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GAO

Report to Congressional Requesters

July 1995

EMPLOYMENT DISCRIMINATION

Most Private-Sector Employers Use Alternative Dispute Resolution

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Health, Education, and
Human Services Division

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The Honorable William L. Clay
Ranking Minority Member
Committee on Economic and
Educational Opportunities
House of Representatives

The Honorable Major R. Owens
House of Representatives

In fiscal year 1994, the Equal Employment Opportunity Commission (EEOC) received over 90,000 discrimination complaints from employees, almost twice the number filed in 1981 and 10 times the number in 1966. The number of employment law cases filed in the federal courts has increased similarly.[1] In resolving these complaints, employers have become more and more concerned about the costs—in time, money, and good employee relationships. In response, some employers have adopted internal alternative dispute resolution (ADR) approaches, including arbitration, that is, submitting disputes to a neutral third person—an arbitrator—for resolution. Some require their employees to agree to mandatory, binding arbitration of discrimination complaints as a condition of their employment, forcing employees to waive the right to sue.

To determine the extent to which employers in the private sector have implemented ADR approaches, you asked us to determine (1) the extent to which private-sector employers use ADR approaches, especially arbitration, to resolve discrimination complaints of employees not covered by collective bargaining agreements[2] and (2) the fairness of employers' arbitration policies.

To determine the extent of the use of ADR approaches, we sent a questionnaire to a stratified, random sample of 2,000 businesses that had (1) filed equal employment opportunity (EEO) reports with the EEOC in 1992 and (2) reported having more than 100 employees. ADR approaches include negotiation, fact finding, peer review, internal mediation, external

[1]In addition to discrimination cases, employment law cases include suits filed by individuals under such statutes as the Fair Labor Standards Act, the Family and Medical Leave Act, the Employee Polygraph Protection Act, and the Employee Retirement Income Security Act.

[2]When unionized employees collectively bargain with employers, arbitration procedures are strictly controlled by the collective bargaining agreement. The employer and the union negotiate the (1) disputes subject to arbitration and (2) rules to be followed during arbitration.

mediation, and arbitration. The following are the definitions of these approaches we used in the questionnaire:

- Negotiation is a discussion of a complaint by the employee and employer and, if appropriate, their counsels, with the goal of setting the terms of a resolution. Negotiation does not require involvement of a neutral party and could include an open door policy, that is, a policy that guarantees an employee the opportunity to discuss his or her complaint with a senior manager without fear of reprisal.
- Fact finding involves a neutral person—someone either within the company or external to the company—investigating a complaint and developing findings that may form the basis for resolution. This would not include formal investigations of charges by government agencies, such as the EEOC.
- Peer review involves a panel of employees or employees and managers working together to resolve employment complaints.
- Internal mediation is a process for resolving disputes in which a neutral person—trained in mediation methods—from within the company helps the disputing parties negotiate a mutually acceptable agreement. This process does not lead to an imposed solution.
- External mediation is a process for resolving disputes in which a neutral person—trained in mediation methods—from outside the company helps the employer and employee negotiate a mutually acceptable agreement. This process does not lead to an imposed solution.
- Arbitration involves a neutral person—an arbitrator from outside the company—deciding how the complaint is to be resolved. The arbitrator's decision is usually binding on both the employee and the employer.

To obtain more detailed information on ADR approaches, we telephoned those employers who had reported using arbitration and asked each of them to send us a description of the arbitration policies used. As part of our assessment of the policies, we compared the policies' provisions with the key quality standards[3] proposed by the Commission on the Future of

[3]The Commission proposed six standards relating to (1) selection of the arbitrator, (2) procedures for aggrieved employees to gather information, (3) payment of the arbitrator, (4) awards and remedies, (5) final arbitrator ruling, and (6) judicial review. Although the Commission recognized a consensus among employers and employees that a fair system must provide the right to independent representation if the employee wants it, this was not included as one of the six standards. However, we included this feature in our analysis of policies.

Worker-Management Relations[4] as standards for a private arbitration system that ensures employees a fair and full airing of their complaints. Further details of our scope and methodology, including sampling errors, are discussed in appendix I. Unless specifically noted, sampling errors do not exceed plus or minus 5 percent. Our review was performed in accordance with generally accepted government auditing standards between April 1994 and April 1995. The questionnaire is reproduced in appendix II, along with a summary of the responses.

Results in Brief

We estimate, on the basis of our questionnaire results, that almost all employers with 100 or more employees use one or more ADR approaches. Arbitration is one of the least common approaches reported. Some employers using arbitration make it mandatory for all workers.

Employer policies on arbitrating discrimination complaints vary considerably in form and level of detail. However, some of these policies, such as those for employees obtaining information and empowering the arbitrator to use remedies equal to those under law, would not meet standards of fairness proposed recently by the Commission on the Future of Worker-Management Relations, which was established by the Secretary of Labor and the Secretary of Commerce at the President's request.

Background

If workers believe that they have been discriminated against in an employment matter, they may generally file a charge with EEOC, one of several federal agencies responsible for enforcing equal employment opportunity (EEO) laws and regulations.[5] Under title VII of the Civil Rights Act of 1964, EEOC investigates—and may litigate, on its own behalf or on behalf of the charging party—charges of employment discrimination because of race, color, religion, sex, or national origin. EEOC has similar responsibility under the Age Discrimination in Employment Act of 1967,

[4]At the request of the President, the Commission was established in May 1993 and asked to investigate and report back on three primary issues: what changes might be needed in labor-management cooperation and employee participation to enhance workplace productivity; how the legal framework and practices of collective bargaining should be altered to enhance cooperative behavior, improve productivity, and reduce conflict and delay; and what can be done to enable employers and employees to resolve workplace problems themselves, rather than turn to state and federal courts and government regulatory bodies. In December 1994, the Commission completed its tasks and issued its final report, summarizing its findings and recommendations.

[5]In some instances, employees of federal contractors can file discrimination complaints with the Office of Federal Contract Compliance Programs in the Department of Labor. Also, 46 states, 40 localities, Puerto Rico, the District of Columbia, and the Virgin Islands have established fair employment practice agencies to investigate employment discrimination. Individuals in these jurisdictions generally may choose to file charges with either EEOC or the appropriate state or local agency.

which prohibits employment discrimination against workers aged 40 and older; under the Equal Pay Act of 1963, which prohibits payment of different wages to men and women doing the same work; and under the Americans With Disabilities Act, which prohibits employment discrimination against workers with physical or mental disabilities.

In April 1995, EEOC announced changes in the way it processes private-sector employment discrimination charges. As soon as guidance and implementation instructions are issued, EEOC will begin categorizing charges according to three priorities. The first category is for charges that appear more likely than not to involve discrimination, and these charges will be fully investigated. The second category includes charges that appear to have some merit but will require additional evidence to determine whether a violation occurred. The third category includes charges that can be immediately dismissed without investigation. EEOC also announced that it will initiate in October 1995 a voluntary ADR program using mediation to handle some of its workplace discrimination charges. Under this planned program, some employees filing charges and their employers will work with a neutral mediator to settle discrimination disputes, rather than go through EEOC's traditional investigative procedures. If the employer and employee fail to reach a resolution, the charge will be returned to EEOC's regular caseload.

If EEOC investigates the charge, it notifies the employer of the charge and requests information from the employer and any witnesses with direct knowledge of the incident that led to the discrimination charge. If the evidence obtained by the EEOC investigator does not show reasonable cause to believe discrimination occurred—for example, the employee was terminated for poor performance and not due to discrimination—EEOC dismisses the case after issuing a "no cause" finding and a right-to-sue letter. When the evidence shows that reasonable cause exists to believe discrimination occurred, EEOC tries conciliation. If conciliation attempts fail, EEOC may go to court on behalf of the employee, although it rarely chooses to do so. EEOC officials have said that the Commission lacks sufficient legal staff to significantly increase the number of cases it can litigate effectively. When EEOC decides not to go to court, it issues the employee a right-to-sue letter, which allows the employee to sue.

While charges filed with EEOC may lead to legal relief for employees with valid claims, each charge results in costs to the employer, even though most are found to be in compliance with the law. Although the employee does not pay for the EEOC investigation, he or she may incur psychological

costs while pursuing the claim, the average time of which was 328 days in fiscal year 1994. The federal government also incurs costs for each charge investigated.

ADR approaches are being considered by employers because "almost any system is quicker, cheaper, and less harrowing than going to court," according to an official of the Equal Employment Advisory Council, an employers' group. Their concerns have recently increased as a result of (1) multimillion dollar jury awards to employees and (2) the provision in the Civil Rights Act of 1991 that permits punitive damages in cases of intentional discrimination under title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act. In addition, a 1991 U.S. Supreme Court decision upholding mandatory arbitration for statutory claims concerning employment disputes in the securities industry[6] has led to consideration of arbitration in particular. Finally, some employers feel that ADR approaches can minimize the adversarial relationship between employer and employee resulting from such complaints.

Commission Appointed to Address Worker-Management Relations

The Commission was appointed at the request of the President by the Secretary of Commerce and the Secretary of Labor to address three questions:

- What (if any) new methods or institutions should be encouraged, or required, to enhance workplace productivity through labor-management cooperation and employee participation?
- What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?
- What (if anything) should be done to increase the extent to which workplace problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and governmental bodies?

In researching this third question, the Commission considered the range of federal and state laws regulating the workplace, including those ensuring minimum wages and maximum hours; a safe and healthy workplace; secure and accessible pension and health benefits; adequate notice of plant closings and mass layoffs; unpaid family and medical leave; and bans

[6]See Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes (GAO/HEHS-94-17, Mar. 30, 1994).

on wrongful dismissal, as well as those outlawing discrimination on the basis of race, sex, religion, age, or disability.[7]

According to the Commission's December 1994 report, both employers and employees agree that, if private arbitration is to serve as a legitimate form of private-sector enforcement of public employment law, arbitration policies must provide

- a neutral arbitrator who knows the laws in question and understands the concerns of the parties,
- a fair and simple method by which the employee can obtain the necessary information to present his or her claim,
- a fair method of cost-sharing between the employer and employee to ensure affordable access to the system for all employees,
- the right to independent representation if the employee wants it,
- a range of legal remedies equal to those available through litigation,
- a written opinion by the arbitrator explaining his or her rationale for the decision, and
- sufficient judicial review to ensure that the result is consistent with employment laws.

The Commission noted, however, that most experts who had testified before it agreed that imposition of fairness standards must not turn arbitration into a second court system.

Some Existing Arbitration Policies Would Not Meet Commission's Recently Proposed Standards

In our review of employers' arbitration policies, we found that some do not meet the fairness standards recently proposed by the Commission on the Future of Worker-Management Relations.

Using the Commission's six standards, we evaluated dispute resolution policies provided by 26 employers that reported using arbitration to resolve discrimination complaints by employees not covered under collective bargaining agreements.[8,9] Most of these policies, which are discussed below, are recent: 15 had been implemented in the past 5 years.

[7]Employer views on these topics are discussed in Workplace Regulation: Information on Selected Employer and Union Experiences (GAO/HEHS-94-138, June 30, 1994).

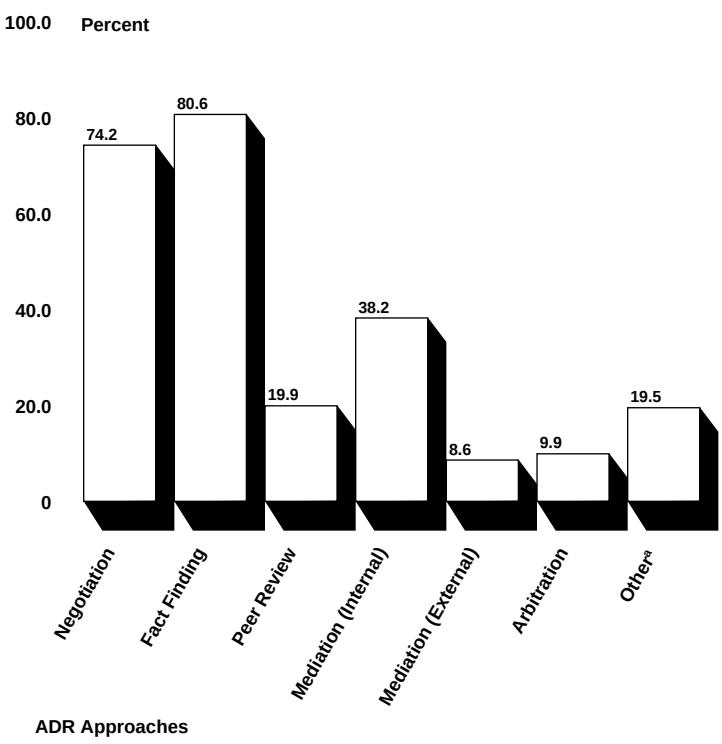
[8]From the employers that indicated in their questionnaire responses that they used arbitration, we excluded employers we could not contact, employers who said they had no written policy, and employers who did not use arbitration to resolve discrimination complaints by employees not covered by collective bargaining agreements (see app. I).

[9]We also evaluated whether the policies permitted employees independent representation if they wanted it.

Almost All Employers Reported Using ADR Approaches, but Few Use or Plan to Use Arbitration

Almost 90 percent of employers that had more than 100 employees and filed EEO reports with EEOC in 1992 use at least one ADR approach to resolve discrimination complaints. The reported use of these approaches, which ranges from about 80 percent for fact finding to about 9 percent for external mediation, is shown in figure 1. Almost 40 percent of these employers use a trained mediator from within the company to help resolve disputes. Only about 10 percent of employers use arbitration. Arbitration was mandatory for all covered employees for about one-fourth to one-half of the employers using this approach.[10]

Figure 1: Percentage of Businesses Using Selected ADR Approaches



[a]Approaches cited include internal investigation, open door policy, and using grievance procedures.

In addition to those firms whose policies include arbitration, 8.4 percent of employers with more than 100 employees that filed EEO reports with EEOC

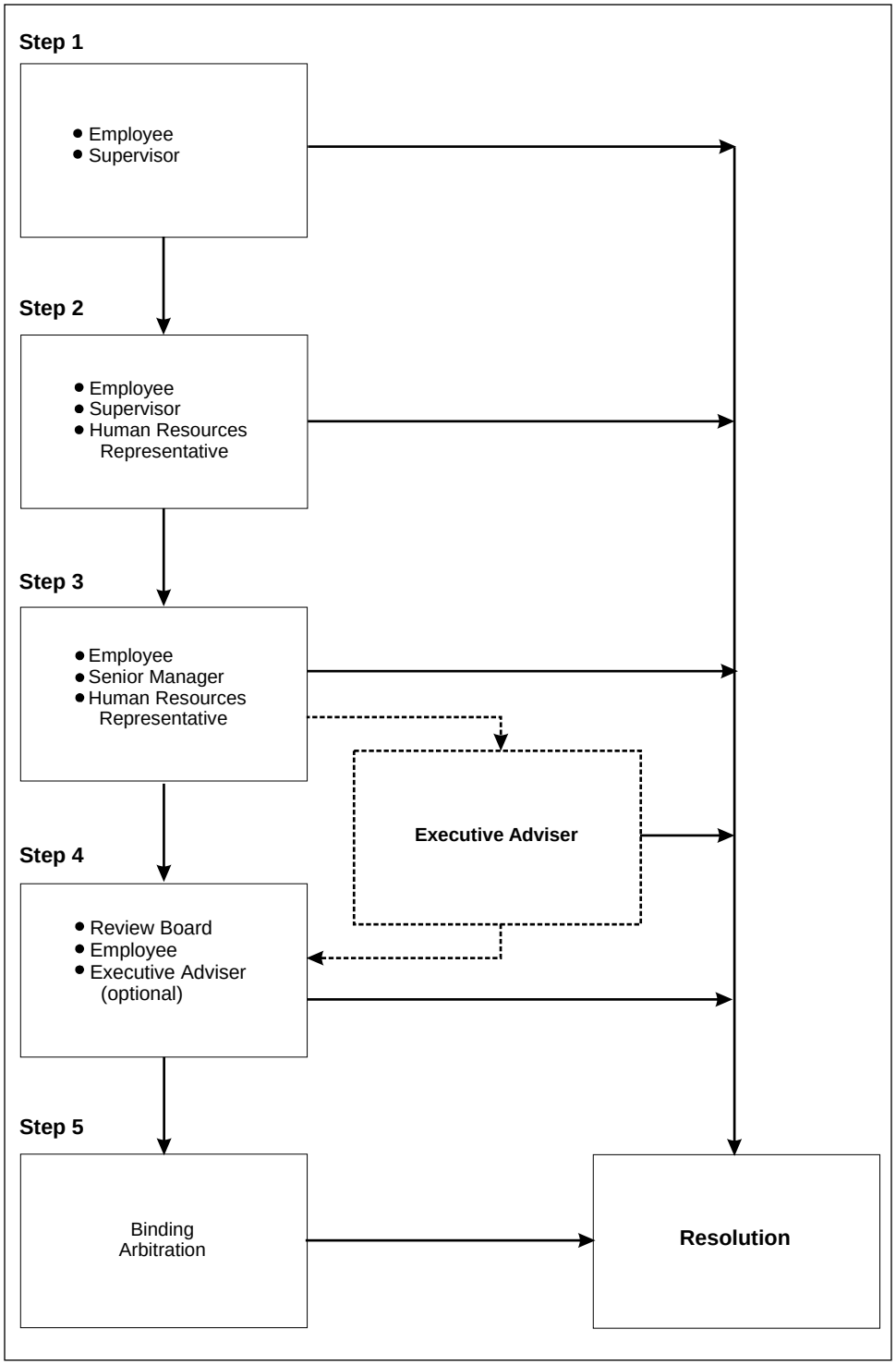
[10]The percentage of employers using arbitration is 39.0 percent plus or minus 16.1 percent.

in 1992 reported that they are considering implementing a policy requiring arbitration of employee discrimination complaints.

Arbitration Is Frequently the Final Step in a Policy Including Other ADR Approaches

A dispute resolution policy frequently has a series of steps, such as those discussed below, that can be linked to different ADR approaches. Usually, a policy that includes arbitration has it as the final step. (See fig. 2 for an example of a dispute resolution system that includes arbitration.)

Figure 2: Steps in Example of Company's Employee Dispute Resolution Policy

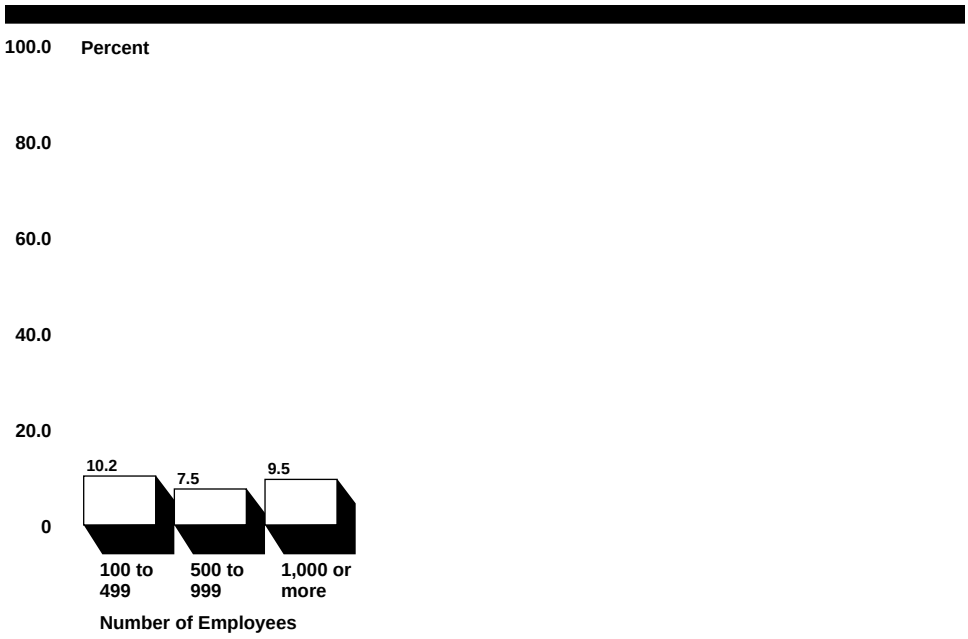


Steps 1 and 2: Negotiation	In step 1, an employee with a complaint is encouraged to discuss the matter with his or her immediate supervisor. The employee and supervisor should make sincere, good faith efforts to resolve the matter. If the employee prefers not to present the matter directly to the immediate supervisor or if they cannot resolve the matter, the employee then discusses the matter with a representative of the establishment's human resources department and decides whether to proceed to the next step. In step 2, the employee may request that a representative of the establishment's human resources department conduct an assessment of the dispute and help the employee and supervisor reach a resolution.
Step 3: Fact Finding	If resolution has not been reached, an employee may proceed to step 3 and request an investigation by a representative of the establishment's human resources department. The results of the investigation are discussed with the appropriate senior manager and the employee. The senior manager decides how the complaint should be resolved. A decision letter is sent to both the employee and supervisor at the end of this step.
Step 4: Review Board	An employee who is dissatisfied with the senior manager's decision may request that the problem be reviewed by a review board, which is composed of an executive, a manager, and a representative from the corporate human resources office. The employee may request the help of an executive adviser in preparing for this step. At the end of step 4, the board will make a final company decision on the dispute's merits, including corrective action, if appropriate.
Step 5: Arbitration	If an employee is dissatisfied with the board's decision, he or she may submit the complaint to binding arbitration, which is step 5 of this company's dispute resolution policy. An employee must give notice within 20 working days of the date the board reached its decision. The arbitration is to be administered in accordance with the procedures of the American Arbitration Association (AAA), a nonprofit organization that trains arbitrators and maintains lists of arbitrators who can be used to resolve different types of disputes, including labor-management and employment disputes. The arbitration will be heard by an arbitrator who is licensed to practice law in the state in which the arbitration takes place. Under this company's policy, the employer and the employee share equally the fees and costs of the arbitrator, although the arbitrator may order the company to pay the employee's costs in excess of 2 weeks' salary if the employee demonstrates a continuing inability to pay his or her entire share.

Smaller Businesses Are as Likely to Report Using Arbitration as Larger Ones

Larger employers with larger human resource and legal staffs might be assumed to be more likely to use arbitration. However, we found no statistically significant difference in use of arbitration based on business size. Figure 3 shows the percentage of businesses using arbitration by size.

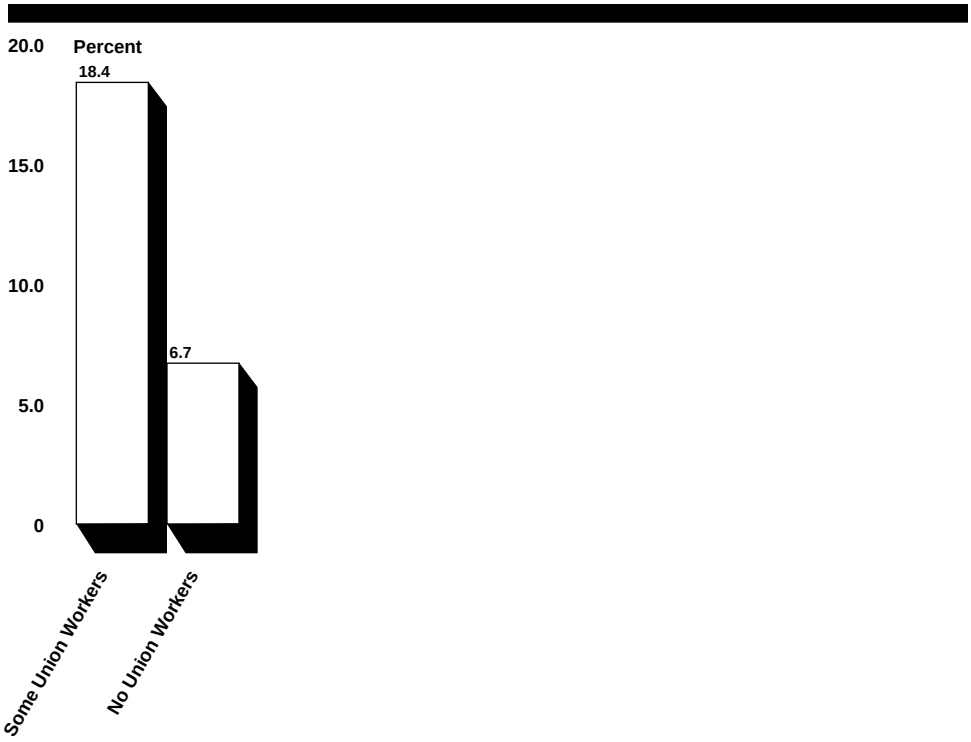
Figure 3: Percentage of Businesses Using Arbitration, by Size



Firms With Some Workers Covered by Collective Bargaining Agreements Are More Likely to Report Using Arbitration

Since arbitration has long been a feature of grievance procedures in the collective bargaining arena, employers that have collective bargaining agreements with some of their workers might be more likely to use arbitration with those not covered by collective bargaining. Figure 4, which shows that businesses with some union workers are nearly three times as likely as those with no union workers to use arbitration, lends credence to this notion.

Figure 4: Percentage of Businesses Using Arbitration, by Existence of Union



Note: Confidence interval for businesses with some union workers is 18.4 percent plus or minus 8 percent.

Selection of Arbitrator Usually Involves Both Employer and Employee

In its final report, the Commission states that the arbitrator selection process should allow both the employer and the affected employee(s) to participate. The arbitrator should be selected from a roster of qualified arbitrators who have training and experience in the area of law covering the dispute being arbitrated and are certified by professional associations specializing in such dispute resolution. The process should ensure that rosters include significant numbers of women and minorities. Neither party should be able to limit the roster unilaterally to avoid the possibility that the arbitrator selected will be biased in favor of that party.

While we did not evaluate the qualifications or demographics of the panels from which arbitrators would be chosen, we noted that in 22 of the 26 policies we examined, both the employee and employer are directly involved in selecting the arbitrator. In 12 policies, this is done with the help of AAA. Immediately after the complaint is filed, AAA simultaneously

sends an identical list of people chosen from its panel of employment arbitrators to both the employer and the employee. The employer and the employee (1) strike any names they object to and (2) number the remaining names in order of preference. In a single arbitrator case, the employer and the employee may each strike up to three names. AAA chooses an arbitrator from among those approved on both lists in accordance with the designated order of preference. If no agreement is reached on any of the names, AAA makes the appointment from other members of the panel. In seven policies we reviewed, the employer and employee alternate striking names from a list. One policy rather vaguely calls for selection "based on the parties' preferences." In two policies, the employer selects the names on the list, but the employee is involved in selecting the arbitrator.

In one of the remaining four policies, the employer unilaterally selects the arbitrator, while the other three do not discuss arbitrator selection.

Employee Access to Information Is Rarely Discussed

According to the Commission, employees should have the opportunity to gather the relevant information they need to support their legal claims. Employees pursuing a discrimination complaint, for example, should be granted access to their personnel files. Broader access to personnel files should also be available to employees bringing systemic discrimination claims. During arbitration, an employee with a complaint should be allowed at least one deposition,[11] with a company official of the employee's choosing. The arbitrator should be empowered to expand discovery (pretrial or prehearing procedure by which one party gains information held by the other) to include any material he or she finds valuable for resolving the dispute.

Only three policies we reviewed discuss access to information. One policy states that discovery will be allowed and governed under the discovery rules of the state code of civil procedure unless otherwise agreed to by the parties; one policy provides for 2 days of depositions; and the remaining policy limits the taking of depositions to one company representative, two other persons, and one expert witness named by the company but also allows requests for documents related to the complaint.

[11]A deposition is a statement of a witness under oath in which both parties can be present and cross-examine the witness and which is transcribed by an official reporter.

Both Employer and Employee Usually Share Payment of Arbitrator

To ensure impartiality of the arbitrator, the Commission proposes that both the employee and the employer contribute to the arbitrator's fee. Ideally, the employee contribution should be capped in proportion to the employee's salary to avoid discouraging claims by low-wage workers.

Seven policies do not address cost sharing. In four policies, the employer pays for all arbitration costs; costs are to be shared equally in nine policies; and the employee share is either capped or limited to less than half the costs in the remaining six policies. For example, one employer pays all costs in excess of $50. Another firm pays 80 percent of the arbitration costs, while the employee is responsible for 20 percent.

Right to Independent Counsel Generally Permitted

According to the Commission, both employers and employees agree that fairness requires the right of independent representation if the employee wants it. AAA rules state that "any party may be represented by counsel or by any other representative."

Twenty-one of the policies we reviewed permit the employee to be represented by an attorney during arbitration. Four policies do not address representation. Only one policy specifically states that representation by an attorney will not be permitted.

Remedies Rarely Addressed, but Not Specifically Limited by Policies

The Commission states that the introduction of a workplace arbitration system should not curb substantive employee protections. This means that private arbitration should offer employees the same array of remedies available in court. Arbitrators should be allowed to award whatever relief—including reinstatement, back pay, additional economic damages, punitive awards, injunctive relief, and attorney's fees—would be available in court under the law in question.

Eighteen of the 26 policies do not address legal remedies—such as monetary compensation—available to the arbitrator. Of the eight remaining policies, seven state that the arbitrator can use any remedy available under law, while one policy prohibits the arbitrator from assessing damages beyond those required to compensate for actual losses.

Final Arbitrator Decision Is Sometimes in Writing

The Commission states that the arbitrator should issue a written opinion that states the findings of fact and reasons that led to his or her decision. This opinion need not correspond in style or length to a court opinion.

However, it should set out, in understandable terms, the basis for the arbitrator's ruling.

Ten policies do not address the form of the arbitrator's decision. The remaining 16 policies require the arbitrator to provide a written ruling, but specific provisions of these policies vary considerably. For example, one policy requires the decision to "contain findings of fact and conclusions of law supporting the decision and the award," while another states that the written opinion should not include findings of fact and conclusions of law unless requested by both the employer and the employee.

Judicial Review Is Not Addressed in Policies

According to the Commission, judicial review of an arbitrator's ruling must ensure that the ruling reflects an appropriate understanding and interpretation of the relevant legal doctrines.[12] A reviewing court should defer to an arbitrator's findings of fact as long as it has substantial evidentiary basis. However, the reviewing court's authoritative interpretation of the law should bind arbitrators much as it now binds administrative agencies and lower courts. For example, if an arbitration decision on a sexual harassment complaint disregards the standard set for such claims by the Supreme Court, the reviewing court should have the power to overturn the arbitration decision as inconsistent with current law.

No policies require that the arbitration decision reflects an appropriate understanding and interpretation of relevant legal doctrines and be reviewable by a court on that basis. Sixteen policies call for the arbitration results to be "final and binding." However, none of these policies specifically provide for judicial review. The remaining 10 policies do not address reviewing the arbitrator's opinion.

Conclusions

Almost all employers that had more than 100 employees and filed EEO reports with the EEOC in 1992 have established some sort of grievance procedure using one or more ADR approaches. However, relatively few use arbitration, and even fewer make it mandatory for employees.

Existing arbitration policies vary greatly. If expected to conform with all the criteria for fairness recently proposed by the Commission on the Future of Worker-Management Relations, most would not do so. This is

[12]Under present law, judicial review of arbitration decisions, unless explicitly stated otherwise in the arbitration agreement, is generally very limited.

especially true when considering the criteria for an employee's opportunity to obtain information for empowering the arbitrator to use remedies equal to those available under law and for providing that the arbitrator's decision be subject to judicial review concerning the arbitrator's interpretation of relevant legal doctrines.

We are sending copies of this report to interested congressional committees, the Chairman of the Equal Employment Opportunity Commission, and other interested parties. Please call Cornelia Blanchette, Associate Director, on (202) 512-7014, or me if you or your staff have any questions. Other major contributors to this report are listed in appendix III.

Linda G. Morra
Director, Education and Employment
Issues

Contents

Abbreviations

AAA	American Arbitration Association
ADR	alternative dispute resolution
EEO	equal employment opportunity
EEOC	Equal Employment Opportunity Commission

Scope and Methodology

We designed a questionnaire to obtain information on the use of alternative dispute resolution (ADR) approaches by private-sector businesses to resolve discrimination complaints brought by employees not covered by collective bargaining agreements. We discussed development of this questionnaire with the Equal Employment Advisory Committee, a nonprofit association of employers; Chorda Conflict Management, Inc., an Austin, Texas, consulting firm that helps employers design dispute resolution systems; and the National Task Force on Civil Liberties in the Workplace of the American Civil Liberties Union.

Before mailing our questionnaire, we pretested it with officials of five employers. Results of the pretests indicated that questions, terms, and definitions were generally familiar, clear, and free from confusion. During the face-to-face pretest, officials completed the questionnaire as if they had received it in the mail. Our staff recorded the time necessary to complete the survey and any difficulties that respondents experienced. Once the questionnaire was completed, we used a standardized series of questions to gain feedback on difficulties and questions encountered with each item.

We surveyed a nationally representative sample of businesses with more than 100 employees in 1992, the most recent year for which data were available. To determine our universe, we used the 1992 EEO-1 data file maintained by the EEOC. This file consists of reports required to be filed by all businesses with more than 100 employees during the reporting period, as well as certain firms with fewer than 100 employees if they are government contractors. We deleted consolidated reports[13] and reports from businesses that reported having less than 100 employees. This yielded a universe of about 87,500 businesses.

We sent the survey to a sample of 2,000 businesses. The sample was selected from three different strata by size: 100 to 499 employees, 500 to 999 employees, and 1,000 or more employees. We sent questionnaires to random samples of businesses in each of the three strata. We obtained an overall response rate of 75.0 percent. Response rates for individual strata ranged from 63.6 percent to 80.0 percent. Table I.1 shows the universe of potential establishments, the sample size, and the number of establishments for which questionnaires were received by strata.

[13]Headquarters establishments are required to provide reports consolidating the statistics for all a firm's establishments.

Table I.1: Universe of Potential Business Establishments, Sample Size, and Respondents by Strata

Size of business establishment	Universe	Sample	Respondents
100 to 499 employees	75,178	500	318
500 to 999 employees	7,534	500	381
1,000 or more employees	4,785	1,000	800
Total	**87,497**	**2,000**	**1,499**

As agreed with the requesters' offices, we pledged that businesses' responses would be kept confidential. A sample questionnaire showing aggregate responses and percentages appears in appendix II.

We calculated sampling errors for estimates from this survey at the 95-percent confidence level. This means the chances are about 19 out of 20 that the actual percentage being estimated falls within the range covered by our estimate, plus or minus the sampling error. Sampling errors for estimates discussed in this report are shown in table I.2.

Table I.2: Sampling Errors of Variables Used

Variable	Percent	Sampling error (percentage points)
Employer uses at least one ADR approach	88.7	+-3
Employer uses negotiation	74.2	+-4
Employer uses fact finding	80.6	+-4
Employer uses peer review	19.9	+-4
Employer uses internal mediation	38.2	+-5
Employer uses external mediation	8.6	+-3
Employer uses arbitration	9.9	+-3
Employer uses other ADR approach	19.5	+-4
Arbitration mandatory for all it applies to	39.0	+-16
Employers with 100 to 499 employees using arbitration	10.2	+-4
Employers with 500 to 999 employees using arbitration	7.5	+-3
Employers with 1,000 or more employees using arbitration	9.4	+-2
Employers with some union workers using arbitration	18.4	+-8
Employers with no union workers using arbitration	6.7	+-3

We weighted the data to account for different sampling rates and varying response rates among the strata. Therefore, our data reflect national

estimates for businesses with more than 100 employees and are based on the assumption that the nonrespondents are similar to the respondents.

To obtain more detailed information on dispute resolution policies, we then telephoned the 132 respondents that reported using arbitration to resolve discrimination complaints brought by workers not covered by a collective bargaining agreement. As shown in table I.3, we eventually received and analyzed 26 policies.

Table I.3: Results of Telephone Survey of Businesses Reporting Use of Arbitration

	Number of businesses
Result of telephone survey	**Total businesses**
Could not reach business by telephone	31
No contact provided on questionnaire	8
Did not respond to our calls	23
Does not use arbitration for employment discrimination complaints by nonunion workers	34
Does not use arbitration	8
Does not use arbitration for discrimination complaints	1
Arbitration used for union workers only	22
Arbitration by securities forums, not employers	3
No written policy for nonunion workers	19
Declined to send policy	22
Policy received	26
Total businesses telephoned	**132**

Summary of Responses to GAO's Survey of Employment Dispute Resolution Policies and Practices

Employment Dispute Resolution:
Policies and Practices

Introduction

The Congress has asked the U.S. General Accounting Office (GAO) to conduct a study of employers' personnel policies, including arbitration, for resolving disputes that arise under federal equal employment statutes for employees not covered under collective bargaining agreements. These disputes arise from allegations of discrimination because of race, sex, religion, country of origin, age, or disability.

As part of our study, we are sending this questionnaire to a random sample of business establishments to collect information on the policies and practices they use to resolve employment discrimination disputes. This questionnaire should take about 15 minutes to complete. Most of the questions can be answered quickly and easily by checking boxes.

We will keep your responses to the questionnaire strictly confidential. Only those responsible for the analysis of the survey data will know how you have responded. When GAO reports the results of this survey, no questionnaire response will be attributed to any specific establishment. Your responses will be combined with those of other respondents and reported in the aggregate.

Instructions

For the purposes of this survey, we would like you to respond for this business establishment alone, even if it is part of a larger organization. If this establishment is a corporate headquarters, please respond only for the corporate headquarters level of the organization.

If you have any questions about this questionnaire, please call Mr. Bob Sampson collect at (202) 512-7251.

Please return the completed questionnaire in the enclosed self-addressed envelope within 10 days of receipt. In the event that the envelope is misplaced, please send your questionnaire to

Mr. Bob Sampson
U.S. General Accounting Office
NGB-Education and Employment
441 G Street, N.W.
Washington, DC 20548

Thank you for your help.

Background

1. Is this business establishment a corporate headquarters? *(Check one)* ***(n=1487)***

   1. **35.9%** Yes --> **If yes, in responding to the following questions, please answer only for this establishment, that is, the corporate level of your organization.**

   2. **64.1%** No --> ***If no, please respond only for this establishment even if it is part of a larger organization.***

2. About how many employees (full-time and part-time) does this business establishment currently employ? *(Enter number)* ***(n=1365)***

   _____ Total employees

   0-99 - 13.0%
   100-499 - 63.5%
   500-999 - 10.5%
   1000+ - 13.0%

3. Are the employees at this business establishment covered or not covered by collective bargaining agreements? *(Check one)* ***(n=1496)***

   1. **6.0%** Yes, all employees are covered by collective bargaining agreements
      ||
      ||
      \/
      If yes, stop here! Please return this questionnaire in the enclosed envelope. There is no need to answer the remaining questions, but it is important that we receive your responses to the first 3 questions. Your cooperation is appreciated. Thank You.

   2. **24.7%** Yes, some employees are covered by a collective bargaining agreement, but some are not

   3. **69.3%** No, none of the employees at this establishment are covered by a collective bargaining agreement

Data presented using percentages rounded to nearest tenth; totals may not sum to 100 due to rounding.

4. About what proportion of employees at this establishment are NOT covered by a collective bargaining agreement? (*Enter percentage*) ***(n=1179)***

   _____ % of employees are NOT covered by a collective bargaining agreement

   For the remainder of the questionnaire, please consider your employee discrimination complaint resolution policies and practices as they relate to only those employees who are NOT covered by a collective bargaining agreement.

   0-24% - 14.3%
   24-49% - 7.9%
   50-74% - 5.6%
   75-100% - 72.2%

Dispute Resolution Policies

Negotiation

5. Question in this section are about negotiation. By "negotiation," we mean a discussion of a complaint by the parties and, if appropriate, their counsel with the goal of setting the terms of a resolution. Negotiation does not require involvement of a neutral party. Negotiation could include an "open door" policy.

   Does this establishment have a policy to use negotiation as a method to resolve discrimination complaints that arise under federal equal employment status? *(Check One)* ***(n=1448)***

   1. **74.2%** Yes --> ***If yes, go to question 7***
   2. **25.7%** No

6. Is this establishment considering instituting a policy to use negotiation to resolve discrimination complaints? *(Check o*ne) ***(n=301)***

   1. **15.4%** Yes --> ***If yes, go to question 11***
   2. **84.6%** No--> *If no, go to question 11*

7. We would like to know what types of employees this policy applies to. Does this policy apply to all those not covered by a collective bargaining agreement or only to those who are in certain positions or located in certain divisions or departments? *(Check one)* ***(n=1135)***

   1. **99.0%** All
   2. **1.0%** Only those in certain positions or certain divisions or departments

8. Does this policy apply to only those who were hired on or after a certain date? *(Check one)* ***(n=1134)***

   1. **0.1%** Yes
   2. **99.9%** No--> ***If no, go to question 10***

9. For those employees who were hired before that date, does this policy begin to apply to them when their status changes (for example, promotion, transfer, position change)? *(Check one)* ***(n=5)***

   1. **65.6%** Yes
   2. **34.4%** No

10. Is negotiation voluntary for everyone it applies to, voluntary for some that it applies to, or mandatory for everyone that it applies to? *(Check one)* ***(n=1121)***

    1. **90.5%** Voluntary for all
    2. **0.6%** Voluntary for some
    3. **8.9%** Mandatory for all

Fact Finding

11. For this section, our questions are about fact finding. By "fact finding," we mean having a neutral party (either someone within the company or external to the company) investigate a complaint and develop findings that may form the basis for resolution. This would not include formal complaint investigations by government agencies, such as the Equal Employment Opportunity Commission (EEOC).

    Does this establishment have a policy to use fact finding as a method to resolve discrimination complaints that arise under federal equal employment statutes? *(Check one)* ***(n=1446)***

    1. **80.6%** Yes --> ***If yes, go to question 13***
    2. **19.4%** No

12. Is the establishment considering instituting a policy to use fact finding to resolve discrimination complaints? *(Check one)* ***(n=241)***

    1. **10.8%** Yes --> ***If yes, go to question 17***
    2. **89.2%** No--> ***If no, go to question 17***

13. Does this policy apply to all those not covered by a collective bargaining agreement or only to those in certain positions or located in certain divisions or departments? *(Check one)* ***(n=1199)***

    1. **99.2%** All
    2. **0.8%** Only those in certain positions or certain divisions or departments

14. Does this policy apply to only those who were hired on or after a certain date? *(Check one)* ***(n=1196)***

    1. **0.1%** Yes
    2. **99.9%** No--> ***If no, go to question 16***

15. For those employees who were hired before that date, does this policy begin to apply to them when their status changes (for example, promotion, transfer, position change)? *(Check one)* ***(n=4)***

    1. **61.6%** Yes
    2. **38.4%** No

16. Is fact finding voluntary for everyone it applies to, voluntary for some that it applies to, or mandatory for everyone that it applies to? *(Check one)* ***(n=1184)***

    1. **54.0%** Voluntary for all
    2. **1.1%** Voluntary for some
    3. **45.0%** Mandatory for all

Peer Review

17. For this section, our questions are about peer review. By "peer review," we mean a panel of employees or employees and managers working together to resolve employment complaints.

    Does this establishment have a policy to use peer review as a method to resolve discrimination complaints? *(Check one)* ***(n=1447)***

    1. **19.9%** Yes --> ***If yes, go to question 19***
    2. **80.1%** No

18. Is this establishment considering instituting a policy to use peer review to resolve discrimination complaints? *(Check one)* ***(n=1136)***

    1. **11.1%** Yes --> ***If yes, go to question 23***
    2. **88.9%** No --> ***If no, go to question 23***

19. Does this policy apply to all those not covered by a collective bargaining agreement or only to those in certain positions or located in certain divisions or departments? *(Check one)* ***(n=305)***

    1. **93.3%** All
    2. **6.7%** Only those in certain positions or certain divisions or departments

20. Does this policy apply to only those who were hired on or after a certain date? *(Check one)* ***(n=305)***

    1. **0.3%** Yes
    2. **99.7%** No--> ***If no, go to question 22***

21. For those employees who were hired before that date, does this policy begin to apply to them when their status changes (for example, promotion, transfer, position change)? *(Check one)* ***(n=4)***

    1. **100%** Yes
    2. **0%** No

22. Is peer review voluntary for everyone it applies to, voluntary for some that it applies to, or mandatory for everyone that it applies to? *(Check one)* ***(n=300)***

    1. **69.2%** Voluntary for all
    2. **5.0%** Voluntary for some
    3. **25.7%** Mandatory for all

Internal Mediation

23. Questions in this section are about internal mediation. By "internal medication," we mean a process for resolving disputes in which a neutral party--trained in mediation techniques--from within the company helps the disputing parties negotiate a mutually acceptable agreement. This process does not involve an imposed solution.

    Does this establishment have a policy to use internal mediation as a method to resolve these discrimination complaints? *(Check one)* ***(n=1448)***

    1. **38.2%** Yes --> ***If yes, go to question 25***
    2. **61.8%** No

24. Is this establishment considering instituting a policy to use internal mediation to resolve discrimination complaints? *(Check one)* ***(n=908)***

    1. **10.6%** Yes --> ***If yes, go to question 29***
    2. **89.4%** No--> ***If no, go to question 29***

25. Does this policy apply to all those not covered by a collective bargaining agreement or only to those in certain positions or located in certain division of department? *(Check one)* ***(n=524)***

    1. **99.1%** All
    2. **0.9%** Only those in certain positions or certain divisions or departments

26. Does this policy apply to only those who were hired on or after a certain date? *(Check one)* ***(n=522)***

    1. **0.2%** Yes
    2. **99.8%** No--> ***If no, go to question 28***

27. For those employees who were hired before that date, does this policy begin to apply to them when their status changes (for example, promotion, transfer, position change)? *(Check one)* ***(n=5)***

    1. **86.3%** Yes
    2. **13.7%** No

28. Is internal mediation voluntary for everyone it applies to, voluntary for some that applies to, or mandatory for everyone that it applies to? *(Check one)* ***(n=520)***

    1. **75.0%** Voluntary for all
    2. **1.9%** Voluntary for some
    3. **23.1%** Mandatory for all

External Mediation

29. For this section, our questions are about external mediation. By "external mediation," we mean a process for resolving disputes in which a neutral party--trained in medication techniques--external to the company helps the disputing parties negotiate a mutually acceptable agreement. This process does not involve an imposed solution.

    Does this establishment have a policy to use external mediation as a method to resolve discrimination complaints? *(check one)* ***(n=1448)***

    1. **8.6%** Yes -->***If yes, go to question 31***
    2. **91.4%** No

30. Is this establishment considering instituting a policy to use external mediation to resolve discrimination complaints? *(check one)* ***(n=1336)***

    1. **8.9%** Yes-->***If yes, go to question 35***
    2. **91.1%** No-->***If no, go to question 35***

31. Does this policy apply to all those not covered by a collective bargaining agreement or only to those in certain positions or located in certain divisions or departments? *(check one)* ***(n=101)***

    1. **84.6%** All
    2. **15.4%** Only those in certain positions or certain divisions or departments

32. Does this policy apply to only those who were hired on or after a certain date? *(check one)* ***(n=100)***

    1. **0.5%** Yes
    2. **99.5%** No-->***If no, go to question 34***

33. For those employees who were hired before that date, does this policy begin to apply to them when their status changes (for example, promotion, transfer, position change)? *(check one)* ***(n=4)***

    1. **31.7%** Yes
    2. **68.3%** No

34. Is external mediation voluntary for everyone it applies to, voluntary for some that it applies to, or mandatory for everyone that is applies to? *(check one)* ***(n=99)***

    1. **82.4%** Voluntary for all
    2. **4.6%** Voluntary for some
    3. **13.0%** Mandatory for all

Arbitration

35. Questions in this section are about arbitration. By "arbitration," we mean having a neutral party (an arbitrator external to the company) decide how the complaint is to be resolved. The arbitrator's decision is usually binding on both parties.

    Does this establishment have a policy to use arbitration as a method to resolve discrimination complaints? *(check one)* ***(n=1448)***

    1. **9.9%** Yes --> ***If yes, go to question 37***
    2. **90.1%** No

36. Is this establishment considering instituting a policy to use arbitration to resolve discrimination complaints? *(check one)* ***(n=1307)***

    1. **8.4%** Yes --> ***If yes, go to question 41***
    2. **91.6%** No--> ***If no, go to question 41***

37. Does this policy apply to all those not covered by a collective bargaining agreement or only to those in certain positions or located in certain divisions or departments? *(check one)* ***(n=130)***

    1. **55.7%** All
    2. **44.3%** Only those in certain positions or certain division or departments

38. Does this policy apply to only those who were hired on or after a certain date? *(check one)* ***(n=127)***

    1. **11.8%** Yes
    2. **88.2%** No--> ***If no, go to question 40***

39. For those employees who were hired before that date, does this policy begin to apply to them when their status changes (for example, promotion, transfer, position change)? *(check one)* ***(n=17)***

    1. **33.9%** Yes
    2. **66.1%** No

40. Is this policy to use arbitration voluntary for everyone it applies to, voluntary for some that it applies to, or mandatory for everyone that it applies to? *(check one)* ***(n=126)***

    1. **47.1%** Voluntary for all
    2. **13.9%** Voluntary for some
    3. **39.0%** Mandatory for all

41. Does this business establishment use any other dispute resolution methods to resolve discrimination complaints? *(check one)* ***(n=1344)***

    1. **19.5%** Yes --> Please describe _____

       use agency grievance procedures; open door policy; total quality management

       _____

       _____

    2. **80.5%** No

Dispute Resolution Practices

42. During the past year, have any employee discrimination complaints in this establishment, not covered by collective bargaining agreements, been resolved? *(check one)* ***(n=1387)***

1. **44.1%** Yes

2. **55.9%** No--> ***If no, go to question 45***

43. Of the discrimination complaints resolved in the pas year, about what proportion of these complaints were ultimately resolved by each method listed below? *(Enter percentage)*

			0%	1-24%	25-49%	50-74%	75%
(n=846)	1. Negotiation	%	**53.7%**	**10.3%**	**9.4%**	**14.8%**	**11.8%**
(n=846)	2. Fact finding	%	**24.9%**	**6.3%**	**11.2%**	**16.4%**	**41.2%**
(n=850)	3. Peer review	%	**91.1%**	**2.7%**	**3.4%**	**1.6%**	**1.2%**
(n=847)	4. Internal Mediation	%	**70.6%**	**11.3%**	**4.2%**	**6.4%**	**7.5%**
(n=851)	5. External Mediation	%	**93.8%**	**5.2%**	**0.1%**	**0.1%**	**0.8%**
(n=851)	6. Arbitration	%	**96.6%**	**1.8%**	**0.8%**	**0.0%**	**0.8%**
(n=847)	7. Other	%	**84.0%**	**2.8%**	**2.8%**	**1.0%**	**9.4%**
	TOTAL	**100%**					

44. Listed below are various methods this establishment may have used during the resolution process for those employees who are not covered by collective bargaining agreements. Once again, consider those disputes resolved in the part year. In about what proportion of these cases were each of these methods used during the resolution process?
(Check one for each method)

	Method	Cases in which the method was used						
		Not Applicable	All or almost all	Most	About half	Some	A few	None
(n=673)	1. Negotiation	**9.1%**	**31.2%**	**16.8%**	**12.8%**	**10.7%**	**6.8%**	**12.5%**
(n=769)	2. Fact finding	**2.4%**	**57.2%**	**19.1%**	**6.9%**	**6.3%**	**5.5%**	**2.7%**
(n=521)	3. Peer review	**33.6%**	**3.9%**	**4.0%**	**0..3%**	**5.6%**	**5.4%**	**47.2%**
(n=577)	4. Internal Mediation	**18.6%**	**18.1%**	**11.1%**	**7.1%**	**9.8%**	**8.2%**	**26.9%**
(n=496)	5. External Mediation	**31.2%**	**3.0%**	**1.4%**	**0.1%**	**2.0%**	**6.7%**	**55.6%**
(n=492)	6. Arbitration	**33.5%**	**1.8%**	**0.1%**	**--**	**1.5%**	**5.8%**	**57.3%**
(n=381)	7. Other	**29.0%**	**7.3%**	**2.6%**	**5.2%**	**2.5%**	**5.0%**	**48.4%**

45. Thank you for participating in this study. If you have any additional comments about employment dispute resolution methods or any questions asked in the questionnaire, please write them in the space provided below. ***(n=178)***

Please provide the following information about the person we should call if additional information or clarification is needed.

Name of person to call: _____

Official title: _____

Telephone number: ( ) _____

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(205272)

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GAO Contacts and Staff Acknowledgments

GAO Contacts

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