



Cornell University
ILR School

Cornell University ILR School
DigitalCommons@ILR

Federal Publications

Key Workplace Documents

September 1994

Statement of Professor Samuel Estreicher Before the Commission on the Future of Worker-Management Relations, Panel on Private Dispute Resolution Alternatives

Samuel Estreicher
New York University

Follow this and additional works at: https://digitalcommons.ilr.cornell.edu/key_workplace

Thank you for downloading an article from DigitalCommons@ILR.

Support this valuable resource today!

This Statement is brought to you for free and open access by the Key Workplace Documents at DigitalCommons@ILR. It has been accepted for inclusion in Federal Publications by an authorized administrator of DigitalCommons@ILR. For more information, please contact catherwood-dig@cornell.edu.

If you have a disability and are having trouble accessing information on this website or need materials in an alternate format, contact web-accessibility@cornell.edu for assistance.

Statement of Professor Samuel Estreicher Before the Commission on the Future of Worker-Management Relations, Panel on Private Dispute Resolution Alternatives

Comments

Suggested Citation

Estreicher, S. (1994). *Statement of Professor Samuel Estreicher before the Commission on the Future of Worker-Management Relations, Panel on Private Dispute Resolution Alternatives*. Retrieved [insert date], from Cornell University, School of Industrial and Labor Relations site: http://digitalcommons.ilr.cornell.edu/key_workplace/339/

Hot Topic "Future Worker Management"

Property of
MARTIN P. CATHERWOOD LIBRARY
NEW YORK STATE SCHOOL
INDUSTRIAL AND LABOR RELATIONS
Cornell University

Statement of Professor Samuel Estreicher¹

**Before the Commission on the
Future of Worker-Management Relations
Panel on Private Dispute Resolution Alternatives**

September 29, 1994

Thank you for the opportunity to appear again before the Commission, this time to address some of the questions in the Commission's Fact Finding Report concerning the appropriate design of private dispute resolution alternatives.

My testimony is based on years of teaching and writing in the field of labor and employment since joining the NYU faculty in 1978; representation of clients of my firm in New York; and service on the labor and commercial panels of the American Arbitration Association (AAA). In addition, for over a decade, I have been a member of the Employment Disputes Committee of the Center for Public Resources (CPR), a nonprofit organization funded by law firms and corporations to promote ADR. Our committee -- which is comprised of plaintiff and defendant

¹Professor of Law, New York University; Counsel, Cahill Gordon & Reindel. Address: New York University School of Law, 40 Washington Square South, New York, New York 10012-1099; telephone (212) 998-6226; facsimile (212) 995-4036. The views expressed in this statement are the author's and should not be attributed to any organization.

representatives -- has developed model procedures for the mediation and arbitration of employment disputes that may be of interest to the Commission.² (I have brought copies of the CPR models as well as my previous writings on the subject of ADR in employment disputes³ which I will make available to the Commission.)

Premises

I start off with the premise that the arbitration of employment disputes should be encouraged as an alternative mechanism, other than administrative agencies or courts, for resolving claims arising under public laws as well as contracts. It is an alternative that offers the promise of a less expensive, more expeditious, and less draining and divisive remedy. Private arbitration will never entirely supplant agency or court adjudication. But if properly designed, private arbitration can complement public enforcement while satisfying the public-interest objectives of the various statutes governing the employment relationship.

I recognize that this is a contested premise. Some, particularly in the plaintiffs' bar, object to the loss of jury trials or the fact that the arbitration approach cannot (and

²See CPR Legal Program's Model ADR Procedures - ADR in Employment Disputes; Model ADR Procedures - Employment Termination Dispute Resolution Agreement and Procedure; Company Policy Statement - Mediation of Employment Disputes.

³See Estreicher, Arbitration of Employment Disputes Without Unions, 66 Chi.-Kent L. Rev. 753 (1992); Unjust Dismissal Laws: Some Cautionary Notes, 33 Am.J. Comp. L. 310 (1985).

should not) replicate the pretrial discovery procedures available in the civil courts or the extensive judicial review of factual and legal errors available in the courts of appeals.

For several reasons, these objections are overstated.

First, civil litigation resulting in substantial jury awards is a realistic option for relatively few claimants under public laws. For the overwhelming majority of the claimants, a private lawyer cannot be secured and their claims will be addressed, if at all, by overworked, understaffed administrative agencies. These agencies -- after considerable delay -- typically offer little more than a perfunctory investigation. Second, while individuals with substantial claims -- often, white senior managers with age-discrimination grievances⁴ -- may lose access to jury trials, the jury trial is a relatively recent innovation in employment law (introduced into Title VII and ADA lawsuits only as a result of the Civil Rights Act of 1991). We should not view jury trials as a necessary feature of the employment-law landscape. Major strides were made in the discrimination field for 25 years without resort to juries. Our basic labor laws do not provide for jury trials. European countries with wrongful dismissal laws rely on specialized labor tribunals, which resemble tripartite arbitration boards, not civil jury trials. And the federal sector in Canada uses private arbitrators for its wrongful dismissal law. Finally, opportunities for discovery and

⁴See, e.g., Schuster & Miller, An Empirical Assessment of the Age Discrimination in Employment Act, 38 Ind. & Lab. Rels. Rev. 64 (1984).

somewhat enhanced judicial review can be made part of the arbitration process without incurring all of the expense, delay and exhaustion of civil litigation.

From the employer's perspective, jury trials inject an element of uncertainty because of the unpredictability of jury awards and the risk that, in certain cases, juries will dispense their own view of social justice rather than finding facts and applying the law in accordance with the court's instructions. This uncertainty undermines society's interest in enabling firms to make sound personnel decisions and, as the Rand studies⁵ suggest, has negative effects on the willingness of firms to hire additional workers. In short, we have a system in which some individuals in protected classes obtain significant recoveries, while others queue up in the administrative agencies and face reduced employment opportunities.

Spurred by these concerns and the pro-arbitration rulings of the Supreme Court -- most notably, Gilmer v. Interstate/Johnson Lane Corp.⁶ -- many companies have either adopted or are seriously considering plans that provide for arbitration by neutrals as the final step of their in-house grievance procedures. Not long ago, surveys by David Ewing, Alan Westin

⁵See James N. Dertouzos & Lynn A. Karoly, *Labor-Market Responses to Employer Liability* (Rand Instit., R-3989-ICJ, 1992); also James N. Dertouzos, Elaine Holland & Patricia Ebener, *The Legal and Economic Consequences of Wrongful Termination* (Rand Instit., R-3602-ICJ, 1988).

⁶500 U.S. 20, 111 S.Ct. 1647 (1991).

and others⁷ found only a handful of companies willing to allow third-party arbitrators to have the final say. The trend today appears to be in the opposite direction. Companies as diverse as Burlington Northern Railroad, Brown & Root, ITT (for headquarters employees), Rockwell International (for top management employees) have taken this step, and more are likely to follow.

Need for Legislation

The Commission, in my view, should recommend legislative reform that would encourage mandatory arbitration of public-law and contractual claims in both union and nonunion firms. Legislation is needed to put mandatory arbitration on a firm legal basis.

1. Uncertainty for Nonunion Firms

For firms in the nonunion sector, there remains a substantial legal question whether the Gilmer decision has applicability for employees other than registered representatives in the securities industry. The Supreme Court left open the reach of the exclusion in §1 of the Federal Arbitration Act (FAA) of "contracts of employment, seamen, railroad employees, or any other class of workers in engaged in foreign or interstate commerce."⁸ Few other industries are like the securities

⁷See, e.g., D. Ewing, *Justice on the Job: Resolving Grievances in the Nonunion Workplace* (1989); A. Westin & A. Feliu, *Resolving Employment Disputes Without Litigation* (1988); D. McCabe, *Corporate Nonunion Complaint Procedures and Systems* (1988); Ichniowski & Levin, *Characteristics of Grievance Procedures: Evidence from Nonunion, Union, and Double-Breasted Businesses*, 40 *Indus. Rels. Res. Assn.* 415 (1988).

⁸9 U.S.C. §1.

industry -- governed by self-regulatory organizations that can be the source of mutual arbitration promises independent of an employment agreement. A number of district courts have read the FAA exclusion as limited to workers directly involved in the transportation industry.⁹ This interpretation enjoys some support in decisions of courts of appeals in the era prior to the Supreme Court's Lincoln Mills decision¹⁰ that strained to find a legal basis to enforce arbitration clauses in collective bargaining agreements. Professor Cox at the time thought the reading to be an artificial construct because it ignores the broader reach of the "any other class of workers in engaged in foreign or interstate commerce" clause of §1.¹¹

Companies may be reluctant to adopt arbitration policies because, if the Federal Arbitration Act is unavailable, there is a considerable risk that mandatory arbitration will not preclude a later lawsuit. Moreover, attempts to limit access to the company's grievance procedure or to condition benefits on an employee's waiver of the right to a judicial forum may be viewed

⁹See, e.g., Crawford v. West Jersey Health Systems, 847 F.Supp. 1232 (D.N.J. 1994); Kropfelder v. Snap-On Tools Corp., 1994 U.S. Dist. Lexis 1157 (D.Md. 1994).

¹⁰Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957).

¹¹See Cox, Grievance Arbitration in the Federal Courts, 67 Harv. L. Rev. 591, 597-98 & n.27 (1954). Competing readings of the FAA §1 exclusion are evaluated in Estreicher, Arbitration of Employment Disputes, supra, 66 Chi.-Kent L. Rev. at 760-62.

as actionable "retaliation" under the discrimination laws.¹²

2. Uncertainty for Employees and Other Claimants

Legal uncertainty also disserves the interests of employees and others with claims under the employment laws who lack a firm basis for determining what their rights are in private arbitration proceedings. It undermines the acceptability of arbitral outcomes and may generate litigation that could be avoided if the necessary safeguards for private adjudication of public-law claims were spelled out.

3. Additional Hurdles for Union-Represented Firms

Union-represented firms face even higher obstacles to securing mandatory arbitration of public-law claims. This is because the Supreme Court in Alexander v. Gardner-Denver Co.¹³ held that union representatives cannot waive the right of represented employees to insist on a judicial forum to hear their EEO claims. Nor can unions agree with employers that resort to the contractual grievance machinery constitutes an election of remedies barring a later lawsuit. Gilmer reaffirms this teaching, and expressly distinguishes between (i) mandatory arbitration clauses in agreements with individual employees (which are enforceable under the FAA), and (ii) the same clauses

¹²See EEOC v. Board of Governors of State Colleges & Univ., 957 F.2d 424 (7th Cir. 1992).

¹³415 U.S. 36 (1974).

in collective bargaining agreements (which are not).¹⁴

The distinction drawn in Gardner-Denver and reaffirmed in Gilmer is from one perspective counterintuitive: It holds enforceable agreements that may be the product of unequal bargaining power, while rendering unenforceable (and possibly unlawful) agreements that reflect the preferences of a collectively-empowered workforce. Also, the combined effect of Gardner-Denver and Gilmer is to artificially raise the costs of union representation vis-a-vis the nonunion alternative. By denying only firms in the union-represented sector the availability of a contractual mechanism for the comprehensive resolution of all claims arising out of an employment dispute, these decisions place the union-represented firm at a competitive disadvantage having nothing to do with the nature of union demands or job practices.

General Principles for Legislative Reform

New legislation in this area should be guided by four general principles:

1. **Legislation in this area should be facilitative.** The goal of the law should be to make it possible for the parties to craft mandatory arbitration agreements that can provide a binding, comprehensive resolution of all employment claims, under certain safeguards. We should avoid, however, insisting on rigid formats. Companies differ in their internal personnel practices, employee and managerial capability, and work culture. Some companies may wish to experiment, for example, with use of mediation or

¹⁴The Seventh Circuit also has ruled that a provision in a labor agreement providing that an employee must choose between invoking his contractual remedy or forgoing that remedy and repairing to the civil courts amounts to illegal retaliation against EEO claimants. See note 12 supra.

peer review as a prelude to binding arbitration. Such experimentation should be encouraged, but these and similar approaches may not be appropriate for all companies.

2. The availability of mandatory arbitration should not turn on the unionized status of the employees. As I hope to demonstrate below, safeguards can be provided to minimize any potential for conflict of interest between employee and union identified by the Supreme Court in Gardner-Denver.

3. Private arbitration agreements cannot waive substantive rights under the employment laws. To the extent the mandatory arbitration procedure purports to deal with claims under public-law statutes, there is a public interest in ensuring that substantive judgments embodied in those laws are honored in the arbitration process. Or, as the Supreme Court put it in Gilmer, employees can waive their right to a judicial forum but, absent clear authorization in the particular statute, cannot waive their substantive entitlements.

4. Private arbitration is not, and should not be converted into, a private form of agency or court adjudication. Some change in traditional commercial arbitration is needed to enhance the capability of the system to address public-law claims in an acceptable manner. We should take care, however, to ensure that any additional procedural safeguards are truly needed to help arbitration assume these new responsibilities. We should always be mindful that regulation comes at a price -- detracting from the traditional advantages of arbitration and possibly discouraging its utilization.

Design of Private Arbitration of Public-Law Claims

With these general principles in mind, I would like to turn to some of the design questions raised by the Commission in its Fact Finding Report of May of this year.

1. Selection of Arbitrator

In my view, arbitration holds the greatest promise of providing an acceptable alternative means of resolving public-law claims if both parties jointly select the arbitrator or, failing agreement, the selection procedures of a recognized, neutral arbitration organization (like the AAA or CPR) are utilized.

The Court in Gilmer allowed use of securities industry arbitration, but it is important to remember that the Court specifically left open the question whether its holding extends to arbitration promises contained in employment agreements. Arbitration always poses the danger that "repeat players" in the system will have special influence over arbitrators. This danger is aggravated by use of an industry panel (despite recent improvements in NYSE panels)¹⁵ or roster of arbiters unilaterally selected by the employer.

To meet the concerns raised in Gardner-Denver, employees represented by unions should have the same right as nonrepresented employees to (i) insist on taking their dispute to arbitration and (ii) participate in the selection of the arbitrator.¹⁶ In most cases, such employees will turn to the union for advice and representation. But we should leave open the possibility that the employee will have access to independent counsel or advisers who could play a useful role in enhancing the fairness and acceptability of the system.

¹⁵Securities-industry arbitration procedures are critically reviewed in U.S. Govt. General Accounting Off., Employment Discrimination - How Registered Representatives Fare in Discrimination Disputes (GAO/HEHS-94-17, March 1994).

¹⁶Labor arbitration of claims arising under collective bargaining agreements would remain lawful even in the absence of these safeguards, but they would seem essential if the arbitration is to have the effect of precluding later suits on public-law claims.

2. Qualifications of the Arbitrator

Arbitrators should be lawyers or former judges with experience in employment law. I note the draft revision of the AAA rules (under consideration by the California region) requires that "[a]rbitrators serving under these Rules be experienced in the field of employment law."¹⁷ Appropriate disclosure by potential arbiters of prior dealings with the parties or their representatives is already a requirement under the current AAA rules. Further regulation here is not advised. We can count on the self-interest of the private arbitration organizations to be keep active only those members of its panels found to be acceptable to employer and employee representatives.

The FMCS and administrative agencies with responsibility over the employment laws can also play a very useful role in maintaining their own roster of arbiters, and perhaps by the force of their moral suasion encouraging the parties to draw individuals from that roster. It would be a mistake, however, to artificially limit the universe of arbiters to those found acceptable to federal or state agencies. Such a requirement would discourage resort to arbitration, without adding significantly to the quality or neutrality of the arbiters.

¹⁷September 1994 Draft of revised AAA Employment Dispute Resolution Rules, §9(a)(i).

3. Arbitration Procedure

a. Representation

In order to promote an acceptable process, any arbitration of public-law claims should permit employees to be represented by counsel of their choosing. Although employees covered by collective-bargaining agreements may well choose to be represented by their union, they should be permitted to secure independent representation. If an employee or former employee claimant does not have access to counsel, the employer should be permitted, if it so chooses, to provide financial assistance (perhaps in the form of an insurance benefit plan for this purpose, with appropriate copayment provisions to deter frivolous claims) to permit the claimant to obtain independent counsel. In addition, the availability of attorney's fees for "prevailing" claimants under the EEO laws should help generate a private bar.

Financial assistance by the employer should not, however, be mandated. Again, the purpose of legislative reform is to promote rather than discourage use of private arbitration. But if the employee is unable to secure counsel, any arbitration -- even proceedings where employers agree not to be represented by lawyers -- should not have the effect of precluding later lawsuits.

b. Discovery

Some limited prehearing discovery might be available as a matter of right, with authorization of additional discovery on a showing of special need. The CPR model procedures allow for a

prehearing exchange of documents, "at least one deposition of an Employer representative designated by the Employee," and additional discovery of items found by the arbitrator to be "relevant and for which each party has a substantial and demonstrable need."¹⁸ The draft AAA procedures envision an "arbitration management conference," at which the arbitrator will consider "the resolution of any outstanding discovery disputes and establishment of appropriate discovery parameters...."¹⁹

We should, however, resist any effort to transform arbitration into a traditional lawsuit -- particularly any temptation to import the full gamut of discovery devices available under, say, the federal rules. Most employment disputes involve garden-variety issues concerning the quality of the claimant's job performance and the motive of the employer. One deposition of an employer representative and transmittal of a copy of the claimant's personnel file, coupled with the traditional subpoena power of the arbitrator (or the lawyers) should suffice for most cases. If there is a special need for additional discovery, arbitrators should have the authority to consider such requests.

¹⁸CPR's Legal Program, Model ADR Procedures - Employment Termination Dispute Resolution Agreement and Procedure, Art. 10.

¹⁹September 1994 Draft of revised AAA Employment Dispute Resolution Rules, §6.

c. Class Actions

Should the law require that private arbitration of public-law claims make provision for class actions to the extent class claims are litigable under the statutes in question? There is some authority interpreting the FAA and the federal rules in this manner.²⁰ The question is a close one. A priori there is no reason why simply because certain procedures are available in the federal courts they must be imported into private arbitrations. Note that states vary in their approaches to class-action litigation, and yet a suit in the state courts will preclude a later federal suit in the federal courts on the same subject matter. Nevertheless, class actions do play an important role in EEO litigation. Some claims, involving theories of disparate impact and systemic disparate treatment, often can only be brought on a class basis.

Because of the close relationship between this particular procedure and substantive entitlements under the employment laws,

²⁰The California courts have held that certification of class claims in arbitration is proper in appropriate circumstances. See *Keating v. Superior Court*, 31 Cal.3d 584, 613-14, 645 P.2d 1192, 1214-18, 183 Cal.Rptr. 360, 377-78 (1982), rev'd in part on other grounds sub nom. *Southland Corp. v. Keating*, 465 U.S. 1 (1984). Relying on Fed. R. Civ. P. 81(a)(3), which provides that in arbitration proceedings the Federal Rules of Civil Procedure "apply only to the extent that matters of procedure are not [statutorily] provided for," a district court has granted a motion to certify a plaintiff class in arbitration proceedings involving customer-brokerage disputes over commodities trading. See *Champ v. Siegel Trading Co., Inc.*, No. 89 C 7148 (N.D. Ill., June 15, 1990). The related issue of the authority of federal and state courts to consolidate related arbitration claims in one proceeding is surveyed in *Stipanovich, Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 Iowa L. Rev. 473, 490 n.82 (1987).

private agreements to arbitrate public-law claims should authorize class actions in appropriate circumstances -- if the intent of the parties is to provide a comprehensive resolution of all employment claims. Private agreements that do not authorize class claims should still be lawful and would preclude litigation of claims adjudicated in the arbitration. However, where arbiters are not given authority to hear class claims, claimants that intend to press such claims should be able to exit from the arbitral system.

4. Arbitration Awards

a. Written Opinions

Because private arbitration in this context purports to resolve public-law claims, there is a public interest in ensuring that awards are at least in broad measure faithful to the legislative judgments contained in the laws. This requires, in my view, a departure from the traditional practice of commercial arbitrators to simply announce results without giving reasons for the award. If the award is to preclude a later lawsuit, the arbitrator should be required to provide an opinion stating the reasons for the decision reached.²¹ The experience in labor arbitrations suggests that a statement-of-reasons requirement promotes acceptability of the process, and does not require a prolix document.

²¹This is the position taken in the September 1994 Draft revision of the AAA Employment Dispute Resolution Rules, §30(b).

b. Remedies

Private arbitration of public-law claims entails a waiver of a right to a judicial forum, but should not involve any waiver of substantive rights. Accordingly, the arbitrator should be authorized to provide the full panoply of remedies available under the statutes in question, including injunctive relief, attorney's fees and punitive damages²² in appropriate circumstances. Again, it should be entirely lawful for the parties to exclude certain remedies from the arbitrator's authority, but later lawsuits seeking the excluded remedies could not be precluded.

c. Confidentiality

One of the benefits of private arbitration is that it provides a means of resolving a dispute in which reputations and good-will can be shielded from public disclosure. Unless there is a need to repair to the courts to obtain judicial enforcement of an award or to make filings with administrative agencies in order to preserve substantive rights, the parties should be free to provide for confidentiality.

Administrative agencies might wish to monitor arbitration awards in order to determine whether private arbitration is

²²Some appellate decisions suggest that the FAA implicitly confers such authority, even where the agreements contain a choice of law clause referring to a jurisdiction that does not allow arbitrators to assess punitive damages. See *Lee v. Chica*, 983 F.2d 883 (8th Cir. 1993); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991); *Raytheon v. Automated Business Systems, Inc.*, 882 F.2d 6 (1st Cir. 1989); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988).

producing satisfactory outcomes in conformity with the substantive requirements of the public law. Litigants (and their representatives) might also need to review previous awards of an arbiter in order to make an intelligent decision as to the arbiter's competence and neutrality. For these reasons, it would be appropriate to require that awards (redacted to delete identifying details) be kept on file with the arbitration organization under whose auspices the proceeding was conducted.

5. Court Review of Awards

Traditionally, judicial review of arbitration awards in commercial cases is limited to questions of bias or other misconduct or whether the arbiter exceeded the submission of the parties.²³ Because private arbitration in this context implicates the public interest in enforcing the policies of public employment laws, the courts should be authorized to engage in a somewhat more demanding scope of review. A possible approach is suggested by the Supreme Court's decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,²⁴ an international arbitration pursuant to the FAA involving claims under the arbitration laws. Justice Blackmun observed in that case: "While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remains minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually

²³See, e.g., FAA §§10-11.

²⁴473 U.S. 614, 638 (1985).

decided them."

This "minimal" review might not be demanding enough in the employment-law context. It would be appropriate to give the courts express authorization to review the portion of awards resolving public-law employment claims for "manifest disregard" of the law.²⁵ However, unless the parties agree otherwise, awards should not be reviewable for factual or legal errors on the same terms as an adjudication rendered by a trial court or administrative agency -- lest we undermine the benefits of the arbitration process altogether.

6. The Authority of Administrative Agencies

Private agreements cannot displace the authority of administrative agencies to vindicate public policies committed to their charge by the legislature. To the extent agencies have authority to mount litigation that is not dependent on the charges of private parties, they could continue to do so irrespective of the outcomes reached in private arbitrations.

A difficult questions arises in connection with claims under the federal employment discrimination laws, where private parties are required to file charges with the administrative agencies in part in order to give those agencies an opportunity to determine

²⁵The "manifest disregard" standard -- a judicially-created addition to the statutory grounds for vacating an award set forth in the FAA -- requires a showing that "the arbitrator 'understood and correctly stated the law but proceeded to ignore it.'" *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892-93 (2d Cir. 1986) (citations omitted). A similarly deferential standard informs the NLRB's review of arbitration awards for conformity with the policies of the National Labor Relations Act. See, e.g., *Spielberg Mfg. Co.*, 112 N.L.R.B. 1280 (1955).

whether enforcement objectives warrant a lawsuit by the government on behalf of the private parties. Current law provides that employees may not waive and employer cannot require waiver of the right to file charge with the EEO agencies.²⁶ That safeguard should be preserved under any new legal regime because it gives the administrative agency an important window of opportunity to monitor employer practices (including the fairness and integrity of arbitration procedures) and to decide whether to file a lawsuit.

Where the applicable law requires such an administrative filing, the employee-claimant should be free to file a charge with the agency, and any arbitration would be stayed until the agency issues what is called a notice of "right to sue" letter.²⁷ If the agency decides to bring litigation on the claimant's behalf, the existence of an arbitration agreement should not bar the agency suit.

If, however, the employee-claimant decides not to file a charge, the sole avenue for redressing the public-law claim will be the arbitration, subject to limited judicial review for "manifest disregard" of the law or the traditional grounds for vacating awards.

²⁶See *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085 (5th Cir. 1987); Older Worker Benefits Protection Act, Pub. L. No. 101-433, §201, 104 Stat. at 984 (amending 29 U.S.C. §626(f)(4)).

²⁷Such letters are now a prerequisite to any private lawsuit under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990 and the Age Discrimination in Employment Act of 1966.

Conclusion

Private arbitration of public-law claims offers the promise of a quicker, less expensive, less divisive means of resolving employment disputes. Legislation is needed to put private arbitration on a firm legal basis, remove impediments in the union-represented sector, and to provide safeguards to ensure appropriate enforcement of the substantive policies of the public laws. This can occur without converting arbitrations into court actions.