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THE ENFORCEABILITY OF EMPLOYER MANDATED DISPUTE RESOLUTION PLANS TERMINATING WITH BINDING ARBITRATION IN MICHIGAN

By Alan M. Kanter

In recent years, many Michigan employers have adopted Mandatory Dispute Resolution Plans (hereinafter "Plan" or "Plans") as a means of dealing with employee complaints, claims or disputes. While there are many commonalities to different types of Plans, this article is intended to focus upon those employer-mandated Plans designed to conclude a dispute through binding arbitration.¹ If the Plan is properly drafted and meets with specified criterion under current Michigan law, an enforceable Plan can operate to deprive both the employer and employee of access to the courts, judges and juries for most employment related claims. In order to enforce Plans which require binding arbitration, certain requirements must be met under current case law and statutes.

This article is not intended to be a drafting guide to ensure the enforceability of such Plans. However, a clear understanding of the key arbitration requirements is imperative—whether one is seeking to enforce or preclude the enforcement of such Plans. This is particularly true with respect to the

finality of the binding arbitration award.

Notwithstanding the recent appellate court resolution of most key historical arbitration related issues in Michigan, there are still a number of legal and practical issues which remain largely unresolved. These will continue to cause concern for employers, employees, lawyers and judges alike. Some of these issues will be addressed, but a clear path to resolution under present Michigan statutes and case law is neither foreseeable nor certain.

Most of the long-standing problematic arbitration issues were discussed and resolved through the convening of a conflicts panel of the Michigan Court of Appeals in *Rembert v. Ryan's Family Steakhouses, Inc.*, 235 Mich App 118, 596 NW2d 208 (1999). Ostensibly, *Rembert* addressed the enforceability of pre-dispute arbitration agreements of statutory employment related discrimination claims.² Essentially, the *Rembert* court held specifically that statutory employment discrimination claims (and by implication non-statu-

tory employment claims) are enforceable so long as the agreement preserves the employee's right to seek and obtain all statutory rights and remedies in a fair arbitration proceeding.

In reaching its holding, the *Rembert* court addressed and disposed of most of the legal issues historically proffered in opposition to the enforceability of pre-dispute mandatory arbitration clauses or agreements. At the same time, the *Rembert* court articulated both general and specific requirements to be met in order to enhance the likelihood of enforceability of pre-dispute mandatory arbitration agreements (and by further implication, mandatory dispute resolution Plans concluding with binding arbitration).³

In its opinion, the *Rembert* court seemingly resolved all the following issues:

1. Employers **can properly condition employment** on an employee applicant's entering into a written contract or agreement to finally resolve all arbitrable disputes in a binding arbitration proceeding.
2. An employer **can properly condition the continued employment** of an employee on the execution of a written agreement providing for binding arbitration of all arbitrable disputes.⁴
3. Michigan public policy clearly and unquestionably **favours** enforcement of valid arbitration agreements and provisions (including valid pre-dispute arbitration agreements).
4. Any and all **doubts** as to the arbitrability of a dispute should generally be resolved in **favor of arbitration** and employment disputes do not constitute an exception to this presumption, regardless of the nature of the employee's claims (statutory or common law).
5. The only cognizable subject matter exceptions to arbitrability requirements of Dispute Resolution

Plans are those set forth either in the body of the Michigan Arbitration Act or in other statutes, which specifically preclude arbitration as a means of final dispute resolution.⁵

6. Without more, mandatory pre-dispute arbitration requirements or obligations **do not** amount to a waiver of rights or remedies by employees.
7. Assuming that arbitration and related processes provide for complete vindication of employee statutory rights and remedies, arbitration does not undermine the deterrent effect of statutes providing specific rights and remedies.
8. Arbitrators, as a rule, are not all inherently unqualified to handle employment disputes.
9. In the absence of compelling factual circumstances, traditional contract defenses such as duress, undue influence, violations of public policy and/or unconscionability are inapplicable to the enforceability of otherwise valid pre-dispute arbitration agreements or Plans even where employment or continued employment are at risk.

In order to identify and adopt requirements for the enforceability of mandatory pre-dispute arbitration agreements, the *Rembert* court looked both to Michigan and federal case law. In reaching these requirements, significant emphasis, discussion and reliance with respect to applicable and important fairness standards rested on the Michigan Supreme Court's decisions in *Renny v. Port Huron Hosp.*, 427 Mich 415, 398 NW2d 327 (1986), and the Federal Circuit Court decision of *Cole v. Burns Int'l Security Services*, 323 U.S. App. D.C. 133, 105 F.3d 1465 (1997). Following its analysis and discussion of the foregoing and other authorities, the *Rembert* court specifically held:

...that pre-dispute agreements to arbitrate statutory employment discrimination claims are valid if: (1) the parties have agreed to

arbitrate the claims (there must be a valid, binding contract covering the civil rights claims), (2) the statute itself does not prohibit such agreements, and (3) the arbitration agreement does not waive the substantive rights and remedies of the statute and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights. 596 NW2d at 226.

In its discussion of procedural fairness, the *Rembert* court also cited a report by the Dunlop Commission⁶ and the American Arbitration Association's National Rules for Resolution of Employment Disputes as evidencing certain "baseline" procedural safeguards and elements to ensure arbitration proceedings meet fundamental fairness requirements.⁷ While not providing any specific guidance as to properly allocating such economic cost burdens in the pre-dispute arbitration agreement, the agreement (Plan) itself should provide for a fair and reasonable allocation of such costs and expenses with some realistic recognition of the typical disparities in the financial resources of employees and employers.⁸

Unfortunately, there remain a number of practical problems and issues to which no clear answers presently exist, without any clear indication of how they may or will be resolved. For example, we don't know whether an employer desiring to implement a Plan terminating in binding arbitration must actually require all employees to execute a written document evidencing each such employee's agreement to be bound by the terms of the Plan, or whether the Plan may simply be implemented through employer announcement. The answer may turn on reconciling and clarifying the writing related requirements of the Michigan Arbitration Act (seemingly requiring a written writing, agreement, or contract for pre-dispute arbitration agreements).⁹ Michigan case law clearly supports the right of Michigan employers of at-will employees to adopt or modify through mere

declaration virtually all employment rules, policies, procedures and conditions of employment as the employer sees fit.¹⁰ While the Michigan Arbitration Act provides, generally, that revocation of an agreement to arbitrate requires the consent of both parties,¹¹ there are at least two Michigan Court of Appeals cases which remain viable authorities and may be relied upon to support the position that an employee's signature on a writing may not always be necessary to enforce a written pre-dispute resolution plan or policy, terminating a binding arbitration.¹² Assuming that the Michigan case law supporting the validity of the employer's right to adopt such pre-dispute Mandatory Arbitration Plans without the necessity of an employee's signature may apply, however, in order to comply with the requirements of the Michigan Arbitration Act, the pre-dispute employment agreement, employer policy and/or employer imposed pre-dispute resolution Plan should nevertheless specifically provide that once the pre-dispute Mandatory Arbitration Plan or policy is adopted, the knowing and voluntary consent and waiver of **both** the employer and employee should be required in order to revoke or avoid enforcement of the employer-adopted mandatory pre-dispute arbitration provision.¹³

Another issue that remains is whether, and to what extent, an employer adopting a pre-dispute resolution plan should specifically address the issue of allocation of responsibility for costs and expenses of the arbitration or other employer mandated pre-arbitration proceedings. While the *Rembert* court specifically rejected the *Cole* court's fairness requirement that the fees and costs of arbitration should be borne entirely or substantially by the employer, in order to assure realistic accessibility of the dispute resolution procedures to the employee, Plans should include some provisions which recognize the general financial disparity between employers and employees by placing any **initial** substantial financial burdens on the employer with the allocation issues ultimately

resolved in conjunction with a Plan resolution and/or the final arbitration award.¹⁴

Another key but unresolved issue is whether an employer can include a valid pre-dispute arbitration agreement or Plan in an employee handbook. In *Heurtebise v. Reliable Business Computers, Inc.*¹⁵, the Michigan Supreme Court held that an employee handbook which contained provisions permitting the employer to modify its policies at will, and further providing that the handbook did not constitute an employment contract, express or implied, was not a “contract” sufficient for purposes of the Michigan Arbitration Act’s pre-dispute arbitration contract requirement. However, the *Heurtebise* court did not preclude the possibility of a valid and enforceable arbitration agreement being contained within an employee handbook provided the requirements of the Michigan Arbitration Act were met, the provision was equally binding and mandatory on the employee and the employer, and that neither party could modify or eliminate the mandatory arbitration requirement without the consent of the other party. Theoretically, therefore, an employee handbook complying with the requirements of the Michigan Arbitration Act as to pre-dispute arbitration agreements in general, and with the requirements established by the *Rembert* court likely will be found enforceable. However, many practitioners, post-*Heurtebise*, prefer to place the Plan provisions in a separate writing.

Another unresolved but related federal issue is whether the Equal Employment Opportunity Commission (EEOC) will be able to institute actions against employers and obtain specific employer targeted relief such as damages and reinstatement on behalf of specific employees who have executed valid and binding pre-dispute arbitration agreements and/or are otherwise subject to the Plans. In *Equal Employment Opportunity Commission v. Waffle House, Inc.*, (4th Cir. 10/06/99), the 4th Circuit Court of

Appeals held that while the EEOC could bring a public enforcement action seeking injunctive relief, it was prevented by a valid private pre-employment arbitration agreement from seeking individual employee-specific relief, such as back pay, reinstatement, compensatory and punitive damages. The 6th Circuit Court had ruled in *EEOC v. Frank’s Nursery & Crafts, Inc.*, that the EEOC was not precluded by private arbitration agreements from seeking such individual employee-specific relief for violations of Title VII (177 F.3d 448, 1999). On March 26, 2001, the Supreme Court granted a petition for review in the *Waffle House* case.¹⁶ In its review of *Waffle House*, the Supreme Court will no doubt cite and rely upon its recent decision in *Circuit City Stores, Inc. v. Saint Clair Adams* (03/21/2001), in which the Court, in a five to four decision, held that the Federal Arbitration Act’s exception set forth in Section 1, excluding “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” applied only to employees who work in the transportation industry. Consequently, except as to such transportation employees, private arbitration agreements, generally, would appear to be potentially enforceable under the Federal Arbitration Act. While *Circuit City* declined to address the holding in *Duffield v. Robertson Stevens & Co.*, 144 F.3d 1182 (9th Cir. 1998), that Title VII cases were not subject to private pre-dispute arbitration agreements imposed as a condition of employment (the only federal circuit court to take that position), the holding in *Circuit City* appears broad enough to cause a pro-arbitration interpretation of the language in Title VII, and to conclude that the Federal Arbitration Act applies to Title VII claims.

To conclude, the Michigan appellate courts have seemingly cleared the way for enforcement of employer Mandated Pre-dispute Plans or agreements that will conclude with binding arbitration. The key to enforceability of such Plans would appear to rest

on both procedural and substantive fairness, as well as compliance with statutory requirements. Employers desiring employee claims to be resolved through binding arbitration should include provisions and mechanisms to assure procedural and substantive fairness to employees. While no specific requirements have been adopted by the Michigan courts or legislature, employers would be well advised to include Plan provisions which do not create or result in unreasonable or unduly burdensome financial impediments to employee access to the Plan. The more accessibility rights and remedies are made available to employees with minimum deterrents and avoidable burdens, the more likely the courts will be to find the Mandatory Dispute Resolution Plan enforceable.

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¹Typically, employer Mandated Dispute Resolution Plans begin with an informal company internal review, often followed by some type of neutral third-party provider mediation or facilitation, and terminate in a binding arbitration procedure.

²The Michigan Elliott-Larsen Civil Rights Act, MCL § 37.2102 et seq.; MSA § 3.548(101) et seq.; and the Persons With Disabilities Civil Rights Act, MCL § 37.1101 et seq.; MSA § 3.550(101) et seq.

³Although *Rembert* did not specifically deal with Mandatory Dispute Resolution Plans in the employment context, it is logical that such Plans imposed by employers, particularly the mandatory arbitration provisions, will need to satisfy the same arbitration requirements to be enforceable.

⁴Presumably, this right assumes the existence of an “at will” employment relationship where no other prior written employment contracts or agreements containing non-modifiable contract provisions are involved.

⁵While not specifically addressed in *Rembert*, presumably, statutory schemes that provide for exclusive jurisdiction in Michigan state agencies, tribunals, or other authorities such as workers’ compensation claims and unemployment compensation claims, are likely exceptions to the general presumption of arbitrability.

⁶Commission on the Future of Worker-Management Relations, Report and Recommendations (Dunlop Report) (1994).

⁷Interestingly, the *Rembert* court specifically rejected the *Cole* court’s specific holding that to satisfy the fairness requirements, the economic burden of payment for the arbitration proceeding and arbitrator fees should fall on the employer and not the employee, citing instead MCR 3.602(M), permitting a court to tax such costs in a **just** fashion.

⁸By way of illustration only, the American Arbitration Association has adopted a policy which offers lower (virtually diminutive) filing fees to enable employees to institute Plan-required facilitative mediations and binding arbitrations, which Plans are first reviewed, approved, and which proceedings are required to be administered by the American Arbitration Association.

⁹MCL § 600.5011(2).

¹⁰See, for example, *In Re Certified Question*, 432 Mich 438, 443 NW2d 112 (1989); *Toussaint v. Blue Cross and Blue Shield of Michigan*, 408 Mich 579, 292 NW2d 880 (1980).

¹¹MCL § 600.5011; MSA § 27a.5011.

¹²See *Carlson v. Hutz Corp. of Michigan*, 183 Mich App 508, 455 NW2d 335 (1990) and *Ebresman v. Bultynck & Co., P.C.*, 203 Mich App 350, 511 NW2d 724 (1994).

¹³This dilemma will likely arise most often in circumstances where one or more existing valued employees are requested, but decline to sign an acknowledgment or agreement providing for pre-dispute arbitration or an employer dispute resolution plan or policy which ends in binding arbitration; while *Rembert* provides that the employer can lawfully condition continued employment upon the employee’s acceptance, and presumably execution of the agreement or Plan requiring binding arbitration, employers may not want to be forced to terminate the employment of such valuable and often hard to replace employees who decline to execute a written document evidencing the employee’s agreeing to the Plan.

¹⁴For example, an employer may require payment of only a nominal filing fee, with the employer initially agreeing to pay, for example, 75% of the arbitration and arbitrator fees and costs pending a final reallocation of such costs and expenses in a final arbitration award. See also, American Arbitration Association’s National Rules for Resolution of Employment Disputes, permitting the arbitrator to allocate such items.

¹⁵452 Mich. 405, 550 NW2d 243 (1996).

¹⁶U.S., No. 99-1823, petition for writ of certiorari granted 3/26/01.

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The Mediation Training & Consultation Institute will present a forty-hour divorce and custody mediation training in Ann Arbor from November 12, 2001 through November 16, 2001. The faculty will consist of Zena D. Zumeta and Associates, and the program has been approved as a training program by the Supreme Court Administrative Office under MCR 3.216.

For further information, contact Zena D. Zumeta at 330 E. Liberty, Ste. 3A, Ann Arbor, Michigan, 48104; telephone (734) 663-1155; fax (734) 663-0524; e-mail mtci@igc.org.

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