Chapter IV

Employment Regulation, Litigation and Dispute Resolution

1. Introduction

The National Labor Relations Act (and the earlier Railway Labor Act) were the pioneering forms of federal legal regulation of labor management relations at the workplace. By the 1990s, though, a very different model of legal intervention, employment law, has come to play a much more prominent role both on the job and in the courts.

American employees have now been promised a wide variety of legal rights and protections by both federal and state lawmakers. These include minimum wages and maximum hours, a safe and healthy workplace, secure and accessible pension and health benefits once provided, adequate notice of plant closings and mass layoffs, unpaid family and medical leave, and bans on wrongful dismissal: these and all other employment terms and opportunities are to be enjoyed without discrimination on account of race, gender, religion, age, or disability. 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 support of a union or other advocacy group in pursuing their legal rights.

Concern over these issues gives rise to the third charge to the Commission:

"What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves rather than through recourse to state and federal courts and government regulatory bodies?"

Crucial to any such policy judgments are appraisals of both whether workplace litigation imposes unnecessary costs on employers, the immediate target of employment regulation, and whether the current procedures meet the needs of ordinary workers who are the intended beneficiaries of such public programs.

2. Evolution and Present State of Employment Regulation

The present body of federal and state employment law -- statutory, administrative, and judicial -- fills many volumes. Employment laws and regulations have expanded at an especially rapid rate since 1960. One study found that from 1960 to 1974 the number of regulatory programs administered by the Department of Labor tripled, growing from 43 to 134.[1] A current count would place this number much higher.[2] Some highlights are noted here.

A. Fair Labor Standards in the 1930s

An important legacy of the New Deal, the Fair Labor Standards Act of 1938 (FLSA), established a minimum hourly wage and required time and one-half pay for overtime hours worked by nonexempt employees. Administration of the FLSA, which covers both private and public employers, is the responsibility of the Wage and Hour Division of the Department of Labor.

B. Birth of Antidiscrimination in the Mid-1960's

The modern birth of federal employment law was inspired by the civil rights movement of the 1960s, which produced three major statutory regimes.

- The Equal Pay Act of 1963 (formally an amendment to the FLSA) prohibited gender-based differences in wages and benefits, unless the differential could be justified by factors not based on sex (such as seniority).

- The Civil Rights Act of 1964, in particular, its Title VII, prohibited discrimination by private firms (with at least 25 employees), not just in pay but also in hiring, firing, and other employment decisions, on grounds of race, sex, religion, and national origin.

- The Age Discrimination in Employment Act of 1967 (ADEA) extended the antidiscrimination principle to age-based decisions affecting employees over 40 years old working for firms of 20 employees or more.

The ADEA and Title VII are administered by the Equal Employment Opportunity Commission (EEOC), now located in the Department of Justice; however, legally

1 "The Limits of Legal Compulsion," U.S. Department of Labor Release, November 12, 1975, Labor Law Review, Vol. 27 February 1976, p. 67.

2 See Outline of Statutes and Regulations Affecting the Workplace, prepared by the Office of the Assistant Secretary of Policy, U.S. Department of Labor, June 21, 1993.

binding verdicts under these statutes must be rendered through lawsuits filed in court.

C. Expansion of Antidiscrimination Laws in the Early 1970s

A number of important expansions in the breadth and depth of federal antidiscrimination law took place in the early and mid-1970s.

- In two major rulings, the U.S. Supreme Court found that employer use of apparently neutral factors (such as high school diplomas or test scores) could be a violation of Title VII if this practice had a disparate statistical impact on members of a particular group and the employer could not justify its practice as a "business necessity" (Griggs v. Duke Power (1971)); and that the civil rights legislation of the post-Civil War era allowed minorities to sue for general and punitive damages suffered because of intentional employer discrimination in an employment contract (Johnson v. Railway Express Association).

- Executive Order 11246, first promulgated by President Johnson in 1965, amended by Executive Order 11375 in 1967, to ensure equal employment opportunities with firms that had contracts with the federal government, was intensified by President Nixon so as to direct all such contractors to develop and file affirmative action plans that set numerical goals and timetables for elimination of underutilization of women and minorities in their labor forces.

- The Equal Employment Opportunity Amendment Act of 1972 extended Title VII's coverage to state and local governments and to private firms with at least 25 employees, and allowed the EEOC, as well as the affected employee, to sue employers for violations.

- The Rehabilitation Act of 1973 prohibited employers with federal contracts from discriminating against employees with handicaps.

D. New Regulatory Targets in the 1970s

In the early 1970s the federal government enacted several statutory programs directed at serious workplace problems that potentially affect all classes of employees.

- The Occupational Safety and Health Act of 1970 (OSHA) imposed on employers the general duty to furnish their employees "a place of employment...free from recognizable hazards that are causing or are likely to cause death or serious physical harm," as well as to comply with a growing array of specific safety and health standards developed by OSHA in the Department of Labor.

- The Federal Mine Safety and Health Act of 1977 (MSHA) established analogous statutory and administrative obligations to protect the safety and health of the nation's mine workers.

- The Employee Retirement Income Security Act of 1974 (ERISA) enacted a program for regulating access, vesting, security, and fiduciary responsibilities in pensions and health and welfare benefits provided by employers to their employees.

E. Judicial Protection Against Wrongful Dismissal

From the mid-1970s through the mid-1980s, there were no major legislativeinnovations in employment regulation. During that period, though, the state courts across the country were transforming their traditional hands-off posture towards employ-

ment at will into a measure of legal protection against wrongful dismissals.

- One such source of protection is a tort action for discharges in violation of public policies, such as retaliation for an employee refusing to violate the law (e.g., commit perjury) on behalf of the employer, or for asserting their own legal rights (e.g., claiming workers' compensation benefits).

- A second source of protection is contractual, based on violation by employers of express or implied representations of job security (e.g., through personnel handbooks).

- A third source of protection is the general doctrine of "good faith and fair dealing," treated by some state courts as contractual and by others as tort-based (with the label used by judges making a real difference in potential damages).

By the early 1990s, 45 states had adopted one, two or all three of these legal doctrines, each of which is enforceable by individual suits filed in state or federal courts. Then,

- In 1987, the state of Montana enacted a broader Wrongful Discharge From Employment Act (WDFEA) which gave all nonunion employees broad legal protection against any form of "wrongful" dismissal, though with more limited damages in most cases.

- In 1991, the National Conference of Commissioners on Uniform State Laws agreed upon a Model Employment Termination Act (META) with important similarities and differences from the Montana example. META has not yet been adopted by any state.

F. Resurgence of Statutory Regulation Since the Late 1980*s*

Beginning in the later years of President Reagan's Administration, and continuing to the present time, there has been a revival of Congressional enactments targeted at workplace problems.

- The Immigration Reform and Control Act of 1986 (IRCA) made it illegal for employers to hire illegal aliens and for employers to discriminate against legal aliens.

- The Employee Polygraph Protection Act of 1988 (EPPA) made it generally illegal for employers to force their employees to submit to lie detector tests.

- The Worker Adjustment and Retraining Notification Act of 1988 (WARN) required 60 days notice by covered employers (those with 100 employees or more) of pending plant closings and mass layoffs (generally those layoffs affecting 50 or more workers).

- The Americans With Disabilities Act of 1990 (ADA) prohibited discrimination by employers (as of July 1994, those with at least 15 employees) against disabled workers, and required reasonable accommodation of the workplace to the employee's disabling condition.

- The Civil Rights Act of 1991 revised several important Supreme Court rulings of the late 1980s (most prominently, Wards Cove Packing v. Antonio (1989), which had relaxed the Court's earlier "disparate impact" standard of discrimination in Griggs v. Duke Power (1971)), and significantly increased potential damages for intentional violations.

Most recently, the Family and Medical Leave Act of 1993 (FMLA) required public and private employers (with more than 50 employees) to grant up to 12 weeks of leave from the job (without pay but with continued health benefits) to employees who had given birth to or adopted a child, or who themselves, their spouse, or their children had developed a medical condition needing care.

In its forthcoming study,[3] the GAO identified a general framework of 26 key statutes and one executive order whose thousands of implementing rules constitute an intricate web of workplace regulation. A description of this major framework of federal workplace regulation is summarized in Exhibit IV-1. (See page 129.)

The number of laws and regulations governing the workplace have increased substantially since the 1960s creating a complex and expensive set of requirements for employers to administer and for employees in pursuit of their legal rights.

3. Nature of Employment Regulation

The body of employment law just recounted constitutes a very different model of government intervention in the workplace than does the national labor relations law depicted in Chapter III. The NLRA provides a variety of protections and procedures for employees choosing whether or not to pool their collective resources to try to negotiate better compensation and conditions of employment. The law, however, basically takes a hands-off attitude to the process and results of free collective bargaining between private employers and unions.

Employment law, by contrast, focuses on issues that are felt to be sufficiently vital to the body politic not to leave to private negotiations -- whether individual or collective. Some such concerns are directly financial: (e.g., what are the minimum wages that should be paid to people at work (under FLSA), and what must be done to insure the value and security of retirement income promised for the future (under ERISA)). But as described above, many employment laws tend to focus on value-laden issues like racial and gender discrimination, occupational hazards, privacy invasions, and the like. Public policy holds that all employees have equal protection against denial of their rights in these areas, whatever their (or their employer's) market power.

The reason these social standards are announced in mandatory legal form is recognition that some employers (perhaps also employees and their unions) are tempted by the financial and non-financial gains from non-compliance with these public standards. Equally important, law-abiding employers need protection against the unfair competition from non-complying employers' lower labor costs. Enforcement of employment law is pursued either through specialized administrative agencies (such as OSHA), or regular courts and juries (as under state wrongful dismissal law), or a combination of the two (the variety of antidiscrimination laws).

Handling and resolving disputes under such law enforcement vehicles requires considerable financial expenditures from employers, employees, and the public. A conservative estimate is that for every dollar transferred in litigation to a deserving

3 United States General Accounting Office, Report to Congressional Requestors, Workplace Regulation, Agencies Need to Become Service-Oriented, Say Employers and Unions, 1994.

claimant, another dollar must be expended on attorney fees and other costs of handling both meritorious and non-meritorious claims under the legal program.[4] 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 the regulations.

The difficulties encountered in fitting regulations to the diverse and changing employment relationships found in the modern economy and the many trade-offs among different policy objectives give rise to a continuous stream of questions and debates over the merits of specific employment regulations. Consider just a few of the current controversies brought to the Commission's attention.

- Should the fact that salaried employees are given unpaid time off work for personal reasons mean that they (and their colleagues in the same positions) are entitled under FLSA to be paid the overtime premium for extra hours that the employer requires them to work?

- Is obesity a disabling condition that should trigger protection of the antidiscrimination and reasonable accommodation requirements of the ADA?

- Does the transformation in technology and family life require different legal treatment of unconventional work schedules, and indeed of work performed entirely at home?

- Has the host of federal regulations and record-keeping promulgated since ERISA, intended to enhance the financial viability and accessibility of pensions and other benefits, in fact served more to reduce the willingness of employers to offer these benefits to their workforce?

- How, if at all, can one address under OSHA the serious hazards posed by guns and cigarettes to people working at their jobs?

- Is a mandate that employers pay for (the bulk of) their employees' health insurance the ideal vehicle for securing comprehensive and affordable health care coverage for American workers and their families?

- Which employer(s) are or should be held responsible for enforcing labor standards (e.g., safety and health) for temporary or contract workers?

Although concerns such as these are often raised about specific rules, the forthcoming GAO study referred to earlier found that most employers and union leaders accept the need for workplace regulations and support the broad social goals embodied in the laws governing the workplace. But these respondents were critical of the complexity and the "command and control" orientation of the agencies that administer and enforce these laws. What they desire is a more service-oriented approach to the administration of workplace laws.

It is not the Commission's task to judge the substantive merits of any of these laws or regulations. Instead, the question before the Commission is whether more efficient and equitable ways can be developed to administer, enforce, and resolve disputes involving the law of the workplace. Specifi-

4 James N. Dertouzos, Elaine Holland, and Patricia Ebenere, The Legal and Economic Consequences of Wrongful Termination (Rand Institute for Civil Justice: 1988), finds the compensation-legal costs ratio to be significantly worse than fifty-fifty.

cally, are there alternative methods for prescribing regulations, administering complaints and resolving disputes that arise under the variety of legal regimes -- federal and state, legislative and judicial -- summarized above?[5] A further question is whether alternative dispute resolution (ADR) mechanisms can render the positive benefits promised by regulation more accessible to and effective for ordinary workers.

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.

It is increasingly difficult to write and enforce standard regulations that fit well with the diverse employment settings and workforce and the changing workplace practices found in the contemporary economy. This is particularly true for the growing number of temporary or contract workers and the firms that employ them or utilize their services.

4. Trends in Employment Litigation

Exhibit IV-2 offers a glimpse of the array of forums, procedures, and remedies available under this country's law of the workplace. (See page 132.)[6] Some cases the individual employee alone can bring (e.g., wrongful dismissal suits); others only the administrative agency can file (e.g., FLSA). Some cases go directly to court (wrongful dismissal); some remain within the agency (OSHA); some go to the agency for investigation and then to the courts for adjudication (ADA), while some conduct adjudication within the agency but leave enforcement (and review) up to the courts (NLRA). Some legal rights carry open-ended compensatory and punitive damages (wrongful dismissal); some provide for general damages under a ceiling, but attorney fees are also assessed against losing employers (Title VII; ADA); while (as set forth in Chapter III) the NLRA is unique in restricting the damages assessed against guilty employers to the net back pay lost by the employee -- along with the prospect of reinstating the employee if the latter is willing to return to the position from which he or she was fired.

Table IV-3 (see page 134), based on suits in federal court, provides as good a statistical index as is available of how fast and how far employment litigation has been rising.[7]

5 As put by the Republican Statement of members of the House Committee on Education and Labor to the Commission (at page 15, referring specifically to the variety of EEO laws): "...it is important to note that the Commission should not attempt to change or alter the basic thrust of each law; rather, the Commission should seek to untangle the legal web of regulation that has spawned a cottage-industry for lawyers, consultants, and employment policy specialists."

6 For detailed analysis, see Clyde Summers, "Effective Remedies for Employment Rights," 141 University of Pennsylvania Law Review 457, 1992.

7 Exhibit IV-3 was based on data supplied to the Commission by the Business Disputing Group Project of Professor Joel Rogers of the University of Wisconsin and Terence Dunworth at the RAND Corporation. The data were generated by their assistant, Matt Zeidenberg, from figures supplied to the Project by the

(There are no systematic records of the rate of state court filings, whether the trends over time or the breakdown by type of suit). By the early 1970's, many of the key features of federal statutory protection were in place. During the two decades from 1971 to 1991, total civil suits filed in federal court were up 110 percent. Interestingly, (non-asbestos) personal injury suits, the usual targets of litigation critics, were up only 17 percent, not appreciably different from population growth. While suits under labor laws had actually dropped slightly, business-related suits by Fortune 1,000 firms had more than doubled. However, the annual rate of employee suits against employers was five times the number of twenty years earlier--and this was before the Americans With Disabilities Act of 1990, the Civil Rights Act of 1991, and the Family and Medical Leave Act of 1993 had come into effect.

In fact, the true leap in employment litigation was even higher than that visible in federal court figures. Though the precise numbers and trends are not available, it is clear that wrongful dismissal cases comprise a major share of employment suits filed in state courts. In 1971, there were only a handful of such discharge suits, because the doctrinal underpinnings for such claims had not yet been fashioned by state supreme courts. By the early 1990s, the best estimate we have is that employees are now filing 10,000 or so wrongful dismissal suits annually, with a total of 25,000 such cases now pending (the bulk in state courts).[8] Adding these state court numbers to the federal court figures in Exhibit IV-4 (See page 135) makes the aggregate rise in employment litigation even steeper.

Lawsuits filed in court are only the tip of the legal iceberg. In contrast to judicially-developed wrongful dismissal law, legislative programs give primary (under Title VII) or exclusive (under OSHA) jurisdiction to a specialized administrative agency. Exhibit IV-2 shows that in 1993, the EEOC received nearly 90,000 employee claims of discrimination by employers, up from 56,000 in 1981 (and up tenfold from 1966). The number of such administrative proceedings is roughly ten times the number of antidiscrimination suits eventually filed in court (only a handful of which are filed by the agency instead of the employee). In 1993, the Wage and Hour Division of the Department of Labor was receiving 46,000 employee complaints under the FLSA and initiating more than 2300 suits, while OSHA was receiving over 10,000 complaints and conducting nearly 60,000 inspections, leading to 9,000 cases. While a considerable portion of such government action potentially affords legal relief to employees with meritorious claims, every such action imposes legal costs on the targeted employers, many of whom turn out to be fully in compliance with the law.

Access to legal relief is not uniformly distributed across the labor force, especially under those laws that require the individual employee to initiate a lawsuit to secure a binding ruling. For example, only about one in ten suits under civil rights legislation is filed by an employee still on the job.[9] By contrast with the early life of Title VII, the vast majority of such suits currently com-

---

Administrative Office of the U.S. Courts.

8 Those rough estimates are developed in a paper by Lewis Maltby, Director of the American Civil Liberties Union's National Task Force on Civil Liberties in the Workplace, to be published in the November 1994 issue of Annals of the American Academy of Political and Social Science.

9 John J. Donohue and Peter Siegelman, "The Changing Nature of Employment Discrimination Litigation, 43 Stanford Law Review 983, 1991.

plain of discriminatory firings, rather than about a refusal to hire in the first place. Such ex-employee plaintiffs are disproportionately drawn from the ranks of executives and professionals. These are the people whose lost earnings and personal characteristics make them the best bets for plaintiff lawyers to make the substantial investment needed to challenge in court an employer with its (usually) much greater resources.

Verdicts in employment litigation regularly reach six and even seven figures. The prospect of such awards does serve as a deterrent to improper management decisions (though sometimes a source of unduly defensive personnel practices). The overall pattern of jury awards does, however, display a rather lottery-like response to the harms inflicted on individual employees.

The administrative procedures and remedies used to enforce workplace laws vary widely, involve multiple agencies from different departments of the federal government, and are administered on a stand-alone basis with little or no regard for overlap or conflicting requirements.

The number of employment suits in federal courts increased by 430 percent between 1971 and 1991. Another 10,000 cases charging unlawful discharge are filed annually in state courts.

The EEOC handles approximately 90,000 complaints per year, compared to 56,000 in 1980.

Access to 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 requirements of private lawyers.

5. Private Dispute Resolution Alternatives

Two broad approaches have been suggested for reforming the current mechanism for implementing employment law: private alternatives for dispute resolution (ADR), and more coordinated administrative regulation, perhaps capped by a single labor and employment court with jurisdiction over the broad array of legal rules described earlier. The private alternatives are discussed in this section and the administrative and judicial options are taken up in the next section.

The option that attracted the most attention and debate before the Commission was private resolution of public law disputes in the employment relationship. This approach is commonly labeled alternative dispute resolution (ADR). ADR can take on a variety of forms including informal problem solving processes, peer review panels, ombudsman systems, grievance procedures, mini-trial, mediation, and arbitration.

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 problem-solving of issues or conflicts that do arise, and includes formal appeal and dispute resolution procedures.[10] In turn, for these internal procedures to be used to full advantage, they need to have the necessary due process features. Moreover, neutrals who resolve claims within these systems need to have sufficient substantive expertise to warrant deference to

10 Douglas S. McDowell, Alternative Dispute Resolution Techniques: Options and Guidelines to Meet Your Company's Needs, Washington, D.C.: The Employment Policy Foundation, 1993.

their decisions by the public agencies and courts responsible for the laws involved. Finally, most experts in dispute resolution stress the importance of involving the parties covered by the system in its design and oversight.[11]

A. Mediation

Under "mediation" the parties try to settle their dispute voluntarily, but with the assistance of a third party who serves as a channel of communication and advice about mutually acceptable resolution of the issues. Ultimately, though, each side retains the prerogative to reject a proposed settlement and proceed to litigation. Under "arbitration," by contrast, the parties agree that their legal dispute will be authoritatively resolved by a private person whom they have jointly selected, rather than pursued to the courts for a jury trial. A third option, fact-finding with or without recommendation or non-binding arbitration, is a blend of the two: the parties submit their cases to a third party who gives them a written decision, but a decision that each has the option of rejecting and going off to court (subject perhaps, to certain sanctions if their case does not fare so well in court).

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.[12]

One difficulty with mandating mediation -- whether by legal directive or at the option of either side -- is that if this process does not succeed in resolving the dispute, additional time and money will have to be expended by the parties who still must go to court to get a binding decision. There is good reason to believe that mediation would be a valuable tool for resolving certain disputes: it benefits not just the immediate parties, but also the agency burdened with a large and fast-growing caseload, and thence other parties who are at the back of the agency's long line. To be cost-effective, mediation of legal disputes should occur at a key point in the litigation process. The parties should be far enough along that they have discovered what they need to know to make an intelligent judgment about how to resolve the matter voluntarily. They should not have gone so far, though, that almost all of the pre-trial costs have been incurred and the parties are either committed to going to trial or are ready to settle themselves, without outside intervention.

Since the most propitious time can vary considerably from case to case, another possible option is for the agency to assemble a group of seasoned outsiders who can offer those parties who want it some expert and reliable advice about where they could reasonably compromise from their original positions. If settlement negotiations still fail, the parties could be assured that what the mediator has learned from them would not figure in the agency's decision about whether to file charges or a law suit.

---

11 See, for example, William L. Ury, Jeanne M. Brett, and Stephen B. Goldberg, Getting Disputes Resolved, San Francisco: Jossey Bass, 1988, p. 65.

12 Report to the Secretary of Labor on the Philadelphia ADR Pilot Project (October 1992), and Marilynn L. Schyyler, A Cost Analysis of the Department of Labor's Philadelphia ADR Pilot Project, August 1993.

B. Arbitration

Arbitration, by contrast, produces a final and binding adjudication of the employment dispute. If the dispute poses complicated questions of fact or law, the arbitration proceeding will require a hearing at which both sides are represented by legal counsel or other experienced advocate. By comparison with litigation in court, arbitration can secure considerable savings in both the time and money that must be expended for such authoritative legal resolution.[13] Arbitration entails much less paperwork, preliminary depositions and motions, and post-hearing briefs and appeals than does the winding path to and from the courthouse. Equally important, the arbitration hearing is scheduled at a time convenient for the parties and the person they have picked to decide their case, rather than placed at the end of a long line of cases filling the dockets of the court or agency responsible. 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.

1. Grievance Arbitration in Union Settings

While arbitration has had a long history in commercial contract disputes, its appearance in the workplace in substantial volume post-dates the National Labor Relations Act of 1935. In almost every industry, unions and employers have negotiated into their collective agreements a system of grievance arbitration to resolve disputes about how their contract provisions should be interpreted and applied. (This labor-management innovation took place in a legal and industrial relations environment in which the likely alternative to arbitration was a strike or lockout, not a lawsuit.)

Grievance arbitration developed under collective bargaining meets many of the requirements of effective dispute resolution system design. It is a voluntary system adopted through negotiation to fit the particular circumstances of the different employment settings and therefore builds participation of the parties into its design, administration, evaluation, and modification. It rests on a foundation of day-to-day interaction among workers, union stewards, and first line supervisors where the vast majority of problems are resolved informally without ever entering the formal procedure. It allows for the parties to reach settlements at multiple steps in the process up to and sometimes during the arbitration hearings. Arbitrators, chosen by the parties for their specialized knowledge and expertise in labor relations, are limited to interpreting the parties' rights under the contract and therefore cannot expand or reduce the substantive rights of either party.

By 1960, the system of grievance arbitration was so widespread in collective bargaining and had achieved such a high degree of confidence that the Supreme Court, in three casesthat became known as the "Steelworkers' Trilogy," gave strong judicial endorsement to the labor arbitrator's jurisdiction and final say about a labor contract. The effect of these three decisions was that the court would defer to arbitrators' awards on nearly all substantive questions and only review arbitration decisions for procedural or due process irregularities.

13 For illustrations of arbitration of legal disputes outside the employment field, see U.S. General Accounting Office, Securities Arbitration: How Investors Fare, 1992, and U.S. General Accounting Office, Medical Malpractice: Few Claims Resolved Through Michigan's Voluntary Arbitration Program, 1990.

Grievance arbitration has proven to be a flexible instrument that has, from time to time over its long history, been combined with other dispute resolution techniques to enhance its effectiveness and lower its costs. For example, labor and management have sometimes used mediation of grievances to increase the number of cases resolved prior to arbitration. Between 1980 and 1992, the Mediation Research and Education Project at Northwestern University Law School, a non-profit organization that conducts grievance mediation, reports that of the 2,220 cases it handled, 82.6 percent were resolved through mediation. The average cost for the mediator in 1990 to 1992 was $393 per case, compared to an average arbitrator's fee during this time of approximately $1,800.[14]

2. Grievance Arbitration in Nonunion Settings

Some nonunion firms have also adopted forms of grievance arbitration. A recent study[15] found that 45 percent of large nonunion firms had some form of employee grievance procedure, versus 98 percent in all unionized firms. In the nonunion setting, senior management usually made the final judgment about whether to uphold or reverse the personnel decision being challenged by an employee (whereas in unionized firms, final authority is lodged in a neutral arbitrator selected by both sides). The study also found that nonunion employees faced significant risks in their future prospects with the firm if they took issue with their supervisor's action through such a review process.

Shortly after the Steelworker Trilogy rulings came the surge in employment legislation and regulation. Unlike the collective agreement, these laws created public rights that could not be waived or altered by private agreement, and they entrusted interpretation and enforcement of the law's terms to a body selected by and accountable to the broader community, not the parties to an immediate dispute. Thus, in the early 1970s, the Supreme Court ruled (in Alexander v. Gardner-Denver (1974)) that a unionized employee with a racial discrimination claim was not bound by nor required to have the claim disposed of by the arbitrator under the labor agreement; the employee was free, instead, to pursue the case in federal court. That refusal to defer to the collectively bargained system was applied by the Court to other civil rights laws (Section 1983 in McDonald v. City of West Branch, 1984) and to employment legislation generally (to the FLSA in Barrentine v. Arkansas-Best Freight System (1981)). Since the substantive rights established by public statutes could not be waived or altered by private agreement, the Court was concerned about entrusting administration of legal claims of individual employees to a grievance procedure negotiated by employers and by unions and to private arbitrators whose jurisdiction and experience was primarily based on the interpretation of labor agreements.

3. Arbitration Under Individual Employment Agreements

By the early 1990s, sentiment had begun to change about the virtues of the ADR alternative to litigation. Thus, in the 1991

14 Data provided to the Commission by Professor Stephen B. Goldberg, the Mediation Research and Education Project, Northwestern University Law School, 1994. The arbitrator's fee is based on Federal Mediation and Conciliation Service data. See Stephen B. Goldberg and Jeanne M. Brett, "Grievance Mediation and other Alternatives to Arbitration," Workplace Topics, Vol. 2, July 1992, pp. 102-12.

15 David Lewin, "Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes," 66 Chicago-Kent Law Review 828, 1990.

Civil Rights Reform Act, the Congress stated:

> "Where appropriate and to the extent authorized by the law, the use of alternative dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, mini-trials, and arbitration, is encouraged to resolve disputes arising under the Acts and provisions of Federal Law amended by this law."

That same year, the Supreme Court was confronted (in Gilmer v. Interstate/Johnson Lane Corp. (1991)) with the question whether to require arbitration of a nonunion employee's claim of age discrimination in violation of the ADEA. The Court majority decided to enforce the employee's agreement to arbitrate even such public law disputes, distinguishing Gardner-Denver and other precedents from the union context on the basis that nonunion workers had sole control over their claims and the arbitrator was empowered to address the non-contractual issues.

There is disagreement about the legal scope as well as the policy merits of the Gilmer ruling.[16] What is still up in the air post-Gilmer, is whether the Supreme Court will treat Congress' decision in 1925 to exclude from the FAA all contracts of employees then engaged in interstate commerce as excluding the contracts of all employees who are now potentially subject to Congressional regulation under the present reading of the constitutional commerce clause. Whatever the Court's eventual verdict, a sound judgment about whether it is worthwhile public policy in the 1990s to facilitate arbitration of employment rights cases should not turn on what Congress intended in the 1920s to be an endorsement of arbitration of commercial contract disputes.

The pros and cons of this form of ADR for statutory claims of employees are hotly contested at present.[17] Proponents of arbitration believe that this procedure actually strengthens enforceability of the

16 What was distinctive about the case was that the employee worked for a financial services firm and the arbitration clause was contained in his registration agreement with the New York Stock Exchange (NYSE) as a securities representative. Arguably, then, the case did not involve an employment contract. The significance of that fact is that the legal premise for the Supreme Court's ruling was the 1925 Federal Arbitration Act which specifically excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In the 1920s, the judicial interpretation of the Constitution basically limited Congress' jurisdiction under the commerce clause to businesses (and employees) engaged in transportation of goods and services. Now interstate commerce under the Constitution has been read to encompass just about any firm engaged in production and distribution of goods and services.

17 Besides Professors Clyde Summers, Theodore St. Antoine, and Katherine Stone who testified on this topic, there is a published debate by two other legal scholars who testified before the Commission on other issues: Samuel Estreicher, "Arbitration of Employment Disputes Without Unions," 66 Chicago-Kent Law Review 753 (1990), and Matthew W. Finkin, "Commentary," Id. 799. The limited evidence we have is that arbitrators tend to uphold claims more often than they reject them (see, for example, U.S. General Accounting Office, Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes (March, 1994), and, at least in the medical malpractice context, to favor the plaintiff's case considerably more often than do juries: see Thomas B. Metzloff, "Alternative Dispute Resolution Strategies in Medical Malpractice," 9 Alaska Law Review 429, 1992.

substantive rights guaranteed by the law, by expanding access for those people whose cases would otherwise not be heard (particularly lower-paid workers with less obvious, but still meritorious, legal claims).

Some experts have expressed misgivings about the type of arbitration system endorsed in the Gilmer case as a model for resolving employment disputes involving public law. Few are concerned about an agreement to use arbitration arrived at by both parties after a dispute has arisen. In this setting the plaintiff (usually a former employee) is advised by a lawyer, and can freely decide that private arbitration is truly preferable to pursuing this particular case in court. The reason arbitration is rarely agreed to at this stage is that the employer and the employee each prefer to take quite different kinds of cases to court.[18] By contrast, the type of pre-dispute arbitration arrangement seen in Gilmer is devised by employers or their associations and presented to newly-hired employees on a "take it or leave it" basis. While the labor market does permit some negotiation and variation in salaries and benefits, it is hardly likely to let employees insist on litigating, rather than arbitrating, future legal disputes with their prospective employers.

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 of a claim.

A crucial fact, of course, is that it is the employer that unilaterally develops the arbitration procedures that (nonunion) employees are contractually bound to use. That means that important quality standards should be met by such a private procedure before it may be enforced against a plaintiff with a public law claim. As the Supreme Court acknowledged in Gilmer, if Congress or the courts have decided that it is in the public interest to guarantee employees certain fundamental rights, this policy judgement must not be evaded or diluted through private procedures that cannot fairly and effectively address employee claims that their rights have been violated.

Employer representatives who addressed the Commission on this topic accepted this fundamental principle.[19] The difficult practical issue concerns the key safeguards that must be built in to any employment ADR model. Some of the questions regarding these safeguards are listed below.

Bilateral Arbitration

Should the employer also have to commit itself to arbitration of all employment disputes it might have with (former) employees covered by this procedure (e.g.,

18 That is why under Montana's wrongful dismissal statute, even though there are substantial financial incentives to the two sides to agree to arbitration, the vast majority of such cases still go to court: see Leonard Bierman, Karen Vinton, and Stuart A. Youngblood, "Montana's Wrongful discharge from Employment Act: The Views of the Montana Bar," 54 Montana Law Review 367, 1993.

19 The views of one such witness are elaborated in a recent book, Douglas S. McDowell, Alternative Dispute Resolution Techniques: Options and Guidelines to Meet Your Company's Needs (Employment Policy Foundation: 1993). The written submission by another witness, Charles Bakaly, was essentially to the same effect.

claims of violation of trade secret or non-compete covenants)?

Selection of Arbitrator

Should a neutral arbitrator for each case have to be agreed-to by the individual employee with the claim, or should the employer be entitled to name a roster of arbitrators (or even a permanent umpire) for all claims by its entire workforce? Should some kind of certification of arbitrators handling public law disputes be required from either arbitration associations or the agency responsible for enforcing the legislation in question (e.g., the EEOC for anti-discrimination claims)?

Arbitration Costs

Should the fees and expenses of the arbitrator be borne entirely by the employer, or be divided equally between the two sides, or divided between the parties but with a cap on the employees' share? Should the employer (and possibly the employee) be required to pay the entire cost of arbitration if the other party wins the case?

Arbitration Procedure

Should each side have a right to discovery of relevant documents and to deposition of representatives of the other side, and if so, with any limits to use of such pre-hearing procedures? Should the arbitrator have the authority to issue subpoenas to secure the presence of reluctant witnesses?

Arbitration Decision

Should the arbitrator have the same broad remedial authority as would be available to a court or to an administrative agency hearing this type of employment law dispute? Should the arbitrator be required to issue a written decision containing both detailed findings of fact and explicit analysis of all the relevant legal issues?

Arbitration Rulings

Should arbitration rulings in employment disputes be a matter of public record or kept confidential? Should arbitration rulings be subject to the same right of appeal or judicial review as is normal with trial court or administrative enforcement of the statute in question, or be subject only to the extremely narrow scope of review of grievance arbitration (after the Steelworkers Trilogy)? Should an arbitration verdict unfavorable to an individual employee affect the prerogatives of the public enforcement agency to file and pursue a claim in court about the same dispute?

Participation in Design and Oversight

Should employees have a voice in the design and oversight of the arbitration system? If so, how can this be achieved?

The current debate about the use of private arbitration relates not simply to employer-designed procedures (post-Gilmer), it also requires rethinking employee use of union-negotiated procedures (post-Gardner-Denver). For example:

> Should unions and employers include in their grievance arbitration systems a right of individual employees to secure resolution of legal claims and a directive to the arbitrator to consider them? If this is done by the parties, should union-represented employees be required to use this procedure to dispose of federal law claims? Should they be entitled to use this procedure for state law claims?

C. Internal Workplace Dispute Resolution Procedures

Grievance arbitration procedures under collective bargaining or in most nonunion

settings are limited to the scope of issues covered in the bargaining agreement or in the written personnel policies of the company. Yet increasingly, the problems that arise at the workplace involve issues and sometimes involve employees or managers not covered by a bargaining agreement. The increased diversity in the workforce and in workplace issues has led to the adoption of a variety of procedures for handling complaints of any type in organizations. Many of these procedures include a designated professional, often with the (Swedish) title, Ombudsperson, who is responsible for handling and seeking resolution of employee complaints as they arise. As MIT Ombudsperson Mary Rowe pointed out to the Commission:

> "We've been hearing about saving the courts from traditional problems and overload of traditional channels. There are, in addition, peer problems, problems between managers, for example, or between workers, or disputes from managers about harassment by subordinates, as well as the typical labor-management problems you're all used to"

In establishments with union representation, these professionals must work to supplement but not substitute for the established grievance procedures or other informal problem-solving processes between union and employer representatives. In both union and nonunion situations, the role of these professionals is to help apply or to supplement, not to modify or substitute for, existing personnel policies. There are no reliable national estimates of the extensiveness of these procedures, nor are there any systematic studies of their effectiveness. Several analyses have documented, though, that properly functioning internal dispute systems can be cost effective for an organization.[20] Exhibit IV-5 (See page 136) lists some of the features professionals believe need to be built into effective workplace dispute resolution systems.

These internal dispute resolution systems tend to embody multiple options for handling complaints: ranging from informal counseling of the individual on how to deal with the problem or with a fellow employee, to mediation and fact-finding, and in some cases, culminating in binding arbitration.

The existence of multiple options for resolving issues is viewed as especially important for the handling of interpersonal issues such as sexual harassment. The processes used to deal with these issues vary depending on the nature of the complaint, the wishes or willingness of the complainant to pursue the issue through a formal or public process, and the subjective nature of the evidence that is often involved.

The limited amount of published information on these systems makes it hard to evaluate their effectiveness at this point in time or the extent to which those in place embody these design features. While most of these systems appear to provide multiple options, they are paid for, staffed, and managed by the employer. Thus, standing alone, they do not serve as a complete substitute for enforcement of worker rights through recourse to a public agency or the courts.[21] The question, however, is how to build on the features and experiences of

20 See A.J. Perneski, G. Hall, M. Rowe, J. Ziehgenfuss, and M. Lux, "Perspectives on the Costs and Cost Effectiveness of Ombudsman Programs in Four Fields: Academia, Health Care, Private Companies, and State Government," 15 Journal of Health and Human Resources Administration, Winter, 1993.

21 Indeed, to the extent that such nonunion grievance procedures involve participation by regular employees, they pose significant questions about their compatibility with the NLRA's ban on employer-established

these internal dispute resolution systems in ways that integrate the private procedures at the workplace with public agencies and the courts.

D. Joint Safety and Health and Other Workplace Committees

Well designed grievance procedures and arbitration models may prove a valuable alternative for resolving the kinds of employment problems that would otherwise be channeled into a lawsuit. These procedures are not, however, well-suited for addressing ongoing problems facing the workplace as a whole: whether it be occupational hazards (under OSHA); the financial viability of the company's pension plan (under ERISA); devising alternatives (including retraining) to mass lay-offs (under WARN); eliminating sexually hostile environments (under Title VII); devising reasonable accommodation to the special needs of disabled workers on the job (under ADA). Implementation of public policies and protections in these spheres has primarily relied on specialized administrative agencies.

Vice President Gore's 1993 Report, Creating a Government That Works Better and Costs Less, underlines the limitations and failings of use of a single centralized agency to monitor and secure compliance with quality standards ordained by public policy for millions of workplaces across the nation.[22] Speaking specifically about OSHA, the Report stated (at p.62):

> "Today 2400 inspectors from OSHA and approved state programs try to insure the safety and health of 93 million workers at 6.2 million worksites. The system doesn't work well enough. There are only enough inspectors to visit even the most hazardous workplaces once every several years and OSHA has the personnel to follow up on only three percent of its inspections."

The Vice President proposed, instead, to draw upon the efforts and insights of those actually on site to figure out ways to make our workplaces safer, fairer and more secure.

Employees, the intended beneficiaries of these public policies, can play a valuable role in enforcing the laws. Properly trained, equipped and organized, employees on the job are in a good position to monitor whether their employers are complying with the government's standards. Working together, employees and managers can also figure out ways of achieving more of these goals at lower costs to their firms and the economy.

That is why joint safety and health committees (JSHCs) are the most common form of employee participation program aimed at employee concerns about conditions of work (as opposed to employer concerns about productivity and quality). A 1993 National Safety Council Report found that JSHCs exist in 75 percent of establishments with 50 or more employees, and in 31 percent with less than 50 employees.[23] Indeed, ten or so states now require by law such a committee (or other forms of em-

---

employee representation plans (discussed in Chapter II). Professor Charles Morris, in his presentation to the Commission titled "Deja Vu and 8(a)(2) -- What's Really Being Chilled by Electromation?" April 1994, pointed out that a case now pending before the NLRB, Keeler Brass Automative Group, may produce a Board ruling on precisely this legal issue.

22 Also see U.S. General Accounting Office, Dislocated Workers: Worker Adjustment and Retraining Notification Act Not Meeting Its Goals, February 1993, documents the particularly egregious failings of WARN, whose notice requirements are complied with by employers less than 30 percent of the time.

ployee involvement in this area). In many of these states the joint committees were legislated with trade-offs involving other provisions of workers' compensation and disability provisions.

What JSHCs do in practice varies significantly from one work site to another. The more effective programs offer technical training to committee members, have regularly scheduled meetings and well-defined internal procedures and responsibilities, conduct periodic on-site inspections to monitor compliance with safety regulations, and recommend (and usually secure) improvements in employer practices and equipment to avoid identifiable hazards. The best such committees are integrated with other employee participation and quality programs. These high-quality JSHCs tend to be found in unionized settings or in larger nonunion firms with a commitment to the advanced human resource techniques described in Chapter II. Union committees, even in small firms, have access to outside technical assistance.

The Commission heard favorable testimony from both business and labor about their experience under the Oregon statute, in particular. (A recent Wall Street Journal article also quoted positive comments from a number of small employers about their experience in Oregon and other states with such laws.) The reasons cited include fewer OSHA inspections and fines, more effective efforts at reducing workplace hazards, and lower workers' compensation costs. (Workers' compensation premiums in Oregon declined by approximately ten percent a year during the first three years, 1991 to 1993, in which its law requiring employee safety and health participation was in effect.) A recent study documents how effective Oregon's new brand of on-the-job safety regulation and administration has proven (in non-union as well as unionized firms).[24] The Commission was also provided with evidence of the considerably longer experience with such "internal responsibility" procedures in Ontario, which shows that higher quality committees lead to lower injury rates for employees.[25]

Private arbitration has served as an effective and flexible process for resolving workplace issues covered under collective bargaining agreements.

The Supreme Court, through the Gilmer decision, has introduced the possibility of an expanded role for arbitration of a wider array of employment law issues. A variety of questions regarding the design of such systems will need to be addressed if arbitration is used to resolve a broader array of employment disputes and is to apply to a broader range of employees.

A wide variety of alternative dispute resolution procedures have arisen in a number of workplaces to deal with issues or individuals not covered by a collective bargaining agreement. These procedures expand the options available for resolving workplace issues.

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 re-

23 Thomas W. Planek and Kenneth P. Kolosh, Survey of Employee Participation in Safety and Health, National Safety Council, October 1993.

24 David Weil, "The Impact of Safety and Health Requirements on OSHA Enforcement" (April, 1994).

25 See the submission by the labor and management co-chairs of Ontario's Workplace Health and Safety Agency: Paul K. Forder and Robert D. McMurdo, "Working Together on Health and Safety: The Impact of Joint Health and Safety Committees on Health and Safety Trends in Ontario" (March 1994).

sources and integrated with other organizational policies and practices have demonstrated their effectiveness in improving workplace safety.

6. Integrated Employment Regulation

Shifting disputes from courts (and juries) to private mediation, arbitration, or in-house dispute resolution is just one component of possible institutional reform. Another would be to create a specialized tribunal -- a single employment court -- to handle the entire array of employment (and labor) law disputes.

As the Preface noted, while it is not possible to import an institution found in other countries into the United States it is important to learn from experiences abroad. The task of consolidating the mix of agencies detailed in Exhibit IV-2 would be enormously difficult and take considerable time in view of the diversity of statutes, administrative agencies, rules, and remedial arrangements.

Labor Courts

Most other countries have tribunals that specialize in workplace disputes (see Exhibit IV-6, page 137).[26] Typically, the tribunal is composed not just of professional neutral lawyers, but also of lay representatives of business and labor. The procedures are considerably more informal and relaxed than standard judicial proceedings, and extensive use is made of mediation sessions with the parties. Either the labor court can itself issue immediate injunctive relief when necessary, or it can petition the regular court for such orders that are routinely granted. There has been little systematic study of the impact of the labor court model on comparative costs and effectiveness in enforcing of employment law in these other countries.

The Commission recognizes an important objection that can be raised to the idea of a single employment tribunal. Are not the differences between, for example, civil rights law and occupational safety and health law, or between pension law and collective bargaining law, so deep and complex that it would be a mistake to assume that a single group of judges could develop the necessary experience and sophistication in all these fields? (People who take that position cannot, of course, easily defend the current breadth of federal and state court jurisdiction in this country, not only over employment, but all other fields of law.)

Unified Agency Administration

The Commission does want to highlight for further discussion the question whether there should be more integrated administration of our numerous federal employment statutes, even granting the difficult odds

26 Good descriptions of the tribunals and procedures for enforcement of labor and employment in other countries can be found in Benjamin Aaron, "Settlement of Disputes Over Rights," in Comparative Labour Law and Industrial Relations (Roger Blanpain, ed., 1990); Manfred Weiss, Simitis and Rydzy, "The Settlement of Labor Disputes in the Federal Republic of German," in Industrial Conflict Resolution in Market Economies (Tadashi Hanami and Roger Blanpain, eds., 1989); Michel Despax and Jacques Rojot, "Labor Law and Industrial Relations in France," in International Encyclopedia for Labor Law and Industrial Relations (Roger Blanpain, ed., 1987); and Bob Hepple, "Labor Law and Industrial Relations in Great Britain, in International Encyclopedia for Labor Law and Industrial Relations (Roger Blanpain, ed., 1992).

against creation of a single Article III labor court for final adjudication of all such cases. It is important to try to improve resolution of immediate disputes in the employment relationship. However, such disputes should not simply be viewed as isolated events affecting only the immediate claimants. This country needs to develop institutional arrangements that will do a better job of integrating the host of legally distinct programs all trying to influence and reshape different parts of the same employment body.

The following are just a few of the questions that one might address from that perspective.

- If the Wage and Hour Division of the Department of Labor discovers that an employer is regularly violating Fair Labor Standards requirements, is that a reason for alerting OSHA about the need to do a sudden and thorough work site inspection to see whether the same management is also endangering the lives and limbs of its workers?[27]

- Since state-appointed tribunals under the federal Unemployment Insurance law now must decide whether an employee was discharged for good reasons and thereby disentitled to UI benefits, could such tribunals also function as the body that awards employees damages against those employers who fire them without good reasons?

- Should the Department of Labor establish a single investigative staff to coordinate enforcement of its extensive body of regulations, and a single adjudicative tribunal for interpretations and enforcement rulings under all these laws?

- Should various agencies that enforce specific employment regulations that are located in different federal departments outside the Department of Labor be included in a single integrated agency responsible for enforcing all employment regulations and resolving employment law disputes?

- Should the judgment about whether to add or delete a new employment regulation or doctrine under one statute be assessed and instituted only as part of a broader process that considers the new rule's interplay with and cumulative impact on other existing (or proposed) employment mandates?

Negotiated Rule Making

Apart from legislative enactment, the promulgation of regulations offers another opportunity to reduce the extent to which workplace problems are resolved without the current level of recourse to regulatory agencies and the courts. Under the Administrative Procedures Act, regulators draft rules, publish them in the Federal Register, hold hearings and receive comments, and then issue the final regulations. The comments often present extreme views of the most interested parties and their versions of the facts. The scene is set for extended litigation on the legislation and what the regulations mean in their finest detail.

Beginning in 1975, the Labor Department began to experiment with negotiated rule-making, under which interested parties were invited to meet with agency officials

27 A study in California (released on April 14, 1994), based on random inspections of 69 garment manufacturers and contractors, found that all but two were breaking some federal and state employment laws -- including locked or blocked fire exits and having 13-year-old children working nine hours a day. A Labor Department official was quoted as stating that "this is an industry that ignores the law."

to present and to discuss various views of the facts and issues.[28] Studies could be agreed upon by mutually respected sources and, with the assistance of a mediation process, a degree of consensus on many facets of the prospective regulations could be reached. Such discourse was designed to concentrate on practical achievement of legislative objectives, rather than on esoteric technicalities. The agency would then issue a draft regulation in the Federal Register for general comment, to be followed by the final rules. The mediation process was designed to produce more understandable and acceptable regulations, within the intent of the legislation, and thereby to reduce subsequent litigation.

The process has now been fully endorsed and authorized by the Negotiated Rulemaking Act of 1990.[29] Despite the encouragement of this legislation, negotiated rule making has seldom been used in the employment law field (by comparison with environmental regulation). Negotiated rule-making's potential to reduce recourse to state and federal courts and administrative agencies for workplace regulation has yet to be achieved. The Commission needs to understand why so little use has been made of these methods since negotiations appear to be such a natural tool for effective regulation at the workplace. The process, however, requires different attitudes and skills from the parties.

Most other countries resolve employment disputes in a dedicated labor court rather than through the civil court system as in the U.S. A number of experts testified about the merits and limitations of adopting this approach in the U.S.

A number of suggestions were presented to the Commission for integrating some or all of the administrative agencies responsible for different employment laws.

Negotiated rule making has been used effectively but infrequently by the federal government to adapt regulations to fit the modern workplace.

7. General Observations

While the various private and public procedures for resolving disputes were discussed separately in previous sections, experience suggests it is best to view them as interrelated. Thus in considering new approaches to resolving workplace issues it is useful to think in terms of at least the following four stages to an overall system:

(1) the practices used to solve workplace problems before they arise or informally before they enter the formal system;

(2) the options available to resolve disputes privately without involvement of public agencies or the courts;

(3) the administrative processes involved in enforcing the law and resolving disputes; and

(4) the judicial procedures used to review or appeal private and public administrative decisions and rulings.

The last three decades have witnessed an explosion in the breadth and depth of legal regulation of the American workplace.

28 "The Limits of Legal Compulsion", U.S. Department of Labor Release, November 12, 1975, Labor Law Journal, February 1976, pp. 67-74.

29 Public Law 101-648, 101st Congress. See also Administrative Conference of the United States, Negotiated Rulemaking Sourcebook, January 1990.

Federal and state legislatures, courts, and administrative agencies have tried to respond to the social and economic concerns of employees by establishing a host of legal directives telling employers what they must do or they may not do.

The virtue of a legal mandate that offers the employee recourse to a judicial or administrative tribunal is that this provides some assurance that crucial employee interests in a safe, secure, and fair working environment will not be ignored. As we saw from Exhibits IV-1 and IV-2, since the 1970s employees seeking such legal relief have produced a sharp increase in the numbers of suits filed in federal courts and complaints filed with federal agencies.

The workers best able to take advantage of the law are upper-level employees whose claims (usually about their termination) are financially worthwhile to sue about, or groups of employees who have the kind of representation (usually by a union or some other advocacy group) that gets the attention of a short-staffed administrative agency.

Even such limited legal protection comes at a considerable cost. Some of the costs are paid from the public purse that supports the judicial and administrative systems. Much of it comes from the parties themselves who must pay the attorney fees and other expenses of legal proceedings. Some of that cost burden is borne by employers who were guilty of violating the law. 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.

In the longer run most of these employer expenditures are passed on to others -- to governments in the form of lower corporate taxes, to consumers in the form of higher product prices, and to employees in the form of fewer jobs or lower wages and benefits. That means that there is a broad social interest, not just a narrow business interest, in reducing the costs of litigation and regulation.

One such path would take us towards privately-run mechanisms for either resolving individual disputes under the law (e.g., discrimination or wrongful dismissal) or for inspecting and monitoring workplace compliance with regulations (e.g., of OSHA or ERISA).

- With respect to arbitration, the key question is whether and how such a procedure should be designed to ensure it is a fair, as well as a more accessible, alternative to a jury trial.

- With respect to joint safety and health or other such "internal responsibility" programs, should the law require committees or some equivalent from of employee participation, and, if so, how can these programs be designed to fit the diverse workplaces and employment settings found in the economy?

- With respect to either arbitration or self-regulatory committees, the question is whether employment law can safely grant these private procedures some leeway in interpreting and applying public laws to local situations.

For all these questions, 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. That, in turn, raises the question about the value of another path towards reform -- more coordinated administration of the array of employment regulations.

8. Summary and Questions for Further Discussion

1. Federal laws governing the workplace increased dramatically since the 1960s. Accompanying this growth in law is a corresponding expansion in the rules and regulations that guide their administration and enforcement. The Labor Department alone is responsible for enforcing a vast number of workplace regulations, and other agencies.

2. At the same time, the American workforce and workplaces have become more diverse, making it difficult for the laws and regulations to fit these changing circumstances. The increased diversity, in turn, created more demand for protective legislation and more complex rules.

3. Workplace litigation caseloads and costs rose faster than other areas of law. Employment cases in the federal courts increased by over 400 percent between 1971 and 1991.

4. Agencies responsible for administering these laws experienced increasing backlogs and delays in processing cases.

5. The private institutions Americans have traditionally relied upon to resolve issues without resort to government regulatins or court litigation, namely collective bargaining grievance arbitration, declined in coverage and were limited in their finality by court decisions.

6. Neither the more longstanding forms of private representation and dispute resolution, i.e., mediation and arbitration, nor the newer more informal employee participation and alternative dispute resolution systems, are being utilized to their full potential for dealing with issues and resolving disputes that now are regulated by law. All of these procedures would need to be modified in various ways if they are to be used as part of a system for adapting workplace regulations to fit different settings and enforce public laws.

7. The administrative procedures for resolving employment cases are complicated by (1) the large number of different agencies, enforcement regimes, and remedies available under the different statutes; and (2) the varying scope of judicial review accorded agency decisions.

8. The U.S. relies on the civil court system to litigate employment disputes while many other countries use specialized, tripartite employment courts.

9. Experience with dispute resolution suggests the value of considering the interrelationships among different levels or stages in the private and public procedures used to resolve workplace issues, including: (1) the informal practices and organizational policies designed to solve workplace problems before they arise or to resolve them informally before they enter the formal system; (2) the formal procedures (e.g. arbitration) used to resolves disputes before they are brought to a public agency or the court, (3) the administrative processes involved in enforcing the law and resolving disputes, and (4) the judicial procedures used to review or appeal private and public administrative decisions and rulings.

10. Negotiated rule making has been shown in some instances to improve the efficiency and acceptability of the regulations required to implement and enforce the objectives of laws governing the workplace. However, it has seldom been used for employment issues.

Questions for Further Discussion

1. What changes in current labor and employment arbitration procedures are needed to deal with the broader range of issues and individuals involved in contemporary employment disputes?

2. What is the appropriate relationship between private and public dispute resolution procedures?

3. What role, if any, should employees have in the design and oversight of workplace dispute resolution systems that involve issues of public law?

4. How can worker-management committees or other forms of employee involvement be used to internalize responsibility for or resolve problems of occupational safety and health or other workplace matters regulated by public law?

5. Should the U.S. government integrate and combine different agencies responsible for administering and enforcing employment laws and regulations?

6. Should the U.S. consider establishing a specialized branch of the judicial system to deal with employment law cases?

EXHIBIT IV-1

Description of Major Statutes and Executive Order Comprising the Framework of Federal Workplace Regulation*

STATUTE	DESCRIPTION	PRINCIPAL ENFORCEMENT AGENCY
	LABOR STANDARDS	
FLSA	Establishes minimum wage, overtime pay and child labor standards.[a]	Labor-WHD
Davis-Bacon Act	Provides for payment of prevailing local wages and fringe benefits to laborers and mechanics employed by contractors and subcontractors on federal contracts for construction, alteration, repair, painting or decorating of public buildings or public works.	Labor-WHD
Service Contract Act	Provides for minimum compensation and safety and health standards for employees of contractors and subcontractors providing services under federal contracts.	Labor-WHD
Walsh-Healy Act	Provides for labor standards, including wage and hour, for employees working on federal contracts for the manufacturing or furnishing of materials, supplies articles, or equipment.	Labor-WHD
CWHSSA	Establishes standards for hours, overtime compensation, and safety for employees working on federal and federally financed contracts and subcontracts.	Labor-WHD
MSPA	Protects migrant and seasonal agricultural employers, agricultural associations, and providers of migrant housing.	Labor-WHD
	BENEFITS	
ERISA	Establishes uniform standards for employees pension and welfare benfit plans, including minimum participation, accrual and vesting requirements, fiduciary responsibilities, reporting and disclosure benefits.	Labor-PWBA[b] PBGC, IRS
COBRA	Provides for continued health care coverage under group health plans for qualified separated workers for up to 18 months.	Labor-PWBA
Unemployment Compensation	Authorizes funding for state unemployment compensation administrations and provides the general framework for the operation of state unemployment insurance programs.	Labor-ETA
FMLA	Entitles employees to take up to 12 weeks of unpaid, job-protected leave each for specified family and medical reasons such as the birth or adoption of a child or an illness in the family.	Labor-WHD
	CIVIL RIGHTS	
Title VII	Prohibits employment or membership discrimination by employers, employment agencies, and unions on the basis of race, color, religion, sex, or national origin; prohibits discrimination in employment against women affected by pregnancy, childbirth or related medical condition.	EEOC

EXHIBIT IV-1 (Continued)

Description of Major Statutes and Executive Order Comprising the Framework of Federal Workplace Regulation*

STATUTE	DESCRIPTION	PRINCIPAL ENFORCEMENT AGENCY
Equal Pay Act	Prohibits discrimination on the basis of sex in the payment of wages.	EEOC
EO 11246	Prohibits discrimination against an employee or applicant for employment on the basis of race, color, religion, sex, or national origin by federal contractors and subcontractors, and requires federal contractors and subcontractors to take affirmative action to ensure that employees and applicants for employment are treated without regard to race, color, religion, sex or national origin.	Labor-OFCCP
ADEA	Prohibits employment discrimination on the basis of age against persons 40 years and older.	EEOC
ADA	Prohibits employment discrimination against individuals with disabilities: requires employer to make "reasonable accommodations" for disabilities unless doing so would cause undue hardship to the employer.	EEOC
Rehabilitation Act (Section 503)	Prohibits discrimination in employment by federal contractors and subcontractors on the basis of disability and requires them to take affirmative action to employ, and advance in employment, individuals with disabilities.	Labor-OFCCP
Anti-retaliatory Protections - STAA	Prohibits the discharge or other discriminatory action against filing a complaint relating to a violation of a commercial motor vehicle safety rule or regulation or for refusing to operate a vehicle that is in violation of a federal rule, or because of a fear of serious injury due to an unsafe condition.	Labor-OSHA[h]
	Occupational Health and Safety	
OSHA	Requires employers to furnish each employee with work and a workplace free from recognized hazards that can cause death or serious physical harm.	OSHA
MSHA	Sets health and safety standards and requirements to protect miners.	MSHA[i]
Drug Free Workplace Act	Requires recipients of federal grants and contracts to take certain steps to maintain a drug free workplace.	OFCCP
	Labor Relations	
NLRA	Protects certain rights of workers including the right to organize and bargain collectively through representation of their own choice.	NLRB[j]
LMRDA	Requires the reporting and disclosure of certain financial and administrative practices of labor organizations and employers; establishes certain rights for members of labor organizations and im-	NLRB

Description of Major Statutes and Executive Order Comprising the Framework of Federal Workplace Regulation*

STATUTE	DESCRIPTION	PRINCIPAL ENFORCEMENT AGENCY
	poses other requirements on labor organizations.	
Railway Labor Act	Sets out the rights and responsibilities of management and workers in the rail and airline industries where one employer may provide services in numerous locations simultaneously; provides for negotiation and mediation procedures to settle labor-management disputes.	NMB[k]
	Employment	
Polygraph Protection Act	Prohibits the use of lie detectors for pre-employment screening or during the course of employment.	Labor-WHD
Veterans Reemployment Act	Provides reemployment rights for persons returning from active duty, reserve training, or National Guard duty.	Labor-ETA
IRCA	Prohibits the hiring of illegal alliens and imposes certain duties on employers; protects employment rights of legal aliens; authorizes but limits the use of imported temporary agricultural workers.	Labor-WHD
WARN	Requires employers to provide 60 days advance written notice of a layoff to individual affected employees, local governments, and other parties.	Labor-WHD

[a] Wage and Hour Division
[b] Pension Welfare Benefit Administration
[c] Pension Benefit Guarantee Corporation
[d] Internal Revenue Service
[e] Employment and Training Administration
[f] Equal Employment Opportunity Commission
[g] Office of Federal Contract Compliance Programs
[h] Occupational Safety and Health Administration
[i] Mine Safety and Health Administration
[j] National Labor Relations Board
[k] National Mediation Board
*Many statutes are complex and contain a multitude of requirements, rights, and remedies. The information presented has been simplified for illustrative purposes.

EXHIBIT IV-2

Procedure, Forum, and Remedy

PROGRAM	AUTHORITY	GROUP CLAIMS	FORUM	INTERIN RELIEF	IN-KIND REMEDY	SCOPE OF COMPEN-SATION	PUNTIVE DAMAGES	ATTORNEY FEES
Fair Labor Standards Act	Dept.of Labor and Individual Employee	Representative Action	Federal District Jury depends on claims	Secretary Petition Dist. Court	Secretary of Dist. Court Injunction	Back Pay	Double Back Pay Criminal Prosecution	Prevailing Plaintiffs
Family and Medical Leave Act	Dept. of Labor If not Individual Employee	Class Action	State or Federal Court. Jury Trial	Sec.of Labor. Petition Court.	Broad Equitable Relief	Back Pay	No	Prevailing Plaintiffs
Employee Polygraph Protection Act	Sec.of Labor. and Individual Empl.	Class Action	State or Federal Court.	Secretary to Dist.Court.	Broad equitable relief	At large damages	Penalties assessed by Sec. of Labor up to $10,000	Prevailing Party
Occupational Safety and Health Act	OSHA Div. Dept. of Labor	Yes.-OSH Compalint	ALJ to OSHRC to Circ Court	OSHA to Dist.Court.	Abatement	For Retaliatory Actions	Fines- Paid to government	None
Employee Retirement Income Security Act	Dept of Labor Individual. Employees	Class Action Rule 23	Federal Court. Some State Court Some Jury Trial	Employee Beneficiaries in Court	Definition & Provision of Benefits	Liquidated Damages to Benefits	Criminal Fines Civil Penalties. Some Punitives	Prevailing Plaintiffs: Some Prevailing Defendants

Exhibit IV-2

Procedure, Forum, and Remedy

Program	Authority	Group	Forum Claims	Interim	In-kind Relief	Scope of Remedy	Punitive Compensation	Attorney Damages Fees
Age Discrim. Employment Act	Individual -Unless EEOC sues in time	Representative with consent of group	Federal District Jury	EEOC Petition Dist. Court trial	Broad Equitable-Rare	Back pay and Front pay Reinstatement	Double damages-If willful	Prevailing Plaintiffs
Fair Labor Standards Act	Dept. of Labor and Individual	Representative Action Employee	Federal District Jury	Secretary Petition Dist. trial for some claims	Secretary to. Dist. Court Court	Back Pay. Back Pay- Injunction	Double Prosecution	Prevailing Plaintiffs Criminal
Family and Medical Leave Act	Dept. of Labor If not,	Class Action Individual Employee	State or Federal Court	Sec. of Labor Petition Court. Jury Trial	Broad Equitable Relief	Back Pay	No	Prevailing Plaintiffs
Employee Polygraph Protection Act	Dept. of Labor and Individual Empl.	Class Action	State or Federal Court.	Secretary to Dist. Court	Broad Equitable Relief	At large damages Sec. of Labor	Penalties assessed by -up to $10,000	Prevailing Party
Occupational Safety and Health Act	OSHA Div. Dept. of Labor	Yes.-OSH Complaint	ALJ to OSHRC to Cir. Court	OSHA to Dist. Court	Abatement	For Retaliatory Actions	Fines- Paid to government	None
Employee Retirement Income Security Act	Dept. of Labor Individual. Employees	Class Action Rule 23 Court	Federal Court. Some State in Court Some Jury	Employee Beneficiaries Benefits in Court Trial	Definition and Provision of Benefits	Liquidated Damages to Benefits.	Criminal Fines Civil Penalties Some Punitives Prevailing	Prevailing Plaintiffs: Some Defendants

EXHIBIT IV-3

SELECTED CATEGORIES OF LITIGATION IN THE FEDERAL DISTRICT COURTS
By Cases Filed

Year	Total Civil[1]	Fortune1000 Plaintiff[2]	Personal Injury[3]	Labor Law[4]	Employment Law[5]
1971	69,465	3,153	20,517	2,430	4,331
1972	72,180	3,396	19,449	2,741	4,635
1973	74,563	3,220	18,520	2,965	4,855
1974	77,347	3,485	18,621	3,311	5,783
1975	87,641	4,139	19,192	4,316	7,638
1976	96,139	4,718	19,161	4,452	10,269
1977	96,829	4,836	19,280	4,305	10,954
1978	103,513	4,495	19,483	4,141	10,709
1979	117,680	4,874	20,630	4,603	11,103
1980	131,533	6,059	22,622	4,368	11,472
1981	139,193	6,044	24,816	4,540	13,134
1982	139,593	7,539	25,801	4,711	15,436
1983	147,518	7,744	27,582	4,669	17,701
1984	152,061	7,855	27,686	4,459	19,166
1985	160,484	8,257	30,294	4,017	18,061
1986	163,664	8,329	29,420	4,242	20,320
1987	159,275	9,709	27,622	3,738	19,950
1988	161,769	9,029	26,760	3,231	20,041
1989	163,865	8,905	26,803	2,920	21,775
1990	156,762	6,637	23,868	2,709	22,165
1991	146,790	6,954	23,959	2,364	22,968
Increase 1971-1991	110%	121%	17%	-3%	430%

[1] This category excludes the following subcategories of civil litigation: prisoner petitions (i.e., for writs of habeas corpus) student loan recovery cases, deportation cases, local cases in U.S. territories, and personal injury or social security cases in which the U.S. is a defendant.

[2] This category is presented here as proxy for business litigation in general, for which there are no precise figures for the period in question. Fortune 1000 stands for the industrial Fortune 500 and service sector Fortune 500 combined.

[3] This category excludes all asbestos cases because the brief but massive surge in asbestos litigation during the 1980s distorts underlying long term trends.

[4] Labor law covers cases involving the National Labor Relations Act, the Labor Management Reporting and Disclosure Act, and the Railway Labor Act.

EXHIBIT IV-4

TRENDS IN COMPLAINT AND CASE VOLUME: SELECTED EMPLOYMENT STATUTES

	Wage & Hour Complaints	Wage & Hour Cases	OSHA Complaints	OSHA Cases	EEOC Complaints	EEOC Cases
1980	45,366	7,949	16,100	11,988	------	---
1981	46,020	5,752	13,161	6,744	56,228	444
1982	46,584	7,648	6,741	5,978	54,145	241
1983	44,869	3,958	6,361	5,219	66,461	195
1984	50,037	3,989	7,532	4,789	-----	---
1985	57,314	3,610	8,663	4,736	-----	---
1986	59,988	4,389	9,085	4,808	62,822	526
1987	58,936	3,343	9,764	5,041	62,074	527
1988	62,599	3,357	12,200	5,686	58,853	555
1989	63,965	3,439	11,869	7,702	55,952	598
1990	60,484	3,327	10,850	8,242	62,135	643
1991	54,142	3,041	10,198	8,686	63,898	593
1992	47,879	2,733	10,873	8,646	72,302	446
1993	46,121	2,295	10,539	8,960	87,942	481
Peak Year	1989	1980	1980	1980	1993	1990
% Change 1980-Peak[1]	+41%	0%	0%	0%	+56%	45%
% Change 1980-1993	+2%	-71%	-35%	-25%	+56%	8%

[1] The figures for the EEOC categories are from 1981, sin 1980 figures are unavailable.

SOURCE: Joel Rogers and Terence Dunworth, Business Disparity Group.

Exhibit IV-5

Key Features for an Integrated Workplace Dispute Resolution System

An Integrated Workplace Resolution System should:

1. Deal with a very wide spectrum of workplace concerns.
2. Be open to al categories of personnel.
3. Handle group issues as well as individual complaints.
4. Have multiple options or mechanisms including encouraging person-to-person or group-to-group negotiations and problem resolution; informal or formal mediation fact finding, and peer review, and; arbitration.
5. Allow "looping backward and forward" to the informal and formal procedures at various stages in the resolution process.
6. Provide a variety of helping resources such as training, advising, and representation not only to the complaint but also to the respondent and the supervisors and coworkers affected by the dispute.
7. Include people of color, women, and men in the various roles in the system.
8. Be taught to all participants in the organization.
9. Proscribe reprisal and provide for monitoring and evaluation.
10. Include a wide cross section of employees and managers in the design of the system.

Source: Testimony of Professor Mary Rowe, April 6, 1994

EXHIBIT IV-6

	GERMANY	*FRANCE*	*UNITED KINGDOM*
General Structure:	The labor court system is three tiered: labor courts of first instance, appellate courts, and a federal labor court, with judicial review by the Constitutional court.	Labor and employment issues may be decided in a number of courts, yet the major venue for these cases is the Conseil des Prud'hommes. There is one labor court in every district where there is a regular first echelon Civil Court.	Industrial tribunals cover most of the individual employment disputes, and an Employment Appeals Tribunal presides over appeals from the industrial tribunals (subject to judicial review).
Panels:	Composed of a professional judge and two wingers - lay judges, with an equal vote, one representing labor and the other business.	The counsellers are not professional judges, but rather representatives of the employees and employers, elected directly by their peers. Elections of representatives for the Conseils are local in nature.	The industrial panel is composed of a professional chairperson appointed by the Secretary of State and two lay-members appointed through consultation with labor and business associations.
Jurisdiction:	Labor courts have exclusive jurisdiction over virtually all private legal industrial conflicts including both collective and individual disputes. Excluded from the court's jurisdiction are most disputes over co-determination, and the internal organization of unions and employers' associations.	The Conseils have jurisdiction only over individual disputes. On these matters they are the first and last instance, with almost no appeal possible.	The tribunals are in charge of individual employment disputes. Collective disputes are resolved through voluntary measures, and under some circumstances in the regular courts.
Procedure:	Compared to the regular German court system, procedures are relaxed and conciliatory. The chair is authorized to summon all witnesses, experts, and documents which he views as necessary for the completion of the trial in one day. Judgment must be pronounced immediately following the proceedings.	Cases always start before the board of conciliation and only if unsuccessful are transferred to the board of judgment or to counsellers-recorders who serve as fact-finders who later present the case before the board of judgment. Procedures are generally informal and extremely fast, with most cases completed within the same day and with a short waiting period.	Complicated pleading procedures are avoided, rules of evidence relaxed, with no compulsory legal representation. The Advisory Conciliation and Arbitration Services (ACAS) promotes ADR for resolving all employment related disputes, including provision of collective conciliation, conciliation in proceedings before the tribunals, and reference to arbitration and mediation.
Remedial power:	Injunctions are issued by the labor court itself. In addition, the court has full remedial power.	The court has broad injunctive and remedial authority.	The tribunals have limited remedial power, and cannot issue interim injunctions, not enforce compliance with their own judgments.