HOT Topic
"Future Worker"

STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION

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ABSTRACT:

The American Civil Liberties Union supports the use of alternate dispute resolution in employment if it is voluntary and meets reasonable standards of fairness. Because of the narrowness of legal bases for relief and economic barriers to litigation, many people with legitimate disputes with their employers are unable to obtain relief in the civil courts. ADR holds the promise of increasing the number of people who are able to obtain justice in workplace disputes.

ADR, however, contains the potential for enormous abuse. Absent external constraints, the employer has the ability and the incentive to shape its private justice system in a manner that will allow it to prevail in most cases. Very few individual employees have sufficient bargaining power to resist such abuses. It is imperative that the law prevent employers from requiring a de facto surrender of civil rights as a condition of employment. ADR should be permitted, but only when it is voluntary and contains reasonable due process protections. There are significant problems achieving such a system, especially in providing a truly neutral arbitrator in the absence of a union.

These problems, however, are soluble, and need not destroy the cost effectiveness of ADR. While ADR has much to offer, it does not relieve the government of its obligation to provide a civil justice system which the average person can afford.

Mr. Chairman and Members of the Commission.

The American Civil Liberties Union appreciates the opportunity to present our views to the Commission. The ACLU has a long history of helping shape our country's laws to protect the civil liberties of Americans at work. Our very first case in the United States Supreme Court was *Hague v. C.I.O.*, in which the Court held that peaceful labor picketing was protected by the United States Constitution. We were involved with the creation of the National Labor Relations Act, the Civil Rights Acts of 1964 and 1991, the Polygraph Protection Act, the Americans with Disabilities Act, and the Family and Medical Leave Act. We have also stayed on the cutting edge of litigation, most recently with an amicus brief in the Electromation case. We are also one of the few groups who approaches these issues without an economically affected constituency.

We are very encouraged to see the Commission take up the question of alternate dispute resolution. If the United States is to remain competitive in a global economy, it is imperative that we have an effective system for resolving workplace disputes. It is no accident that the countries which compete most effectively, such as Germany, have such systems. They have recognized that workers with unresolved disputes are not productive.

The sad truth is that the United States does not have a good system for resolving employment disputes. Indeed, it would not be much of an exaggeration to say that we do not have a system at all. Employees in unionized companies generally have a comprehensive collective bargaining agreement backed by a grievance procedure. Only 16% of the workforce, however, have the benefits of this arrangement. A few non-union employers have voluntarily established similar systems. But the reality for the vast majority of American workers is that the only grievances which they have any basis for raising and resolving are those based in federal and state law.

While there are many such laws, their scope is quite narrow. With a few notable exceptions, U.S. labor law consists of protection against discrimination. A private employer is free to do almost anything to her employees as long as she does it to everyone equally. She can require all employees to take intrusive and inaccurate personality tests. She can require all employees to urinate into a bottle in front of witnesses of the opposite sex. She can covertly monitor employees' telephone calls and computers. Employees who have complaints about such practices have nowhere to turn.

Even those employees who have a claim covered by law must face formidable obstacles. The cost of trying an employment case today has been estimated to be $5 to $10 thousand. This represents 6 months take home of pay for the average wage earner. Moreover, most disputes arise when the employee has been terminated. Most people who have lost their jobs struggle just to support themselves and their

dependents. Raising several thousand dollars for an attorney is virtually impossible. While a few people escape this dilemma through contingency fee arrangements, most cases do not have an economic potential large enough to induce an attorney to take this risk. The result is that most people with a legitimate grievance against their employers receive no justice.

The ACLU encounters the inadequacy of our employment justice system on a daily basis. We receive approximately 200,000 complaints a year. Contrary to popular belief, the most common complaint is not the denial of free speech by a government agency, nor is it the denial of due process by the criminal justice system. These problems, as serious and common as they are, are not what most people call us about. Our most common source of complaints, some 50,000 every year, is the American workplace.

Every day, 200 American men and women call us with complaints about their employers. They generally call us because they have nowhere else to go. And the vast majority of the time, we cannot help them either. They get no justice. They don't even get their day in court.

Under these circumstances, the American Civil Liberties Union supports the use of alternative dispute resolution in employment disputes. Done properly, ADR has the potential to provide workplace justice to many who currently go without.

It must be recognized, however, that there is enormous potential for abuse in ADR. This stems from the fact that such private justice systems are designed by one of the parties to the dispute. Employers have a financial incentive to design a system

in which they will generally prevail. While not all employers take advantage of this opportunity, many do. We have seen ADR systems in which the employee is not permitted to be present when the employer presents its case. We have seen systems in which the employee is not permitted access to relevant documents. We have seen systems which do not even use a neutral arbitrator, but instead have one company manager rule on the conduct of another, both knowing that the roles may be reversed tomorrow.

There is little a typical employee can do about such abuses. "Agreeing" to use the employer's ADR system is generally a condition of employment, and the employee has no choice if she want to keep her job.

For ADR to be acceptable, two conditions must be met. First, the employee's decision to use ADR must be voluntary. If the employer and employee truly agree that they would prefer to settle their disputes through ADR, the law should not stand in the way. It would be unconscionable, however, for employers to be allowed to coerce employees into surrendering rights guaranteed by Congress as a condition of employment.

Second, private justice systems must meet minimum standards of fairness. This does not require turning ADR into the sort of complicated, expensive hearings it was designed to replace. Many of the most important aspects of due process cost little or nothing to provide. Notice, access to relevant information, the opportunity to confront ones accusers, and an impartial decision maker can be provided without great cost or delay. Other aspects of due process, such as formal discovery and

judicial review, are more costly. In these areas, close attention must be given to balancing the competing demands of due process and affordability.

This does not mean that creating an acceptable private justice system is easy. There are important and difficult issues which must be resolved. Perhaps the most difficult is the problem of providing a truly neutral decision maker. This has not been an issue in traditional labor arbitration. Management and the union must agree upon the choice of an arbitrator. The arbitrator's interest in repeat business requires her to be fair to both sides. In non-union ADR, the union and its institutional memory are lost. The arbitrator now faces a conflict of interest in which her own economic interests will be advanced if she rules for the employer. Even if the employee must agree to the choice of arbitrator, a lone employee will seldom have the resources or the expertise to collect and analyze a proposed arbitrator's decisional history.

There is also the related problem of the composition of the pool from which prospective arbitrators are drawn. Each of us has perspectives and general beliefs that could affect the way we view a particular dispute. If all the arbitrators in a pool share a background and general beliefs that make them more sympathetic to one class of litigants, the system is unfair, even in the absence of a conflict of interest. For example, a pool of arbitrators composed entirely of corporate executives would undoubtedly rule for employers more often than one composed entirely of union officials. If employers are given carte blanche to select arbitrator pools, this danger is very real.

Another major issue is how to make the employee's decision to use ADR truly voluntary. The fundamental law of the American workplace is employment at will, under which an employee can be fired for any reason, no matter how arbitrary or unfair. While there has been much discussion of judicially developed exceptions to employment at will, they are extremely narrow. A recent study published in the Labor Law Journal found that even in California, probably the most favorable jurisdiction for employees, 96% of all those wrongfully fired obtained no judicial relief.[1]

In a world where an employee can be fired without cause, free choice becomes almost an oxymoron. An employee who does not "choose" to do what the employer "suggests" can simply be fired. It is thus very difficult to construct a system in which employees would truly have the ability to accept or reject an ADR system offered by their employers.

These problems are not insoluble. One way to insure the impartiality of arbitrators is to allow a third party to select arbitrators. A neutral body, perhaps a government agency, could create the pool of arbitrators and assign individual arbitrators to disputes. The problem of coercion might be solved by allowing the employee to communicate their choice of dispute resolution system to an independent party, rather than to the employer, much like a secret ballot.

It is not imperative that these particular solutions be chosen. The ADR field is still being explored, and other, perhaps better, solutions may be found. Professor Weiler, for example, has suggested that selecting the arbitrator could be left in the

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[1]L. Maltby, "The Decline of Employment at Will -- A Quantitative Analysis," *Labor Law Review*, January 1990, at 52.

parties' hands if the company's employees had an independent organization that could duplicate the function performed by the union in traditional arbitration. It is imperative, however, that genuine solutions to these problems be implemented.

It must also be said that the creation of ADR systems does not relieve the government of it obligation to create a court system which the average person can afford to use. Many workplace disputes involve important political and civil rights. The government has an acknowledged obligation to protect all citizens from discrimination based on race, gender, and other impermissible criteria. Federal and state governments have acted on that responsibility by enacting civil rights laws. But rights without remedies are meaningless. Government has an obligation to provide a viable method for citizens to obtain redress when their civil rights are violated. While private dispute resolution systems, properly designed, have much to offer, they do not relieve the government of its obligation to provide an effective civil justice system.

The American Civil Liberties Union supports the creation of fair and voluntary alternative dispute resolution systems for the workplace. We look forward to working with the Commission and other interested parties on the challenge of determining how to create such systems.