CPR Publishes Employment Arbitration Rules

By Anna M. Hershenberg and Christopher C. Murray

The International Institute for Conflict Prevention and Resolution (CPR) has launched its first set of administered employment arbitration rules. CPR, already well known for its rules governing international, commercial, and construction arbitrations, and model procedures for employment mediation and arbitration, set out nearly two years ago to create a new set of rules especially for CPR administered employment arbitration.

Created through a unique collaboration of counsel from the plaintiff's bar, in-house employment counsel, corporate defense attorneys, and neutrals, the resulting CPR Administered Employment Arbitration Rules (Employment Rules)[1] are designed to meet the unique needs and concerns of employment arbitration. The Employment Rules fill a hole in the market by providing an option for employers looking to choose employment arbitration rules that are user-friendly, efficient and offer a fair and balanced arbitration process for both the employees, who as a practical matter often do not negotiate their terms, and the employers who use them.

What Is CPR?

Headquartered in New York City, CPR is an independent, 501(c)(3) not-for-profit organization formed in 1977, among other things, to identify alternatives to litigation and resolve legal conflicts more effectively and efficiently. CPR promotes dispute prevention and resolution through two arms: The CPR Institute and CPR Dispute Resolution.

The CPR Institute is a think tank whose membership of arbitrators, mediators, companies, law firms, government, and academics convene committees, like the CPR Employment Disputes Committee, to share best practices and develop tools for dispute prevention and resolution. CPR Dispute Resolution provides dispute management services through its global Panel of Distinguished Neutrals and utilizes the resources generated by the CPR Institute.

The Growth of Employment Arbitration

Employment arbitration has become increasingly common due in large part to the U.S. Supreme Court's developing precedent. In 1991, the Court first held that federal employment discrimination claims can be subject to arbitration.[2] Ten years later, the Court confirmed that the Federal Arbitration Act covers employment arbitration agreements and requires courts to enforce them on the same terms as other contracts.[3] In May of 2018, the Court decided *Epic Systems*, holding that employment arbitration agreements may contain class and collective action waivers.[4]

Over this 30-year period, employers' interest in arbitration as an efficient, cost-effective alternative to litigation steadily grew. By early 2018, one study found that 53.9% of non-union private-sector employers were using employment arbitration, and the percentage climbed to 65.1% among companies with 1,000 or more employees.[5] After the Supreme Court issued its highly publicized *Epic Systems* decision in May of 2018, observers expected employers' use of employment arbitration to increase even further.

At the same time employment arbitration has become more prevalent, there has been a growing concern from employees and their advocates, some courts, academic commentators, and legislatures that employment arbitration can be misused by unscrupulous employers to the disadvantage of employees. Courts and commentators have long recognized that employment arbitration differs from commercial arbitration in important ways and presents unique challenges. Perhaps most importantly, employment arbitration agreements and programs are rarely negotiated by the parties. Instead, employers typically adopt arbitration programs as mandatory employment policies, requiring employees to agree to them as a condition of employment. This dynamic creates an opportunity for overreaching employers to impose on employees arbitration procedures that are clearly biased in the employers' favor.[6]

Recognizing the need to protect employees' interests in employment arbitration, state and federal courts review employment arbitration agreements to ensure their provisions are not unconscionable and refuse to enforce arbitration programs that try to take advantage of employees.[7]

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In addition, arbitration administrators like CPR and its peers, the American Arbitration Association and JAMS, apply "due process" standards to the employment arbitration disputes they administer. CPR, like other administrators, will refuse to handle employment arbitrations that fall short of its Due Process Protections.[8]

Despite courts' and arbitration administrators' efforts to police employment arbitration agreements, some commentators still question whether employment arbitration gives employees a fair shake. In the wake of the #MeToo movement, for example, several advocates have expressed concerns that employment arbitration places employees at a disadvantage in pursuing their claims.[9]

Rule 1.4 (Due Process Protections)

Demonstrating the fundamental importance that CPR places on fairness to all parties, including, in particular, employees and individuals who may be subject to mandatory arbitration programs, CPR incorporates its Due Process Protections directly into the Rules at their outset. This provision is intentionally detailed to provide employers with ample guidance on when and how CPR will apply its Due Process Protections.[10]

Rules 3.12 (Joinder) and 3.13 (Consolidation)

CPR has created an innovative procedure that uses a separate administrative arbitrator to address issues of joinder and consolidation when they arise prior to selection of an arbitrator. These Rules identify the factors to be considered for joinder or consolidation, such as the risk of inconsistent or conflicting awards, any significant efficiencies or cost-savings gained or lost by joining or consolidating cases, or the risk of significant prejudice to a party in the absence of, or as a result of, joinder or consolidation. Joinder and consolidation are not permitted if prohibited by the applicable arbitration agreement.

Rules 5 and 6 (Selection of Arbitrator)

CPR's Employment Rules provide for arbitration by a single arbitrator selected by the parties from a list using striking and ranking as the default procedure (like other employment arbitration providers). However, the Rules also offer parties a variety of other options for arbitrator selection should they wish to innovate in this area, including allowing parties to propose arbitrators to be included on the slates for nomination or to use CPR's unique screened selection process for three-arbitrator tribunals. This process provides for CPR to send the parties a slate of arbitrator candidates that includes arbitrators designated by the parties themselves. CPR appoints each party's first choice unless it has sustained a reasoned objection to that designee. The Chair is selected through a strike and rank procedure. The arbitrators are unaware as to whether they were designated or selected by either side. This option can be particularly beneficial to parties who want to ensure that their arbitrator list includes arbitrators

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CPR's Employment Arbitration Rules

In light of the explosive growth of employment arbitration and the need to ensure that such arbitration is fair to all concerned, CPR decided in 2018 to develop a new set of employment rules. CPR created a subcommittee of its Employment Disputes Committee composed of representatives from the in-house community, counsel from both the plaintiff's bar and the defense side, and neutrals and charged it with this task. The make-up of the subcommittee was essential to its purpose: developing approaches to the prevention and resolution of employment disputes that are fair, flexible, and balanced.

After nearly two years of drafting, revising, and much debating, the subcommittee finished its work earlier this year, and CPR's Employment Rules were published in April 2021. The result is a collection of rules created with the overriding goal of ensuring fairness. The Employment Rules also strive to provide clarity and detail to the parties and arbitrators in order to reduce opportunities for confusion and ambiguity.

The Employment Rules have several important provisions and distinguishing characteristics, and also seek to incorporate a number of innovations from CPR's 2019 Administered Rules.

with certain experiences or characteristics (such as those relating to diversity).

Rule 11 (Discovery)

This rule strikes the balance between the need for complete, fair discovery with the goal of being efficient and cost-effective and keeping the case moving forward to reach a reasonably prompt resolution. For example, within 21 calendar days after all pleadings or notice of claims have been received, and without awaiting a discovery request, the parties must provide certain discovery. Likewise, absent an agreement to the contrary or a ruling by the arbitrator, each party is presumed to be entitled to take one deposition.

Rule 12.1 (Early Disposition)

This provision allows the parties and the arbitrator to address the possibility for early identification and narrowing of the issues in the arbitration through the early disposition of claims, counterclaims, defenses, or other legal and factual questions. Rule 12.1 establishes a process for a party to file a preliminary application to the arbitrator seeking permission to file a motion for early disposition. The arbitrator will then review the application for leave to file the motion and consider whether:

> a) the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case; b) success on the motion will increase efficiency in resolving the overall dispute; c) proceeding on the motion will maintain fairness for all parties; and d) proceeding on the motion will not unduly delay a final award.

If the arbitrator grants leave to file the motion, the Rule provides the freedom to submit and resolve the motion "in any manner that the parties agree or the arbitrator orders," with due recognition of the arbitrator's responsibility to provide that "each party has a reasonable and fair opportunity to make its factual and other presentations." This Rule thus presents the opportunity to structure the arbitration to advance efficient resolution of the overall dispute, without causing undue delay.

Rule 12.2 (Hearings)

Given the experiences gained during the COVID-19 pandemic, Rule 12 makes clear that an arbitrator may order remote hearings and provide factors to be considered in making this determination.

Rule 14 (Emergency Measures of Protection)

Clarifying a matter than can be ambiguous, Rule 14 provides that emergency procedures will apply automatically in arbitration unless parties expressly agree that they do not. Notably, the emergency procedures are not exclusive, and parties still have the choice of going to court for emergency relief.[11]

Rules 17 and 18 (Administrative and Arbitrator Fees)

Consistent with most state law and with the Due Process Protections, the Employment Rules provide that employers are generally required to pay the arbitration fees, understanding that the arbitrator has authority under Rule 19, in appropriate cases, to shift fees to the same extent a court would be able to do so. In addition, to address a matter that has become more commonly litigated, the Employment Rules set out detailed guidance to address cases where a party has refused to pay the required fees so as to provide clarity on preserving the rights of the non-defaulting party, for example, by tolling any deadlines if the proceedings are suspended due to non-payment.

Rule 20 (Confidentiality)

Rule 20 provides that CPR and the arbitrator must maintain confidentiality. But, consistent with developing case law, these Rules do not impose confidentiality by rule upon the parties.[12] The arbitrator has the same authority as a court to issue confidentiality orders to protect evidence/discovery.

Comments From the Drafters

The three co-chairs of CPR's Employment Rules subcommittee, employee-side attorney Wayne Outten of Outten & Golden LLP, Christopher C. Murray of management-side labor and employment law firm Ogletree Deakins, Nash, Smoak & Stewart, P.C., and Al Feliu of Feliu Neutral Services, LLC sought to represent the perspectives of employees, employers, and neutrals. They believe the new Employment Rules will meet the needs of these various constituencies.

"Balance and fairness were a guiding principle in the drafting of these Rules—balance of perspective, interests, and points of view," stated Mr. Feliu. "This balance was reflected in the membership of the subcommittee and is evident in the final product."

Mr. Outten added that, "as a lawyer representing employees and their interests, my goal was to assure that these Rules created a level playing field for the resolution of employment disputes, while balancing various perspectives, interests, and points of view. I believe that that goal was achieved, and I am proud of the final product."

Mr. Murray explained that "our ultimate objective was to develop a set of rules that would be acceptable to all stakeholders." He added, "I'm convinced it is in employers' best interest to use rules like CPR's Employment Rules that are fair to everyone. A dispute resolution program is more likely to be efficient and produce finality when all participants feel the process is impartial and

evenhanded. I believe CPR's Employment Rules will accomplish that very well."

CPR hopes its new Employment Rules, with their emphasis on fairness and efficiency, will be a welcomed contribution to the employment arbitration field.

Endnotes

1. The CPR Administered Employment Arbitration Rules can be found at https://www.cpradr.org/resource-center/rules/pdfs/CPR-Administered-Employment-Arbitration-Rules.pdf.
2. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
3. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).
4. *See Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018).
5. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (April 6, 2018).
6. *See, e.g.*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999) (refusing to enforce employment arbitration agreement where the employer's "rules when taken as a whole . . . . [were] so one-sided that their only possible purpose is to undermine the neutrality of the proceeding").
7. *See, e.g., Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 271 (3d Cir. 2004) (finding various terms of arbitration agreement unconscionable and unenforceable).
8. CPR's Due Process Protections include fee-shifting so that the employee would not be required to pay more than they would in filing the case with the relevant court; the arbitrator may award any remedy available to the employee in a court of competent jurisdiction; the employee and employer have the right to nominate candidates for consideration as arbitrator, to an exchange of information process, and to representation by counsel of their choice; the employee has the right to a hearing within 50 miles of the employee's hometown; and the arbitrator must issue a written, reasoned award. The CPR Due Process Protections apply where a dispute relates to a contract between a consumer and a person or organization and where the person or organization presented the arbitration contract that governs the dispute to the consumer on a take-it-or-leave-it basis. The term "consumer" also includes (a) employees, (b) applicants for employment, and (c) individuals who may be called "independent contractors" by the person or organization receiving services from the consumer if the dispute is about or relates to the work (or payment for the work) that the individual performs or would perform or the individual's status as an employee or independent contractor. The Due Process Protections can be accessed at: https://www.cpradr.org/resource-center/rules/pdfs/Due-Process-Protections.pdf.
9. *See, e.g.*, John Eggerton, *Ex-Fox News Anchor Gretchen Carlson Testifies on Forced Arbitration* (Feb. 11, 2021), https://www.nexttv.com/news/fox-news-ex-gretchen-carlson-testifies-on-forced-arbitration.
10. Rule 1.4 reminds the parties that CPR reserves the right not to administer an arbitration if it deems the agreement inconsistent with its Due Process Protections taking into consideration the nature of the agreement and dispute, while also noting that these Protections may not all be applicable to certain types agreements, such as negotiated executive compensation contracts, where parties desire the benefits of arbitration.
11. Rule 4.12 provides that any "request for emergency measures by a party to a court shall not be deemed incompatible with the agreement to arbitrate, including the agreement to this Rule 14, or as a waiver of that agreement."
12. While other institutions' arbitration rules commonly do not impose confidentiality on the parties themselves, CPR's many commercial arbitration rules, including both domestic and international Administered and Non-Administered Arbitration Rules, do provide that "the parties, the arbitrators and CPR shall treat the proceedings . . . as confidential," unless the parties agree otherwise. This is, therefore, an important distinction that was critical in the development of the Employment Rules.

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