when the agency still awaits the confirmation of its new Chair (Gilbert Casellas) and two new commissioners (Paul Steven Miller and Paul Igasaki). Accordingly, for almost two years into the Clinton Administration, the EEOC has lacked political direction on how to deal with its administrative and enforcement problems.

The caseload crisis at the EEOC has become much worse since 1992 when Rep. Steve Gunderson (R-WI) co-sponsored a bill along with Sen. John C. Danforth (R-MO) to encourage mediation prior to the filing of an employment discrimination suit. Rep. Gunderson, along with 22 cosponsors, reintroduced the bill in 1993, and Sen. Danforth did so in 1994. (See below, pages 17-20). Rep. Gunderson stated:

Congress has to be honest with itself. It cannot continue to pass new anti-discrimination statutes, to underfund the enforcement agencies, and then ignore the burden it has put on the federal court dockets.<sup>27</sup>

To be candid, however, it is unlikely that Congress will cut back on the types of claims that can be brought under the EEO laws; but it is extremely likely that there will be attempts to expand their coverage. Also, given fiscal constraints, it is unlikely that Congress will be able to appropriate anywhere near enough funding to significantly cut the EEOC's caseload.

In short, there is a strong likelihood that the present statutory system of resolving employment discrimination claims will exacerbate the delay, frustration and contentiousness that is being caused by the ever-increasing volume of charges. On the other hand, there are a number of ADR possibilities whose use could ably and fairly assist in resolving these claims in a manner that is acceptable to both employees and employers.

Former and current EEOC officials as well as civil rights experts have suggested several options that they believe would improve the federal government's ability to enforce employment discrimination laws. The one mentioned most often is increased use of alternative dispute resolution (ADR) approaches such as mediation.<sup>28</sup> We now turn to the Commission's discussion of private ADR procedures.

## 5. Private Dispute Resolution Alternatives

This section of the *Report* deals briefly with various types of ADR procedures, such as informal problem solving processes, peer review panels, ombudsman systems, grievance procedures, mini-trial, mediation and arbitration. The Commission noted that:

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<sup>27</sup> Cong. Rec. E3206 (October 9, 1992). The Danforth/Gunderson mediation bill is discussed below at pp. 15-18.

<sup>28</sup> GAO Report No. GAO/HEHS-94-2, at 2.

Practitioners of ADR suggest that these procedures work best when integrated into a system that begins with effective organizational policies and practices that limit occurrence of problems before they arise, provides informal processes for individual and group problems-solving of issues or conflicts that do arise, and includes formal appeal and dispute resolution procedures.<sup>29</sup>

We agree with that statement as demonstrating the importance of supporting these internal procedures.

#### *Basic Fairness and Finality Should Be Provided*

The Commission also notes that for these procedures to be used to full advantage, they need to have appropriate due process features. Also, the neutrals who help resolve these claims must have sufficient expertise to warrant deference to their decisions by the public agencies and courts responsible for the laws involved. The Commission also stresses the participation by the parties in its design and oversight. From our own experience at Federated, all these points are commendable and are compatible with successful ADR systems supported by the Labor Policy Association.

Before discussing the various ADR options that are available, we would like to discuss two basic and extremely important principles—fairness and finality. An unfair system is not likely to be used by the employees and, even if it is, there is high likelihood of the system, or the outcome in a particular case, being set aside by a court or agency. At the same time, once a fair system is used to address and resolve the dispute, we recommend that there be a presumption that the result should be enforced, absent a serious mistake of fact or law.

Numerous specific concerns about the fairness of arbitration will be addressed in more detail below. At the outset, however, there are several basic principles of fairness that often are quoted as being necessary components of any fair ADR procedure, such as the internal company procedures discussed in this section. One example of fairness principles is found in the Michigan Supreme Court's decision in *Renny v. Port Huron Hospital*:<sup>30</sup>

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<sup>29</sup> *Report* at page 113. For further examination of the issues, the *Report* cites (at page 113 n. 10), Douglas S. McDowell, *Alternative Dispute Resolution Techniques: Options and Guidelines to Meet Your Company's Needs*, Washington, DC: The Employment Policy Foundation, 1993.

<sup>30</sup> 427 Mich. 415,437, 398 N.E.2d 327, 338 (1986), cited in David Ewing, *Justice on the Job*, at 93; and Alan F. Westin and Alfred G. Feliu, *Resolving Employment Disputes Without Litigation* at 265, Bureau of National Affairs, Washington, D.C. 1988. Another format for fairness was described in the April 6, 1994, testimony of Prof. Theodore J. St. Antoine, where he argued that with some adaptation, the Commission could recommend the "due process" standards of § 101(a)(5) of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, 29 U.S.C. § 411(a)(5), dealing with internal union disciplinary proceedings. Section 101(a)(5) provides:



- a. Adequate notice to the employees who will be bound by the adjudication;
- b. The right of employees to present evidence freely, and to rebut the evidence and arguments offered by the other side;
- c. A formulation by the company tribunal at its hearing of the personnel rules in question and of the facts relevant to those rules;
- d. Specification of the point at which the tribunal renders its final decision; and,
- e. Other procedural elements as may be necessary to ensure a means to determine the matter in question. These will be determined by the complexity of the matter in question, the urgency with which the matter must be resolved and the opportunity of the parties to obtain evidence and formulate legal contentions.

Any ADR system will not be fair or successful unless the parties are notified of the basic procedures to be followed, are aware of the basic rules to be applied, and have sufficient rights to participate in the proceedings

#### *In-House Open Door and Peer Review Systems*

Before proceeding to mediation and arbitration, we touch briefly on in-house open door or peer review systems similar to the system we use at several locations within Federated. These systems did not receive much discussion in the *Report*, but they have proven extremely useful in resolving employment disputes without the intervention of outside neutrals (such as mediators or arbitrators). Typically, these systems apply internal performance or other standards and give the employees an opportunity to challenge employment decisions that they feel are unfair or inconsistent with company policy.

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#### (5) Safeguards against improper disciplinary action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Professor St. Antoine's testimony also may ease concerns about the fairness of arbitration to resolve statutory claims. Citing several federal judges (Harry Edwards, Alvin Rubin, Betty Fletcher) he argued in favor of the desirability of an increasing resort to private arbitration to resolve statutory claims. (April 6 testimony, at 9-10).

We urge the Commission to strongly encourage such procedures, in part because they may resolve what could blossom into full blown statutory lawsuits. These systems also provide a way for employees to have a hearing on complaints that may have some validity, but may not be covered by any specific statute.

It is our understanding that these systems may or may not resolve statutory claims of discrimination based on race, sex, disability, *etc.* Moreover, these systems often are voluntary, and their success depends upon whether the employees feel that the systems are fair and respond to their legitimate concerns.

To generalize, such systems can be successful if they include basic fairness, including:

a timely, accessible, and inexpensive process; the right to present evidence and rebut charges made by the other side; as much privacy and confidentiality as is practicable; a fair and impartial fact-finding process and hearing; a decision that is objective and reasonable plus corrective action if such is called for; and freedom from retaliation for using the procedure.<sup>31</sup>

These systems have the advantage of being prompt, efficient and inexpensive. They also use company employees and managers whose knowledge of can provide a check on decisions that may be well-intended but contrary to company policy, or simply wrong, poorly reasoned, or unethical. Even if statutory claims are not directly addressed, employees who might otherwise have filed discrimination charges often will abide by the in-house resolution of the complaint because they have had a fair opportunity to have their side of the story heard.

"Open Door" policies, for example, set up procedures for employees to approach high level officials and voice a complaint. Employees are assured that prompt action will be taken and that their complaints are a matter of high priority for the company's top management.

"Peer review" systems most often are used to enforce or apply company standards or procedures. Peer review systems are particularly useful in connection with employee involvement programs that give much autonomy to nonmanagement employees. As discussed more fully below, we recommend that employee involvement in ADR design be permitted, but not required.

Examples of the types of complaints resolved by peer review systems include: disciplinary actions or corrective counseling; failure to meet quality or quantity of production standards; and terminations or discharges for violations of company policy.

The issues under peer review systems are resolved by a panel of employees and managers who are specially trained to participate in the system. These panels have the

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<sup>31</sup> David Ewing, *Justice on the Job*, at p. 6. Ewing's book provides a broad, detailed overview of in-house systems along with case studies of the systems used by several companies.

authority to review management actions and to grant, modify within policy, or deny the employee's request, and the panel's majority decision is binding on the employer. In some programs, individuals who opt to have their claims heard by a peer review panel agree to be bound by the panel's decision, but this is not essential to an effective programs. Peer review systems have been quite successful at many companies and undoubtedly have resolved disputes that otherwise might have been taken to the EEOC or the courts.

We now turn to ADR systems that use outside professionals (*e.g.*, mediators or arbitrators) to help resolve employment disputes in the nonunion setting.

## 6. Mediation

Mediation typically involves the services of a trained neutral who assists the parties to negotiate a mutually acceptable agreement. Unlike arbitration, mediation is not merit based. The mediator does not render a decision and does not bind the parties to any particular solution. In mediation, the parties control whether or not to settle. Because of its informal nature, mediation often can be used on an *ad hoc* basis to deal with specific cases. Thus, mediation often is an ideal first step in using ADR procedures both before or after a charge or lawsuit is filed.

The Commission correctly described the advantages of successful mediation:

Mediation, if successful, is advantageous to both sides. They get firm resolution of their legal conflict without the expense and delay of protracted litigation, and on terms that the parties themselves control, rather than being subject to the judgment of an outside tribunal applying public law. Mediators often provide real assistance in settlement negotiations by facilitating private conversations that explore the zone for a "win-win" consensus among the two sides. These potential gains are the reason the EEOC and the Department of Labor have been experimenting with mediation of employment law suits.<sup>32</sup>

We also concur with the Commission's finding that "mediation would be a valuable tool for resolving disputes in order to cut back on the case backlog of the federal agencies."<sup>33</sup>

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<sup>32</sup> *Report* at 114. The EEOC's Pilot Project is described in more detail below at pages 14-16.

<sup>33</sup> *Report* at 114.



We take issue, however, with the Commission's attempt to identify some "key point" in the litigation process where mediation apparently would be optimal.<sup>34</sup> The *Report* recommends that mediation at some midpoint, where the parties know enough about the case to make intelligent judgments. We would point out, however, that the EEOC's Pilot Mediation Program was fairly successful even when the charging party chose mediation shortly after the charge was filed.

In our view mediation may be a viable option anytime the parties agree to undertake it. Thus, we prefer the option set out in the *Report* recognizing that the most propitious time for mediation can "vary considerably from case to case."<sup>35</sup>

For these reasons, LPA concurs with the Commission's alternate recommendation that the agency should have a group of "seasoned outsiders" available to help the parties in possible settlement negotiations.<sup>36</sup> The Commission should recommend that mediation be made available at the parties' option *anytime* after a charge is filed.

The Commission also seems to recommend against mediation where pre-trial costs have been incurred and the parties have committed to litigation.<sup>37</sup> We disagree. The federal courts are having a great deal of success in ordering mediation of cases *after* litigation has been filed and even after an appeal has been lodged.

For these reasons, we encourage the Commission to endorse the Danforth/Gunderson approach that would allow one party to require FMCS-supervised mediation shortly *before* a federal civil rights lawsuit can be filed. See pp. 17-20, below.

We also agree with the Commission's point that the mediator should come from outside the agency and that "the parties could be assured that what the mediator learned from them would not figure in the agency's decisions about whether to pursue charges or file a lawsuit."<sup>38</sup> Indeed, in most mediations, the parties sign a confidentiality agreement. Several state statutes expressly protect the confidentiality of mediation-related communications, often protecting the mediator from being forced to testify about the mediation in any other proceeding.

The following discussion of the EEOC's Pilot Mediation Program and the Danforth/Gunderson mediation bill will provide further details on how mediation could be used from the time a charge is filed until just before a lawsuit is begun.

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<sup>34</sup> *Report* at 114.

<sup>35</sup> *Report* at 114.

<sup>36</sup> *Id.*

<sup>37</sup> *Report* at 114.

<sup>38</sup> *Report* at 114.

a. The EEOC's Pilot Mediation Program

On April 1, 1993, the EEOC began a pilot mediation program at four local offices: Houston, New Orleans, Philadelphia and Washington, D.C. We strongly supported the program and several LPA member companies mediated disputes under the EEOC's auspices. The pilot program was set up and run by the Center for Dispute Settlement (CDS), a private mediation firm based in Washington, D.C.

The Pilot Program now is complete and the results are being analyzed. A final report has been prepared by a consultant and given to the EEOC. The Commission, however, will not release the final results of the program until the Senate confirms the three pending nominations to the EEOC, and they have reviewed the recommendations.

Preliminary figures were based on 284 charges referred for mediation. Of these, 17 were settled before mediation actually began, and 156 (52 percent) were resolved successfully in mediation. Moreover, the overall processing time for mediated charges was 67 days. Mediation sessions averaged about 3.6 hours, with several additional hours for preparation. By comparison, the average time to process an EEOC charge is now 293 days compared to 274 days one year ago. Also, the General Accounting Office projected earlier this year that by FY 1996, the average time to process an EEOC charge could more than double and approach 21 months. The speed of these mediations contrasts markedly with EEOC's average charge processing time of 294 days in FY 1993 and the projected time of 608 days in FY 1996.<sup>39</sup>

The pilot project, however, is now complete, and there no longer is a mediation program in place at the EEOC. Moreover, as only 267 charges were mediated, the program made hardly a dent in the 87,942 charges filed in FY 1993 alone. Without greatly increased funding and encouragement from the EEOC and Congress, it is unlikely that the EEOC will use third party neutrals to the extent required to have any appreciable effect on the EEOC's backlog.

There were several features of the EEOC's pilot program that may be of interest to this Commission. For example:

1. Mediation did not take place until a charge was filed. This feature helped avoid confusion over when a charge would have to be filed in order to be timely under the relevant statute.
2. Mediation was not conducted by EEOC officials. Rather, outside mediators were used. This feature was designed to encourage the parties to be open and candid with the mediator. This feature thus differs from statutory "conciliation" where the EEOC tries to resolve a case before filing a suit. Many employers find that conciliation with an agency that can use the

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<sup>39</sup> GAO Report at 7.

information in its lawsuit against the employer often is a disincentive to a candid assessment of the parties' cases.

3. Participation was voluntary on both sides. If mediation was agreed to, the EEOC suspended its investigation until the mediation was complete. The parties had up to 60 days to complete the mediation.
4. Although it was not required, each party could bring an attorney or any other representative to the mediation. Also, the parties could consult with an attorney or representative at any time during the mediation or before signing an agreement.
5. Information presented in the mediation was confidential and was not subject to EEOC subpoena. This feature conforms to the *Report's* recommendation on page 114.
6. If the mediation resulted in a written agreement, that agreement became an enforceable contract.

One concern about the pilot program, however, was that the mediation took place shortly after the charge was filed and was not available later in the investigation. As noted above, we recommend that in addition to early mediation, mediation be available at any time while the case is before the EEOC or prior to a lawsuit being filed.

#### b. The Danforth/Gunderson Mediation Bill

As noted above, we strongly recommend that the Commission encourage the approach taken in The Employment Dispute Resolution Act ("EDRA"). Experienced litigators and judges recognize that mediation may be particularly helpful if it occurs just before a lawsuit is filed so that an experienced professional can make the parties take a good, hard look at their cases to see if litigation makes legal or financial sense. That is the purpose of the proposed legislation.

The EDRA is a bipartisan bill, introduced in both the House and Senate, that would encourage the use of mediation shortly before the filing of a federal employment discrimination lawsuit. The bill was introduced in 1992 by Sen. John Danforth (R-MO)(S. 3356) and Rep. Steve Gunderson (R-WI)(H.R. 6197). Rep. Gunderson reintroduced the bill in 1993 (H.R. 2016) along with a bi-partisan group of 22 co-sponsors.<sup>40</sup> On July 28, 1994, Sen. Danforth introduced the same bill (S. 2327). Previously, Sen. Danforth, the author of

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<sup>40</sup> Rep. Gunderson's remarks on the Employment Dispute Resolution Act of 1993 are found at E1181 Cong. Rec. (May 6, 1993).

the Civil Rights Act of 1991, urged this Commission to consider this mediation model to resolve disputes.<sup>41</sup>

The EDRA provides a Congressional finding that "cooperative mediation of charges is a more time-saving and cost-effective method of resolving disputes than litigation of civil actions." As Rep. Gunderson explained:

It is no secret that excessive, and in many cases unnecessary litigation is hurting the American economy. The rest of the world, frankly, looks on in amazement at the time and the resources Americans dedicate to suing one another. Litigation is costing America, collectively, between \$60 and \$100 billion a year. We all pay that bill. We pay it through higher prices, lost jobs and wages, diminished economic competitiveness, and a clogged and increasingly unresponsive justice system.

The EDRA provides that any party involved in a claim of discrimination under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, or 42 U.S.C. § 1981, could insist that the claim be submitted to mediation before a lawsuit could be filed. The bill thus provides a substantial incentive for employers, as well as potential plaintiffs, to resolve cases before litigation.

If the EEOC (or State/local agency) issues a right-to-sue letter, or determines that it will sue the respondent, the EEOC will so notify the parties, who will have up to 14 days to request that the dispute be submitted to mediation. A suit cannot be filed during this 14-day period. Similarly, no suit could be brought under 42 U.S.C. § 1981 unless the plaintiff has given the defendant at least 60 days written notice and informed the defendant that either party may request that the complaint be referred to the FMCS for mediation.

EDRA further provides that before a plaintiff can file a lawsuit, all parties shall be informed that any party can request mediation. Either the charging party, respondent employer or union, the EEOC or State/local agency could request the mediation. Similarly, the respondent could require the EEOC to mediate before filing suit. Once mediation was requested, no lawsuit could be filed for a period of 90 days.

If the dispute were submitted to mediation, the parties would follow procedures established by the Federal Mediation and Conciliation Service (FMCS). The mediation would apply to the EEOC or State or local authority, as well as any other potential party.

Although the mediation could be required by any potential party, any agreement resolving the dispute would be voluntary. The Act would not force an agreement between the parties. The parties would have the option of using a mediator chosen from a panel

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<sup>41</sup> See S3678-3679 Cong. Rec. (March 24, 1994).

provided by the FMCS. They also could choose their own mediator from some other source, such as the American Arbitration Association (AAA).

This procedure would differ from existing Title VII "conciliation," which is required before the EEOC can file a suit. The existing procedure puts the EEOC in the position of trying to conciliate a case when, in many cases, the EEOC has made a decision that it is likely to file a civil action. In this situation, the employer may well see conciliation as a discovery device for the EEOC rather than a true attempt to settle. Sen. Danforth explained:

by using truly neutral mediators who act as go-betweens rather than arbitrators, mediation is less threatening to employers. Thus, early settlement is more likely.<sup>42</sup>

The EDRA further protects the plaintiff's time to file a lawsuit. If the statutory time period to file a lawsuit were to lapse during the mediation period, the filing period would be tolled, and the time to file a suit would be extended for 14 days after mediation ended. If the parties agreed, the 90-day mediation could be extended; and if a suit were filed, the judge could order additional mediation.

As noted, the parties could not be compelled to reach an agreement. Once agreed to, however, the agreement would be binding and enforceable in a federal district court with jurisdiction over the parties. The agreement would be kept confidential unless the parties agreed otherwise. The charging party would receive a copy of any agreement between the employer and government agency.

The bill also contains confidentiality requirements protecting all communications and related documents from unwarranted disclosure in any other proceedings, including requests under the Freedom of Information Act (FOIA). However, information that usually would be disclosable in discovery and that was not prepared for mediation would not be confidential if subject to a proper discovery request.

Under this bill, the parties still have access to traditional litigation if an agreement is not reached by mediation. "Thus, the mediation alternative can be a 'no-lose' option" for the parties.<sup>43</sup>

From LPA's perspective, one of the highest priorities of the Commission should be to encourage mediation. Neither side can be compelled to reach an agreement, and both sides can be represented by counsel. The EEOC pilot program and the Danforth/Gunderson bill certainly are serious proposals that we would strongly recommend. We would, however, add one final recommendation:

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<sup>42</sup> S17037 Cong. Rec. (October 5, 1992).

<sup>43</sup> S17307 (October 5, 1992)(Sen. Danforth).



Some procedure should be added to assure that the individual parties (and not just their attorneys) are informed of these options and be given some realistic information on costs and success rates.

## 7. Arbitration

As the *Report* points out, arbitration is similar to court proceedings in that it requires a formal hearing, both sides are represented by their own chosen representative, and the results usually are binding on the parties. We further agree with the *Report*, that there are several advantages to arbitration when compared with litigation:

- Arbitration can secure considerable savings in both time and money that must be expended for an authoritative legal resolution. One study found that the average arbitrator's fee was about \$1,800;
- Arbitration entails much less paperwork, preliminary depositions and motions, and post-hearing briefs and appeals;
- The arbitration hearing can be scheduled at a time that is convenient for the parties and the person they have picked to decide their case, rather than being placed at the end of a crowded court docket; and,
- "For a smaller expenditure than going to court, the parties entrust their fate to a decision-maker whose previous track record they knew about and whom they decided to use, rather than a jury for whom this is usually the first and last legal experience."

### a. Grievance Arbitration in Union Settings

As human relations professionals, many working with unions, LPA's members are very familiar with the grievance-arbitration process. The *Report* correctly concludes that this procedure "meets many of the requirements of effective dispute resolution system design."<sup>44</sup> It also is true that this system has achieved a high degree of confidence from the parties and, and was given a strong endorsement in the U.S. Supreme Court's *Steelworkers* "Trilogy" of cases.

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<sup>44</sup> *Report* at 115-116.

The *Report* accurately finds that arbitration in this context is flexible, effective and relatively inexpensive.<sup>45</sup> We would hope that the Commission would rely upon this commendable record in making its recommendations in the nonunion context.

b. Grievance Arbitration in the Nonunion Setting

1. Arbitration Should Not Be Considered in a Vacuum, But Should Be Considered Along With the Presently Overcrowded Agency And Court Enforcement Procedures.

LPA's reaction to the *Report's* treatment of arbitration in the nonunion setting generally is positive. Indeed, we were pleasantly surprised with the *Report*, given decidedly negative approach to arbitration taken by the plaintiffs' bar and several of the plaintiffs' representatives appearing as witnesses at the Commission's April 6, 1994 hearing.

At several points during the hearing, the panelists were asked a basic question: "What answer do you have to Congress' continual expansion of federal law without giving sufficient resources to handle the resulting caseload?" Several of the witnesses failed to recommend any type of ADR procedure (either voluntary or involuntary) and spent much of their time telling the Commissioners why they should recommend reversing the Supreme Court's *Gilmer* decision that upheld an agreement to arbitrate all employment disputes.<sup>46</sup> These witnesses gave rather extreme examples of unfair ADR procedures and showed no recognition that it possible to design a system that is fair.

A more realistic plaintiff's attorney recognized that arbitration has many benefits over the present litigation system. He stated:

Although he questioned the fairness of the [securities industry] arbitration procedures, [Jeffrey L. Liddle of Liddle, Robinson & Shoemaker] characterized the alternatives as "not appealing." He continued that EEOC is plagued by backlogs, as are the state and city human rights commissions; state courts create "incessant delays" under 19th century procedural rules that make them the "quintessential defendants' jurisdiction;" and clogged federal courts have referred thousands of cases to arbitration.

We feel that the arbitration process, if allowed to function properly—ensuring full discovery rights, selecting qualified and diverse arbitrators, armed with subpoena power, and not enfeebled by current proposals to limit the availability of

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<sup>45</sup> *Report* at 116.

<sup>46</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647 (1991).

punitive damages or the awarding of attorneys fees—can do the trick.<sup>47</sup>

LPA is encouraged that the Commission did not take the negative approach and was not diverted by descriptions of systems that are not advocated by any responsible employer representative. Instead, the *Report* took the practical approach of comparing nonunion arbitration of statutory claims with their only present statutory alternative; *i.e.*, filing a charge and taking on all the all the risks of expensive and time consuming litigation. The Commission thus made the following apt observation:

The fact that employment arbitration is not a particularly voluntary procedure as far as individual employees are concerned is not a sufficient reason for rejecting this option. The alternative of litigation in court or before an administrative tribunal is hardly voluntary either. The employee-plaintiff has no other option but to expend the time and money needed for legal resolution of a claim.<sup>48</sup>

The *Report* is absolutely correct that arbitration should not be considered in a vacuum but alongside the present system, which, in our view, has very serious problems. As noted above, the average EEOC case takes about one year to process, and this time will approach two years by 1996. Many cases will take much longer. EEOC investigators are overworked and may not have sufficient time to consider many of the backlogged cases. The court backlog will further delay resolution of the case. During this time, the employee may be out of a job; or be in the uncomfortable position of continuing to work while the EEOC or courts deal with the claim against her/his employer.<sup>49</sup>

If the case finally gets to court, legal fees will mount and if the employee loses, he often will have to pay his lawyer's fees. And even if the plaintiff wins, the attorney takes a large part of the award to compensate the attorney for all billable hours that are needed to navigate the case through the agencies and courts.

In light of these problems, it would be inappropriate to focus only on perceived problems with arbitration and completely ignore the shortcomings of the present system as several witnesses have urged the Commission to do. It is just as relevant to turn the question around and ask whether we can condone efforts to deprive these employees of some alternative to resolve their complaint. If a fair neutral can resolve a dispute in a matter of

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<sup>47</sup> No. 182 Daily Labor Report (BNA), September 22, 1994, at p. A-15.

<sup>48</sup> *Report* at 118.

<sup>49</sup> As a general rule, allegations of loss of earnings will not be sufficient to permit the courts to order reinstatement of employees who allege that their discharges have been discriminatory. The availability of back pay after trial is an adequate remedy at law that negates allegations of irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 94 S.Ct. 937 (1974).



days or weeks, one could argue that it is just as proper to require employees to use that system as to make them proceed only under the existing statutory and administrative structure.

Second, many questions about the arbitration of EEO claims cannot yet be answered, either from a lack of solid evidence or because the cases are still working their way through the courts. A preemptive strike to forestall arbitration of discrimination claims may well deprive us of an alternative that has many benefits over the existing system.

Third, arbitration should be allowed as an option but should not be mandated by Congress. In many circumstances, mediation or various in-house procedures may be a preferable alternative.

We recognize that there are valid concerns that a system crafted by an employer must have proper safeguards to assure that the system is fair. Indeed, the "[e]mployer representatives who addressed the Commission on this topic accepted this fundamental principle."<sup>50</sup> LPA also agrees with this principle and will address these concerns below.

Thus, one alternative that deserves consideration is to establish base-line principles of fairness. Once those principles are fulfilled, the employer should be allowed sufficient leeway to design a system that best meets the needs of the particular situation. For example, the Federal Mediation and Conciliation Service could promulgate fairness standards after an opportunity for public comment. An arbitration procedure meeting those tests should be presumptively valid and determinations under such a system would be binding, subject to appropriate review.

## 2. Establish a System That Provides Notice To a Charging Party That Optional Arbitration Is Available

A debate has begun over whether an employer should be allowed to have a mandatory system of arbitration to resolve employment disputes. While that debate may take several years to resolve, the Commission could take a smaller, but equally significant step by recommending that federal agencies resolving employment disputes establish a system whereby the charging party and the employer have the *option* to have their dispute decided by a mutually acceptable arbitrator under the principles discussed below. If they agree to that procedure, then the results should be binding. This is the same approach we are advocating for mediation.

As with mediation, we also urge the Commission to recommend that the individual parties (and not just their attorneys) should be informed of these options and be given realistic information on costs and success rates.

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<sup>50</sup> Report at 118.

### 3. The *Gilmer* Decision and Mandatory Arbitration

As much of the discussion about arbitration has been generated by the U.S. Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991), some description of that decision is warranted.

The Court's 7-2 *Gilmer* decision held that an employee in the securities industry who signed an agreement to arbitrate "any employment controversy" must arbitrate an age discrimination claim instead of proceeding with a suit under the Age Discrimination in Employment Act of 1967 (ADEA). *Gilmer's* ADEA suit thus was stayed pending arbitration of his claim. The Court applied the Federal Arbitration Act, whose purpose was to "place arbitration agreements upon the same footing as other contracts."<sup>51</sup>

The Court observed that under the arbitration procedure, "a party does not forego the substantive rights afforded by the statute; it only submits their resolution to an arbitral rather than judicial forum."<sup>52</sup> Justice White also noted that "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."<sup>53</sup>

The Court in *Gilmer* further stated that the ADEA has a "flexible approach" to the resolution of claims, including "informal methods of conciliation, conference, and persuasion," in addition to concurrent, deferral jurisdiction which allows the claims to be resolved in state agencies and courts.<sup>54</sup>

Assuming that a consensus can be reached on the elemental principles of fairness for arbitration procedures, a reasonable case can be made that further legislation on this issue is not necessary, as the issue is being handled by the federal courts who are well-qualified to supervise arbitration awards in the employment arena, just as they supervise awards under several other important statutory schemes.

To our knowledge, much more data needs to be collected before any hard conclusions can be drawn as to the extent that employers have adopted mandatory arbitration for employment disputes. Indeed, on March 4, 1994, the House Education and Labor Committee requested the General Accounting Office (GAO) to initiate a comprehensive study of non-collectively bargained corporate personnel policies that compel arbitration of federal EEO claims. The Committee's letter stated that "[n]o comprehensive data has been

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<sup>51</sup> 111 S.Ct. at 1651.

<sup>52</sup> 111 S.Ct. at 1652.

<sup>53</sup> 111 S.Ct. at 1656 n. 5, citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-26 (1985).

<sup>54</sup> 111 S.Ct. at 1654.

developed regarding the number and types of employers who have established such policies."<sup>55</sup> The GAO has sent questionnaires to several hundred employers and is in the processing of receiving and analyzing responses.

To be sure, some private employers have adopted mandatory arbitration procedures. Their experiences will be valuable in evaluating what approaches might be appropriate for statutory support. However, LPA has also received a large number of inquiries about ADR from its member companies who are considering all their options. Indeed, a great many employers are still gathering information and have not made a final decision. The GAO may well find that mandatory arbitration is not the juggernaut that some news reports indicate.<sup>56</sup>

#### 4. Comparison Of Arbitration With Bench Or Jury Trials

##### a) Arbitration Is Quicker and Cheaper

Most observers feel that cases can be resolved faster and much less expensively in arbitration than through litigation. Indeed, an arbitration system could contain a time limit within which a case should be referred to an arbitrator and a decision rendered.

##### b) The Parties Select the Arbitrator

The *Report* asks several questions about the selection of an arbitrator.<sup>57</sup> A fair procedure would allow the individual employee to choose the arbitrator. Indeed, most arbitration systems have this characteristic. Also, most arbitration procedures allow the individual to pick from a roster of arbitrators. Arbitrators are available from a number of sources, such as the American Arbitration Association, the Federal Mediation and Conciliation Service, the Society for Professionals in Dispute Resolution (SPIDR) and other sources.<sup>58</sup>

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<sup>55</sup> On March 30, 1994, the General Accounting Office published a report entitled *Employment Discrimination, How Registered Representatives Fare in Discrimination Disputes*, GAO/HEHS-94-17 Employment Discrimination ("herein" GAO Securities Report"). The Report found that neither the Securities and Exchange Commission, the New York Stock Exchange nor the National Association of Securities Dealers kept much information on the arbitration of employment disputes. The GAO found about 20 discrimination cases at the NYSE in 1990-1992. It found 18 cases at the NASD during this same period. Moreover, neither the NYSE nor the NASD systematically kept demographic data on arbitrators in their pool. GAO Securities Report at 2, 7-8.

<sup>56</sup> See Steven A. Holmes, "Some Workers Lost Right to File Suit for Bias at Work," *New York Times*, March 18, 1994 at A1 and B6.

<sup>57</sup> *Report* at 119.

<sup>58</sup> In order to avoid an arbitrator and proceed to a jury trial, a plaintiff recently filed a wide-ranging attack on the panels made available by the American Arbitration Association, alleging that the AAA's panels are biased, being made up mostly of older, white males. The suit also asserts that most the panelists are management-side labor attorneys. *Olson v. American Arbitration Association*, No. 94-08981 (Texas Dist. Ct., Dallas County, Texas). See also "Woman Claims Arbiters of Bias are Biased, Too," *Wall Street Journal*,

By comparison, no party can select a judge.<sup>59</sup> Also, jury panels are selected randomly. Counsel for the parties have limited ability to strike potential jurors, but in many jurisdictions, the court conducts the *voir dire* examination of jurors, thus greatly reducing any control the parties might have.

In other cases, the attorneys have more control over the jury panel. Indeed, while trial lawyers complain of arbitrator bias, they also search for venues with the most favorable jury panels for their case, or they look for individual jury members they think will be predisposed to their side. Indeed, the U.S. Supreme Court recently told litigants that they have to stop picking juries based on sex- or race-based stereotypes.<sup>60</sup>

### c) Sharing the Costs of Arbitration

One of the more contentious issues involving arbitration is who should pay for it.<sup>61</sup> Critics of arbitration want it both ways. First, they argue that if the employer pays the entire amount, the arbitrators will be biased toward the employer. Second, they argue that individuals probably cannot afford to use an arbitrator, and thus are prejudiced by the system. They ignore the possibility that the arbitrator does not have to be aware who is bearing the costs and could be paid with a cashier's check that does not identify either party.

These criticisms also fail to consider other options. For example, most would agree that arbitration is much less expensive than litigation. Many plaintiffs would have the resources to share the costs, at least on a mutually agreed upon basis. The procedure also could provide that if the individual was the prevailing party, the employer would pay for the costs of arbitration and other related expenses, such as transcripts. Indeed, if the individual were provided a realistic comparison between the costs of litigation and arbitration, we predict that arbitration would become increasingly popular fairly quickly.

### d) The Parties Can Choose Their Own Representative

Most arbitration procedures allow the parties to pick their own attorney or some other representative. Thus, their rights in this regard are the same as before the EEOC or the

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Monday, September 19, 1994, at p. B1; and "Employers Find a Tool to End Workers' Right to Sue: Arbitration", *The Washington Post*, September 19, 1994.

AAA seems to have rebutted the allegations. According to the Wall Street Journal, the AAA's figures show that they have 212 men and 74 women who hear employment disputes for the AAA. Of these, 247 are attorneys, 76 primarily represent employers, 33 primarily represent employees, 18 represent both, and 20 are regulators. The remaining 139 include retired judges, labor arbitrators, professors and consultants.

<sup>59</sup> The plaintiff in the *Olson* case probably would want to challenge the entire federal judiciary, whose makeup is less diverse than the AAA panels.

<sup>60</sup> *J.E.B. v. Alabama, Ex. Rel. T.B.*, 114 S.Ct. 1419 (1994).

<sup>61</sup> *Report* at 119.

courts.

e) The Parties Can Discover Information

The *Report* asks whether there should a right to discovery, depositions and subpoenas.<sup>62</sup> A fair procedure will provide basic rights in this area and give fair notice to the participants of their rights.

*Gilmer* does not specifically provide guidance as to how much discovery is required for arbitration, although the Court did state that the plaintiff had not demonstrated that the New York Stock Exchange (NYSE) arbitration rules would "prove insufficient to allow ADEA claimants such as *Gilmer* a fair opportunity to present their claims."<sup>63</sup> Any fair arbitration procedure, at minimum, should allow the complainant access to relevant information and documents, his/her personnel file, some depositions and witnesses. A subpoena power also could be provided to give the arbitrator sufficient authority to assure compliance with proper information requests.

Arbitration discovery, of course, could be made as onerous as it is under the Federal Rules of Civil Procedure, but then the value of arbitration may be lost:

by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."<sup>64</sup>

There is no set formula that arbitration must follow, but the procedure must be fair and give the complainant an adequate opportunity to develop his/her case.

f) Significant Remedies Would Be Available In Arbitration

*Gilmer* implied that the arbitrator in that case could award the same relief available under the ADEA.<sup>65</sup> The ADEA, however, does not provide for compensatory and punitive damages as are now authorized by Title VII and the ADA, although it allows liquidated (*i.e.*, double) damages for willful violations. Thus, *Gilmer* did not address whether the arbitrator

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<sup>62</sup> *Report* at 119.

<sup>63</sup> 111 S.Ct. at 1655. The arbitration rules of the AAA, for example, "authorize an arbitrator to subpoena witnesses and documents either independently or upon request of a party." *Williams v. Katten, Muchen & Zavis*, 63 Fair Empl. Prac. Cas. (BNA) 792, 799 (N.D. Ill. 1993).

<sup>64</sup> *Gilmer* at 1655, citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

<sup>65</sup> 111 S.Ct. at 1655. The Court stated that the NYSE rules allowed the arbitrator to award "damages and/or other relief," and indicated that arbitrators have the power to award "equitable relief."



should be able to award compensatory and punitive damages when they can be recovered in court under the statutory schemes at issue in the case.

Many employers, however, feel that arbitration awards dealing with statutory claims probably would not be final and binding if the arbitrator did not have the authority to award the same damages as are available under the specific statute involved in the arbitration. Indeed, many arbitration agreements allow the arbitrator to award these damages. Thus, a mandatory arbitration procedure could provide the same remedies and damages as are available under the statute upon which the individual's claims are based.

An interesting question, of course, is whether a plaintiff has a better chance of getting a large damages award from a jury or arbitrator. In many jurisdictions where extremely high damages awards are the norm in state wrongful discharge litigation (such as California, Michigan and Texas), many conclude that juries would be the most favorable forum for plaintiffs.

In fact, in employment cases involving state wrongful discharge claims, single plaintiffs have received jury awards of \$124 million, \$31 million, \$20.3 million and \$15.5 million. Awards between \$1 million and \$10 million are not uncommon. These immense awards typically include punitive damages and greatly exceed the actual monetary loss suffered by the plaintiff.<sup>66</sup> Little wonder that plaintiffs' counsel strongly resist any alternative to juries.

Under federal statutes like Title VII and the Americans with Disabilities Act, damages are limited to \$300,000 for large employers. Under 42 U.S.C. § 1981, however, larger damages are available. The plaintiffs' bar, of course, would like to lift the cap and allow unlimited damages for all the employment statutes.

Comparisons with arbitration awards are hard to make as there is very little experience with arbitration of EEO claims or employment arbitration where the arbitrator has the authority to award compensatory or punitive damage. In an interview with the *Employment Discrimination Report*, Robert Coulson, the AAA's past President responded as follows:

Q: [Will] arbitration results . . . be more predictable than taking a case before a jury?

A: That depends, of course, on the identity of the arbitrator. If the arbitrator is somebody who is familiar with the applicable law and experienced in taking evidence and making sure that the evidence is there before making a decision, then it's bound to be more predictable than a jury.

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<sup>66</sup> See McDowell, *Alternative Dispute Resolution Techniques*, at 16-18.

Q: What about [the suggestion] that arbitration often results in lower and more realistic damage awards?

A: I think that's very difficult to demonstrate. I am not at all sure an employer should go into the process expecting that to be true.

Q: [Are] arbitrators less likely to be swayed by emotions or anti-corporate sentiment and normally hesitate to award punitive or compensatory damages except in egregious cases?

A: I think that's true in general but, on the other hand, arbitrators may be more familiar with the kinds of awards that the courts have been making. It may be in trying to reflect what the case would be worth in court they actually give a higher number than some jury might have.<sup>67</sup>

There also has been a fair amount of conjecture over whether arbitrators will have a tendency to "split the baby" and try to give both parties something in an arbitration award. Thus, it may be that arbitration will not be as favorable for employers as some may assume. For example, it has been argued that:

arbitrators often are not lawyers and may be inclined to ignore prevailing law and compelling legal arguments. In particular, an arbitrator may be less than receptive to "technical" procedural arguments that are available to the defendant, such as statute of limitations or timely filing issues. Moreover, an arbitrator may be less inclined to follow established burden-of-proof analyses, such as the *McDonnell-Douglas/Burdine* three-step order of proof. Thus, a purely "legal case" may be better off in court. Arbitrators generally are more concerned with issues of basic fairness and are more likely to give the claimant something, even where no violation of the law occurred. An arbitrator is more likely to reach a "compromise" verdict in close cases.<sup>68</sup>

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<sup>67</sup> October 10, 1993, *Employment Discrimination Report (BNA)*, at 84-86.

<sup>68</sup> Bompey and Pappas, "Is There a Better Way? Compulsory Arbitration of Employment Discrimination Claims After *Gilmer*?", 19 *Employee Relations L.J.*, Winter 1993-94 at 197, 211. The authors further argue that arbitrators may be less likely than judges to follow strict rules of evidence or to dismiss claims based on motions.

Mr. Coulson recommends that these outcomes might be diminished if the parties selected arbitrators who were specialists in employment discrimination issues.<sup>69</sup>

We cannot leave this issue without making one final, obvious observation. Even the least experienced arbitrator has more experience in resolving disputes than have most jurors. Most jurors have had *no* prior experience with the relevant discrimination law or any related enforcement proceeding. Moreover, they have no background reference as to how these cases are resolved or what damages are appropriate. Juries can be quite unpredictable, stemming in part from the fact that:

In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.<sup>70</sup>

The jury situation is not likely to improve, but arbitrators surely will become more skilled as they handle more discrimination claims.

g) Arbitrators Write Opinions; Juries Don't.  
Court Review of Arbitrator Decisions  
Could Be Enhanced

Critics of arbitration often argue, as did Gilmer in his suit, that arbitration is deficient because arbitrators often do not write opinions and thus do not leave a body of precedent for use in other cases.<sup>71</sup> Plaintiffs' representatives, of course, generally disfavor arbitration because they want a jury trial. Individual jurors may have opinions, but they don't write them down except to respond to interrogatories from the judge. If the plaintiffs' bar really wanted written opinions, they could ask for a bench trial before a judge.

For the most part, the criticism that arbitration does not leave a body of case law is not only disingenuous, it has no basis in fact. Arbitrators, of course, often write opinions and easily could be required to do so. The arbitrator could be required to make detailed

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<sup>69</sup> *Employment Discrimination Report*, October 10, 1993, at 84-85. The GAO Securities Report found that the NYSE and the NASD use securities industry arbitrators who specialize in securities issues and who often were not familiar with employment issues. We understand that institutions outside the securities industry that provide arbitration panels have been more successful in broadening the demographic makeup of their arbitrators and increasing the availability of arbitrators with expertise in employment discrimination issues. Also, the AAA informs us that they have several programs in operation that have increased the diversity of their arbitral panels. The increase in court-annexed arbitration has further increased this pool of specialized arbitrators. Also, arbitration procedures that allow the parties to choose and agree upon their arbitrator would provide greater party control than in securities industry arbitration.

<sup>70</sup> *Gerz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)(Powell, J.).

<sup>71</sup> 111 S.Ct. at 1647.



factual findings and to make an explicit analysis of the relevant legal issues. A large number already do. Their opinions, numbering in the tens of thousands, are found in several hard copy and electronic reporting services.

Moreover, for many legal issues, the EEOC and other agencies would continue to issue regulations and other policy guidance that could be evaluated by arbitrators just as they are by federal district judges. For example, there is a substantial body of agency guidance under the Americans with Disabilities Act developed by the EEOC.

Further, arbitrators' opinions are subject to court review under either Section 301 of the NLRA (29 U.S.C. § 185) or Section 1 of the Federal Arbitration Act (9 U.S.C. § 1). District and appellate court decisions also would be available for review. Closer scrutiny of arbitrator's decisions could be provided by using the same standards of review as now are used by the federal appellate courts to review the statutory decisions of the federal district courts under these same statutes.

In such a system, the arbitrator would act more like an Administrative Law Judge, and the district court could review the arbitrator's decisions. Indeed, if the experience of the NLRB is any indication, many initial decisions would be extremely lengthy in order to withstand subsequent agency or court review. Of course, this could increase the expense of the arbitration and the caseload of the courts.

This discussion of arbitration leads us to our final recommendation. Where the arbitration procedure is fair, the federal enforcement agencies should be bound by the result unless the decision is overturned under the appropriate court review procedure. It makes little sense to go through a full and fair arbitration procedure and then have the agency continue litigation of the claim, particularly where all parties have agreed to go through the arbitration procedure in the first place.

#### h) Employee Participation in the Design and Oversight Of Arbitration Procedures

##### 1) Union Context

The *Report's* discussion of collectively-bargained arbitration procedures was generally favorable. Our position would be that an employer and the collective bargaining representative of its employees should be able to agree to include statutory claims within the framework of an existing grievance-arbitration procedure. The union could be an adequate representative of its employees. A safeguard could be built in so that the individual could choose another representative to present his/her statutory case to an arbitrator if the individual would not be satisfied with being represented by the union.

Under present law, a strong argument can be made that the *Gilmer* decision has undercut the continuing viability of *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), which did not permit the results of an arbitration to be binding as to the statutory claim in that case. See e.g., *Austin v. Owens-Brockway Glass Container, Inc.*, 844 F. Supp. 1103

(W.D. Va. 1994), *appeal pending*, No. 94-1213 (4th Cir.). Moreover, the main reason that *Gardner-Denver* would not let the arbitrator's decision be binding was that the arbitrator only considered the contract and did not consider the statutory claim. Where the arbitration procedure actually covers statutory claims (such as Title VII or the ADA), then we would argue that *Gardner-Denver* is inapplicable and the arbitrator's decision should be binding.

## 2) Non-Union Context

In the non-union context, it would be much more difficult to involve the employees in designing the system.

First, there is continuing uncertainty about whether Section 8(a)(2) of the NLRA allows an employer to negotiate with its employee about wages, hours and working conditions with non-unionized employees. While a case can be made that employee involvement in designing an ADR system does not violate Section 8(a)(2), the uncertainty over the issue is a disincentive for many employers to involve employees in the process. If employee involvement were made mandatory for an ADR system to be upheld, many employers might opt out of ADR altogether.

Second, we suggest that the difficulties in reaching a consensus in the design of an ADR system should not be overlooked. While some incorrectly think that there is mass movement in the employer community toward some fairly uniform ADR systems, the views of our own membership would indicate that such a conclusion is greatly overstated. The types of systems that have been adopted can vary greatly from employer to employer. Adoption generally comes only after a great deal of internal debate within the company about what type of system should be used. This is why LPA does not advocate a "one-size-fits-all" approach to ADR.

The difficulties in choosing among the various options would be multiplied greatly if employee involvement were mandated, especially as most employees have no experience whatsoever in the underlying ADR concepts.

Where there is no union to resolve the issues, it would be extremely difficult to decide which employees the employer should deal with. Moreover, the lack of expertise of employees on these issues would make it extremely difficult for them to craft a system that was not largely the product of the employer's design and direction anyway. This point is fairly obvious, and we suspect that some of the advocates of mandatory employee participation in ADR design realize that in many cases nothing would happen and that no ADR system would result.

In individual instances, there may be some advantage in involving employees, particularly where such participation may increase the acceptability of the program. On balance, however, we conclude such participation should not be mandatory. As long as the system includes the requirements of fairness set out above, that system should be allowed to resolve statutory claims.

## 8. Application of Mediation and Arbitration Procedures to Particular Employment Laws

As discussed above, we believe that ADR procedures, such as mediation and arbitration would be useful to resolve claims within existing statutory schemes. These recommendations, however, should not be read to mean that other changes in these statutes previously recommended by LPA should not be undertaken. Moreover, there are certain employment statutes whose enforcement schemes would not be benefitted by the incorporation of ADR procedures particularly those in which no private right of action is available and the agency has sole discretion over whether or not to pursue a claim. We now turn to specific statutes.

### a. Statutes Enforced by the EEOC

Based on the EEOC's Pilot Mediation Project and the decided cases, we believe that ADR procedures would work extremely well for Title VII, the Equal Pay Act, the Age Discrimination in Employment Act and the Americans with Disabilities Act. Mediation and arbitration is useful where there is a private right of action and there is no statutory requirement that the settlement be supervised by the agency. Moreover, the *Gilmer* decision, which required arbitration of ADEA claims, has been extended by the courts to cover these other statutes. Also, the EEOC is a charge-driven agency with a tremendous backlog that is not being handled very well under the existing case-handling framework.

As indicated above, the EEOC should have a cadre of experienced neutrals available to resolve cases anytime after a charge is filed. Moreover, we recommend the Danforth/Gunderson approach under which any party can require mediation before a suit is filed.

### b. FLSA-Based Statutes

LPA also recommends that ADR should be examined favorably for those statutes that are based upon the Fair Labor Standards Act, such as the wage-hour titles of the FLSA and the Family and Medical Leave Act. The recent experience with the Labor Department's Philadelphia ADR Pilot project would seem to confirm this recommendation.<sup>72</sup> The general conclusion of the report was that the use of agency-initiated ADR efforts had proven to be a positive experience in many respects in the several programs where it had been tried.<sup>73</sup> The report noted that initially, some agency officials were concerned that the agency's enforcement reputation would suffer if cases were settled too readily or for too little. After the experience with the pilot project, the report stated:

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<sup>72</sup> Alternative Dispute Resolution Steering Committee, *Report to the Secretary of Labor on the Philadelphia ADR Project*, October 14, 1992.

<sup>73</sup> *Id.* at 52.

Regional Wage Hour personnel are now much less concerned about those potential problems. They believe that mediation after referral to [the Office of the Solicitor]—in which [the Solicitor's] presence makes it clear litigation is a real possibility—is a useful tool to encourage opposing parties to settle favorably, and thus supplements and complements conciliation efforts at the agency level.<sup>74</sup>

The concern that settlements might be too quick or for too little arose perhaps because the FLSA and its case law indicate that settlements of FLSA-related claims must be supervised by the Labor Department where the Department initiates the enforcement action.<sup>75</sup> We would recommend that where the individual has brought a private suit against the employer, the employer and the employee should be able to use ADR procedures without the approval or supervision of the Department of Labor. If the Labor Department initiates the suit, then we believe that ADR could be used to resolve the dispute between the Department and the employer.

c. National Labor Relations Act

We would not recommend more use of mediation or arbitration under the National Labor Relations Act. First, as there is no private right of action, mediation between the company and individual employees would not be feasible. Under the NLRA, the cases are under the primary control of the NLRB's General Counsel. Also, in stark contrast with the EEOC, the NLRB has its caseload under relatively firm control.

Moreover, unlike other statutes, the NLRB has established procedures and standards for deferring to arbitration. *Collyer Insulated Wire*, 192 NLRB 837 (1971); and *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955). Under those cases, the Board has the discretion to defer to arbitration based upon the relationship between the parties and whether the collective bargaining agreement encompasses the issues in dispute. Also, where there is an established bargaining relationship, the parties likely will have adopted a grievance/arbitration system to resolve claims already. To the extent that an additional ADR procedure would conflict with or parallel the existing procedure, it may well turn out to be counterproductive to existing bargaining obligations under the Act.

d. Executive Order 11246

In our view, mediation or arbitration probably would not be particularly helpful for issues arising under the affirmative action requirements of Executive Order 11246, which is

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<sup>74</sup> Id.

<sup>75</sup> See 29 U.S.C. § 216(c); *D.A. Schulte, Inc. v. Gagni*, 328 U.S. 108 (1946); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1949); and *Leader, Wages and Hours: Law and Practice*, Matthew Bender, 1994, pp. 9-26 to 9-28.



enforced by the Office of Federal Contract Compliance Programs at the Labor Department. For the most part, that program is not driven by individual complaints and thus there is not a backlog at all comparable to that at the EEOC.

Enforcement of Executive Order 11246 primarily is by compliance reviews scheduled by the agency. The issues tend to be highly technical and based upon statistical analyses of the racial and gender makeup of the contractor's workforce. Resolution of issues arising in compliance reviews is the product of highly technical negotiations between affirmative action professionals representing the agency and the contractor. Also, the OFCCP already sets fairly strict time schedules to resolve compliance reviews. In that context, the use of an outside mediator with no knowledge of the specific issues often would not be necessary. Indeed, it is doubtful whether there are very many outside neutrals with expertise in this highly complex area.

e. Occupational Safety and Health Act

Under OSHA's existing enforcement procedures, the Secretary has the discretion to bring an enforcement action. There is no private right of action. If citations are issued, the employer has 15 days in which to contest the violation and/or proposed penalties to the independent Occupational Safety and Health Review Commission (OSHRC). The initial contest is held before a Commission Administrative Law Judge, and the 3-member OSHRC has the discretion to review the ALJ's findings and conclusions. Final orders of the OSHRC are appealable to the federal circuit courts of appeal.

Typically in the past, the Secretary of Labor has engaged in settlement negotiations with employers in contested cases that result in settlements before the citation is heard by the OSHRC. One incentive for the Secretary to engage in settlement negotiations is the fact that he bears the burden of proof of establishing the violation in any contested case. While this system is far from perfect, the fact that there is no private right of action under the OSH Act and the fact that, at least in the past, the Secretary has shown a willingness to engage in settlement negotiations have led to a fairly workable mechanism for resolving disputes within a reasonable period of time. Accordingly, we do not believe ADR would be necessary in OSHA actions.

Does this mean the current OSHA enforcement procedures cannot be improved? Certainly not. For example, as mentioned above, an employer has only 15 days in which to contest an OSHA citation. Particularly for medium and smaller businesses that do not have an OSHA or legal expert on staff, this short time-frame can operate to preclude them from responding in a timely manner. The time-frame in which to contest a citation easily could be expanded to 30 days without causing any increased administrative delays.

To cite another example, under current law OSHA inspectors must cite any instance of an alleged violation of an OSHA standard that they discover, even though it may be technical in nature and/or an employer has employed alternative measures that effectively abate any hazard. The inspector has no discretion to exercise judgment, thus resulting in



needless citations and needless contests. Further, OSHA's current system for permitting an employer to seek a variance to an OSHA standard is so complicated and administratively burdensome that few employers have bothered even trying to seek a variance. We would propose instead that the variance process be streamlined.

The 103rd Congress considered but did not act upon controversial legislation—the Comprehensive Occupational Safety and Health Reform Act—that would have made radical changes to the OSH Act, including its current enforcement mechanism. The business community believed strongly that the COSHRA bill for the most part would not have improved workplace safety and health, and therefore opposed it. We continue to stand ready to explore changes in the Act that will in fact improve workplace safety and health.

## 9. Joint Safety and Health and Other Workplace Committees

There are two specific references to safety and health committees in the *Report*. In Chapter III, as part of the discussion on "Key Features of Workplace Participation Process," reference is made to a 1993 National Safety Council Survey in which survey respondents indicated that 75% of establishments with 50 or more employees and 31% of establishments with less than 50 employees had workplace safety and health committees. Similarly, in LPA's own employee involvement survey, 71% of the respondents indicated that committees/teams are typically involved in health and safety issues and activities. In both cases, the responses appear to show that where employee involvement exists, workplace health and safety typically is an integral part of the focus.

It is important, however, that more significance to the results of these surveys not be attached than they actually indicate. In particular, they should not be read as an endorsement of the controversial mandated safety and health committee requirement that was proposed in the "Comprehensive Occupational Safety and Health Reform Act (COSHRA)," legislation sponsored by Senator Kennedy and Representative Ford in the 103rd Congress that was opposed by the business community.

The fundamental objection to the COSHRA mandate from an EI perspective is that it seeks to regulate employee involvement, rather than address the more fundamental policy issue of the need to remove existing legal obstacles to EI. As detailed below, while it is clear that safety and health issues can be effectively dealt with in a cooperative employer/employee environment, it is equally clear that the key to the success of such efforts is in the word "cooperation." Such cooperation cannot be mandated, regardless of the form of the mandate.

There is a more extensive discussion of safety and health committees in Chapter IV of the *Report* which concludes the discussion with the finding that:

Safety and health committees are widely used in the U.S. and other countries. Although their effectiveness varies

considerably, well designed committees that are supported with adequate training and resources and integrated with other organizational policies and practices have demonstrated their effectiveness in improving workplace safety.

Again, we would caution that not too much be read into this finding of fact. As LPA's own survey shows, the form of employee involvement can vary considerably, even within a single establishment. The use of the term "safety and health committee" should not connote a template that is applied in every workplace where safety and health issues are addressed in a joint manner—the model that would be imposed by COSHRA—but rather the fact that safety and health issues are addressed in some form of cooperative employer/employee mechanism. The Commission's favorable reference to the Oregon safety and health committee requirement suggests that it may be considering recommending some form of mandated committee requirement on a national basis. We think this would be a mistake.

A close examination of those states that have some form of mandated safety committee requirement reveals that they vary widely, are far less prescriptive, and provide much more flexibility than would be permitted by the COSHRA requirement.<sup>76</sup> And, despite the good things said about the Oregon requirement, in fact, Oregon had its biggest improvement in worker's compensation costs after the reform package was enacted, but before the committee requirement went into effect.

More to the point, we urge the Commission not to make a recommendation that structured safety and health committees, or even particular elements of a committee, be mandated.

In 1992, the Employment Policy Foundation issued a policy paper entitled "Can Employee Involvement Be Mandated?"<sup>77</sup> Among its findings, which were based on an extensive review of research that had been done on employee involvement:

- The success of employee involvement efforts depends on the ability of the participants to reinforce and sustain high levels of trust, an element that cannot be legislated.
- For cooperative programs to succeed, all parties must actively participate and a real commitment must be communicated or shown. If the commitment is not already there, legislation cannot create it.

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<sup>76</sup> Jeweler, Memorandum on "Survey of State Laws Establishing Workers' Safety and Health Committees," American Law Division, Congressional Research Service, Library of Congress, March 1994.

<sup>77</sup> Yager and Ehrlich, Employment Policy Foundation (Washington, D.C., 1992).

- A successful program, at least at the outset, needs individuals with leadership capacity who have the support of the organization and who understand that their role is limited by the purpose of the program—to maximize the involvement of all the employees.
- Programs must have a flexible organizational structure that can be adapted to the unique needs of the company and its employees and that can adjust to the changes in workplace roles inevitably caused by successful employee involvement. For this very reason, two out of every three employee involvement programs do not even have a manual of procedures, thus allowing the participants to invent their own programs to meet their changing needs.

We would point out that these findings are fully consistent with the Commission's own findings with respect to employee involvement as contained in Chapter II.

The fact that structured safety and health committees have worked well in some workplaces does not justify a particular formula for all workplaces. Instead, we would recommend, as we did in our testimony to the Commission at its August 10, 1994, hearing, that the Commission recommend changes that will ensure that the progressive changes in human resources practice that are being made by employers and employees are protected from legal attack. We believe that this is the best way to encourage the successful cooperative efforts that are contributing to safer and healthier American workplaces.

## 10. Integrated Employment Regulation

- a. Integration and Combination of Existing Agencies Is Not Likely To Decrease Their Workload Whereas Implementation of ADR Procedures Would.

At the April 6 hearing of the Commission and in the *Report* (at page 128) questions were raised by Commission members about whether federal agency consolidation or reorganization would reduce the caseload of the federal agencies.

Past experience indicates that it would not. For example, under Reorganization Plan No. 1, the EEOC acquired from the Department of Labor the authority over enforcement of the Age Discrimination Act of 1967 and the Equal Pay Act.<sup>78</sup> That statutory authorization simply allowed the transfer of the Labor Department's caseload to the EEOC. Also, at that

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<sup>78</sup> See section-by-section analysis of H.R. 1746, § 4, 92d Cong., 2d Sess., 118 Cong. Rec. 7564-65 (1972). See also H.R. Rep. No. 238, 92d Cong., 2d Sess. (1971), reprinted in Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, at 61-131 (1972).

time, several enforcement personnel from the Labor Department transferred to the EEOC and presently are in the EEOC's Legal Counsel's office working on the EEOC's age discrimination policies. As we all know, the EEOC's case load continued to expand, and Congress has not increased its budget commensurate with the agency's increased workload under the ADEA, the EPA or any other statute.

If the transfer of functions is nothing more than retitling the enforcement functions with a common name, there would be no point in making the change. As the previous discussion indicates, unless some fundamental changes are made in the case handling and resolution process—such as mediation and arbitration—the governmental agencies simply will not be able to handle the rearranged workload.

Moreover, at the last hearing, the Committee discussed the possibility of merging the EEOC with the NLRB. In our view, this move would create needless confusion and intermingle very different statutes. By comparison with the EEOC, the NLRB has a much smaller constituency and administers a statute which is technically very different than the ones handled by EEOC. As set out below, however, the NLRB enforcement scheme should be considered as an alternative to the present enforcement system under other employment statutes.

b. Consolidation, Accompanied By Fundamental Changes  
In Procedure, May Be Worth Considering

Consolidation, however, might merit some consideration if, and only if, it were accompanied by changes in procedure that would improve the enforcement process, such as:

1. Establishing at the front end of the enforcement process a system that stresses the use of alternative dispute resolution systems to resolve as many employment cases as possible to reduce the involvement of the federal agencies and courts.
2. Implementing new ADR procedures such as those outlined above. For those cases that cannot be settled informally, having those cases tried before federal administrative law judges with review before an agency panel or in the U.S. courts. Consistent with our recommendation below that the NLRB model be followed, review of agency decisions would be before the U.S. courts of appeals.
3. Extending the concept of the NLRB General Counsel's unreviewable discretion in deciding whether a charge is meritorious to all federal employment laws, thus establishing a mechanism to keep cases without merit from reaching the federal courts. A detailed proposal to implement this concept is found in H.R. 4889, the "Fair Employment Reform and Consolidation Act of 1990," introduced by Rep. Steve Bartlett

on May 23, 1990. At the same time, eliminating the private right of action now found in employment laws.

4. Developing a better system of selecting NLRB/Commission members to avoid the political wars that have accompanied the current process. H.R. 1466, introduced in 1994 by Rep. Major Owens (D-NY) would be a good first step in implementing this recommendation.
5. Devising a more rational penalty/remedial scheme that would discourage litigation in search of high-stakes jury awards. The present system has greatly increased the EEOC's caseload in return for a "lottery-like" jury system (*Report* at page 113) that discourages the option of viable alternative dispute resolution procedures. Indeed, the American Civil Liberties Union testified before the Commission that over 70 percent of those persons who feel they have a statutory claim cannot even find an attorney who will take their case.
6. Ending the practice of using the federal workplace laws (such as OSHA and the FLSA) for revenue raising purposes. In recent years, both Congress and the Administration have begun to increase fines and penalties under the labor laws for the express purpose of deficit reduction. Such an approach to enforcement indicates that the federal government is becoming more interested in raising revenue than in achieving the underlying goals of these laws.
7. Establishing safeguards to protect the federal employment laws from being used by unions for corporate campaign purposes.
8. Barring a charging party from instituting similar enforcement actions in multiple forums. Alternatively, requiring that the results in one forum (such as the results of arbitration) be considering binding or *res judicata* for all other forums.
9. Preempting all similar state and local laws to provide uniformity in U.S. employment laws.

c. Specialized Labor Court

As above, we preface our comments in this section with our view that any successful system for handling employment cases must be integrated with an effective alternative dispute resolution procedure.



From a general perspective, there are two likely views that may be taken about specialized labor courts. Some will feel that it is better to use courts of general jurisdiction (such as the federal district courts) because they are accustomed to dealing with a variety of issues and will not become overly-familiar with or captives of pre-conceived opinions about the technicalities of specific statutes. Also, using courts of general jurisdiction spreads the workload throughout the entire court system and does not overload a specialty court.

Others may feel that these laws are so technical that it is better to have specialized courts (such as the federal Bankruptcy or the Federal Circuit) concentrate on those cases.

From a more specific, practical viewpoint, there will be concerns that a specialized court may be predominated by judges who tend to favor one side or the other. Opinions often will vary depending upon the political party that will make the nominations or the possibility that the judges may tend to favor one side or the other. For example, unions and plaintiffs' attorneys usually express displeasure that the federal bench is largely made up of appointees of Presidents Reagan and Bush. On the other hand, employers are likely to oppose a new court system largely appointed by a Democratic administration. To be perfectly candid about it, the political composition of the Commission on the Future of Worker/Management Relations is an excellent case in point.

The experience of European labor courts also gives employers much concern. The employer perception is that the labor courts primarily are pro-labor, and American employers are concerned that a similar result could occur in the United States.

In short, all sides are likely to be concerned about the fairness of a labor court system, and it is unlikely that such fairness can be assured to an extent that both sides will be satisfied with that system. From a political standpoint, therefore, the idea of labor courts are likely to have substantial opposition.

## Conclusion

There is no question whatsoever that the EEOC and the courts have become overwhelmed by the growing number of employment discrimination charges and lawsuits. Increased resources from Congress are not likely, but even if they were, it is in the public interest to seek less acrimonious, less expensive and more timely alternatives to the present system. We urge the Commission to give full consideration to all available alternatives and issue recommendation that would establish the flexibility needed to encourage prompt and fair resolution of employment discrimination claims.