

# ARTICLES

## **COMPULSORY ARBITRATION AS PART OF A BROADER EMPLOYMENT DISPUTE RESOLUTION PROCESS: THE ANHEUSER-BUSCH EXAMPLE**

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### ABSTRACT

Federal and state reporters are filled with examples of lopsided arbitration agreements drafted by employers with the apparent intent of discouraging employees from successfully bringing valid claims. The case reporters contain far fewer examples of employment dispute resolution programs that are carefully designed to ensure that employees receive a fundamentally fair forum for the resolution of their employment disputes, for the obvious reason that employees are less likely to challenge these programs. Similarly, most scholarly commentary focuses on the overall merits and demerits of employment arbitration, or on problems posed by particular provisions often found in

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employment arbitration agreements, but not on employment dispute resolution programs that are designed with an eye toward employee fairness. Both the case law and the legal commentary, therefore, provide an arguably distorted picture of extant employment dispute resolution programs—from these perspectives, all the apples look rotten.

This Article begins from the premise that much can be learned from closely examining a well-drafted and well-implemented employment dispute resolution program. Such a program can (1) provide scrupulous employers with a model for drafting fair, ethical, and enforceable dispute resolution programs; (2) provide a benchmark to courts in their decisions of whether to enforce other employment dispute resolution programs; and (3) serve as a reminder that not all the arbitral apples are rotten. This Article examines in detail the Dispute Resolution Program of Anheuser-Busch, and finds that it is possible for an employment dispute resolution program culminating in binding arbitration simultaneously to serve (1) the employer's goal of containing employment litigation costs, (2) the employee's goal of access to a fair forum for resolving employment disputes, and (3) both parties' goal of promoting the non-adversarial resolution of employment disputes.

The findings of this Article are particularly important now that Congress appears increasingly likely to consider statutory amendments prohibiting pre-dispute employment arbitration agreements. This Article should not, however, be taken as a blanket endorsement of employment arbitration. We argue merely that employment arbitration *can* be fair to employees, not that employment arbitration is necessarily, or even usually, fair.

## OUTLINE

### I. INTRODUCTION

### II. WHY ANHEUSER-BUSCH?

### III. AN OVERVIEW OF ANHEUSER-BUSCH

### IV. THE ANHEUSER-BUSCH ADR PROGRAM

#### *A. Development and Implementation*

#### *B. An Overview of the DRP*

#### *C. The Three-Step Process*

##### *1. Local Management Review (Level One)*

##### *2. Non-Binding Mediation (Level Two)*

##### *3. Binding Arbitration (Level Three)*

### V. RESULTS

#### *A. Outcomes Assessment*

#### *B. Follow-up and Future Challenges*

### VI. ANALYSIS

### VII. CONCLUSION

## I. INTRODUCTION

Ever since arbitration of individual statutory employment claims exploded onto the scene in 1991,<sup>1</sup> legal commentators have debated the merits and demerits of employment arbitration. Proponents, such as Samuel Estreicher, have argued that arbitration provides dispute resolution access to low- and middle-income employees who otherwise would not find legal representation and for whom judicial resolution therefore is not an option.<sup>2</sup> Critics, such as Katherine Van Wezel Stone, have argued that arbitration is a form of second-class justice, the modern equivalent of the yellow dog contract, particularly when employers foist lopsided agreements upon employees as a condition of employment.<sup>3</sup>

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1. See RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 1-2 (1997) (describing the early years of employment arbitration).

2. See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001).

3. See Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1020 (1996) [hereinafter

Federal and state case reporters are filled with examples of lopsided employment arbitration agreements. Examples include agreements that waive the employee's right to recover punitive damages<sup>4</sup> and attorneys' fees,<sup>5</sup> cap the amount of consequential damages well below the amount permitted by statute,<sup>6</sup> impose shortened statutes of limitation,<sup>7</sup> impose filing fees and other prohibitive costs on would-be claimants,<sup>8</sup> require employees and consumers to submit their claims to arbitration while leaving the company free to litigate,<sup>9</sup> forbid class actions,<sup>10</sup> restrict or eliminate discovery,<sup>11</sup> and give the company unilateral authority to appoint arbitrators.<sup>12</sup>

The case reporters contain far fewer examples of employment dispute resolution programs (often culminating in binding arbitration) that are carefully designed to ensure that employees receive a fundamentally fair forum for the resolution of their employment disputes.<sup>13</sup> This is partly for the obvious reason that employees are less likely to challenge these programs, and partly because when a dispute resolution program is challenged the judicial focus is not on the "fair" parts of the program, but on the questionable parts that may render the program unenforceable.<sup>14</sup> Similarly, most scholarly commentary focuses

*Mandatory Arbitration*]; Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 960 (1999) [hereinafter *Rustic Justice*].

4. See, e.g., *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 267, 271 (3d Cir. 2003) (striking arbitration agreement that, among other things, limited damages to reinstatement and "net pecuniary damages").

5. See, e.g., *Graham Oil Co. v. Arco Prods. Co.*, 43 F.3d 1244, 1247 (9th Cir. 1994).

6. See, e.g., *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 670-71 (6th Cir. 2003) (en banc) (agreement imposed a one-year cap on back pay, a two-year cap on front pay, and a \$5000 cap on punitive damages in most cases); *Pellow v. Daimler Chrysler Servs. N. Am., LLC.*, No. 05-73815, 2006 WL 2540947, at \*8 n.7 (E.D. Mich. Aug. 31, 2006).

7. See, e.g., *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003); *Alexander*, 341 F.3d at 266-67 (striking arbitration provision that, among other things, required employees to notify the employer "within thirty days of the event providing the basis of the claims"); *Conway v. Stryker Med. Div.*, No. 4:05-CV-40, 2006 WL 1008670, at \*1 (W.D. Mich. Apr. 18, 2006).

8. See, e.g., *Ingle*, 328 F.3d at 1177.

9. See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 675 (Cal. 2000).

10. See, e.g., *Gentry v. Superior Court*, 165 P.3d 556, 560 (Cal. 2007).

11. See, e.g., *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 786-87 (9th Cir. 2002).

12. See, e.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999).

13. A sampling of cases from various state and federal reports, concerning employment dispute resolution programs, yield few results. See, e.g., *id.* at 935-41; *Armendariz*, 6 P.3d at 694.

14. See Interview by Peter Phillips with Richard R. Ross, Senior Assoc. Gen. Counsel, Anheuser-Busch Cos. (January 3, 2002) in CPR INSTIT. FOR DISPUTE RESOLUTION, *How Companies Manage Employment Disputes: A Compendium of Leading Corporate Employment*

on the overall merits and demerits of employment arbitration, or on problems posed by particular provisions often found in employment arbitration agreements, but not on employment dispute resolution programs that are designed with an eye toward employee fairness.<sup>15</sup> Both the case law and the legal commentary, therefore, provide an arguably distorted picture of extant employment dispute resolution programs—from a worm’s-eye view, all the apples look rotten.

This Article begins from the premise that much can be learned from closely examining a well-drafted and well-implemented employment dispute resolution program. Such a program can provide scrupulous employers with a model for drafting fair, ethical, and enforceable dispute resolution programs.<sup>16</sup> It also can provide a benchmark to courts in their decisions of whether to enforce other employment dispute resolution programs. Finally, it can serve as a reminder that not all the arbitral apples are rotten. Ultimately, the purpose of this Article is to assess whether an employment dispute resolution program culminating in binding arbitration can simultaneously (1) serve the employer’s goal of containing employment litigation costs, (2) serve the employee’s goal of access to a fair forum for resolving employment disputes, and (3) serve both parties’ goal of promoting the non-adversarial resolution of employment disputes.

## II. WHY ANHEUSER-BUSCH?

In 2002, Richard R. Ross, Senior Associate General Counsel of Anheuser-Busch, was interviewed in a book published by the International Institute for Conflict Prevention & Resolution (“CPR”) for his role in creating the Anheuser-Busch Dispute Resolution Program (“DRP”).<sup>17</sup> Ross stated:

The enforceability of these programs will always be an issue. My

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Programs app. at 55 (2002).

15. See, e.g., Estreicher, *supra* note 2, at 560, 563 (focusing on policy debates that influence the Justices in making their decisions in employment arbitration litigation); *Mandatory Arbitration*, *supra* note 3, at 1017-18 (giving an example of how employers impose control over employees by requiring their acceptance of a biased arbitration agreement as a requisite part of employment).

16. The word “fair” is used throughout this piece to assess dispute resolution programs. We use the word as an excluder that encompasses all the things we mean by unfair, bad faith, no cause, and the like. When we say “fair,” we use that as shorthand to say that a dispute resolution program does not contain any of the procedures that courts repeatedly have identified as unfair, such as no discovery, high fees, a biased pool of arbitrators, and the like.

17. Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 49.

philosophy on that is first, you cannot play games with these programs. If you try to use an employment ADR program to limit legal exposure or employee rights or remedies, you are going to get shot down. Second, no matter how fair and reasonable the program, there will always be some risk that a particular court will not enforce it. . . .

Besides, the true key to a good employment ADR program is not legal enforceability. The key to a good program is whether it has sufficient credibility in the eyes of the employees that they willingly use it. If you can get your program to that level, you don't have to worry about enforceability.<sup>18</sup>

Ross's approach to the DRP thus appeared to be consistent with the approach that one of the authors of this Article has been advocating for several years: employers adopting employment arbitration programs should "bend over backwards to formulate fair employment arbitration procedures."<sup>19</sup>

In spring 2007, at a conference hosted by the National Academy of Arbitrators and the Chicago-Kent College of Law Institute for Law and the Workplace,<sup>20</sup> the same author of this Article met several mediators and arbitrators who had worked on cases originating from the Anheuser-Busch DRP. The mediators and arbitrators uniformly described Anheuser-Busch as going the extra mile to ensure that employees received both procedural fairness and reasonable substantive outcomes. This anecdotal evidence seemed to indicate that the Anheuser-Busch DRP tended to be fair to employees, not only on paper, but also in practice.

Of course, a handful of anecdotal reports cannot serve as the basis for concluding that the Anheuser-Busch DRP yields procedural and substantive justice in every case, or even that it does so more often than the civil litigation it is designed to replace. However, these reports, together with the ADR philosophy of the General Counsel responsible for implementing and administering the DRP, led the authors to conclude that the Anheuser-Busch DRP likely would be one of the more pro-employee extant employment dispute resolution programs.

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18. *Id.* app. at 55.

19. See, e.g., Rick Bales & Reagan Burch, *The Future of Employment Arbitration in the Nonunion Sector*, 45 LAB. L.J. 627, 634 (1994).

20. Editor's Note, *Papers from the National Academy of Arbitrators Conference, "Beyond the Protocol: The Future of Due Process in Workplace Dispute Resolution,"* 11 EMP. RTS. & EMP. POL'Y J. 255, 255 (2007).

Our goal in this Article is modest. We have not attempted empirically to compare outcomes in cases arising under the Anheuser-Busch DRP to litigated cases generally<sup>21</sup> or to outcomes arising under other dispute resolution programs in an effort to ascertain whether the DRP results in substantive justice. Nor have we surveyed Anheuser-Busch employees (or former employees) who have participated in dispute resolution under the DRP to ascertain their subjective perceptions of procedural and substantive fairness. Instead, our goal is to describe the Anheuser-Busch DRP, evaluate it for procedural fairness to employees, and to answer the question of whether it is possible for an employer to achieve the legitimate goals of a dispute resolution program (such as enhanced employee relations and decreased fees paid to attorneys for litigation) by implementing a dispute resolution program containing reasonably fair dispute resolution procedures.

### III. AN OVERVIEW OF ANHEUSER-BUSCH

The creation of Anheuser-Busch can be traced to the Bavarian Brewery which was founded in 1852 in St. Louis, and was subsequently purchased by Eberhard Anheuser in 1860, establishing E. Anheuser & Co.<sup>22</sup> Four years later, Anheuser's son-in-law, Adolphus Busch, became a part of the business that would eventually be called Anheuser-Busch.<sup>23</sup> The company's flagship brand, Budweiser, was pioneered in 1876.<sup>24</sup> Today, Budweiser and its counterpart, Bud Light, are "the two best-selling beers in the world."<sup>25</sup> Moreover, the company maintains a nearly 50 percent market share of the U.S. beer market.<sup>26</sup>

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21. For a thorough discussion of why efforts to do so amount to comparing apples with oranges, see Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 347-49 (2006).

22. Anheuser-Busch Companies: History, <http://www.anheuser-busch.com/History.html> (last visited Oct. 13, 2008). Adolphus Busch came to St. Louis as an immigrant from Germany in 1857. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. ANHEUSER-BUSCH COS., 2006 ANNUAL REPORT 2 (2006) [hereinafter 2006 ANNUAL REPORT], available at [http://anheuserbusch.com/\\_pdf/2006AR\\_Anheuser\\_Busch.pdf](http://anheuserbusch.com/_pdf/2006AR_Anheuser_Busch.pdf). The company currently retains a 48.4 percent share of the U.S. beer market. *Id.* at 2, 9. This market share is more than twice as much as that of its nearest competitor on the domestic front. *Id.* at 9. Moreover, the company "leads sales in all major U.S. beer categories: premium, premium light, specialty, popular, value and nonalcohol." ANHEUSER-BUSCH COS., THIS IS ANHEUSER-BUSCH 3 (2007) [hereinafter THIS IS ANHEUSER-BUSCH], available at <http://www.anheuserbusch.com/PDF/ABQuickGuide2.pdf>. Since 1957, the company has been the forerunner in the U.S. beer industry. *Id.* at 24.

The Anheuser-Busch Companies continue to be headquartered in St. Louis<sup>27</sup> and are currently comprised of three primary business units: Beer and Beer-Related, Packaging, and Entertainment.<sup>28</sup> Beer and beer-related operations is “[t]he company’s principal subsidiary[.]. . . [p]roduc[ing] more than 90 beers, flavored alcoholic beverage and nonalcoholic brews at 12 breweries in the United States and 15 around the world . . . .”<sup>29</sup> In addition to Budweiser and Bud Light, the company produces such well-known brands as Michelob, Busch, Rolling Rock, and Bacardi Silver.<sup>30</sup> In total, the company produces beverages across eleven major groups: Budweiser Family, Michelob Family, Imports, Specialty Beers, Busch Family, Natural Family, Malt Liquors, Seasonal Beers, Specialty Malt Beverages, Specialty Organic Beers, and Alliance Partner Products.<sup>31</sup>

In addition to its beer unit, the company also operates significant packaging operations, supporting the packaging needs related to beer production.<sup>32</sup> By providing its own packaging materials such as cans, bottles, and labels, “the company [is able] to manage the supply, cost, and quality of its packaging.”<sup>33</sup> Finally, the company is a leading operator of amusement parks in the United States, U.S. theme park operators running nine family entertainment parks, including Sea World and Busch Gardens.<sup>34</sup> Annually, the Busch theme parks receive well over 22 million visitors.<sup>35</sup> The net result of its business operations has placed Anheuser-Busch at the top of Fortune’s industry rankings in the

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27. 2006 ANNUAL REPORT, *supra* note 26, at 68.

28. THIS IS ANHEUSER-BUSCH, *supra* note 26, at 24-25.

29. *Id.* at 24. The beer-related operations include agricultural operations, barley elevators/contracting offices, hop farms, hop contracting offices, nutri-turf operations, malt plants, rice mills, seed facilities, research centers, barley offices, refrigerated car companies, and railway companies. *Id.* at 25.

30. Anheuser-Busch Companies: Beer, <http://www.anheuser-busch.com/BeerVerified.html> (last visited Oct. 13, 2008) [hereinafter Beer].

31. *Id.* For a complete list of the brands produced by Anheuser-Busch, see *id.*

32. THIS IS ANHEUSER-BUSCH, *supra* note 26, at 10, 25. The packaging division includes a metal container corporation, can plants, lid plants, a recycling corporation, a recycling facility, a printing and packing corporation, a label plant, liner plants, a glass corporation, and a bottle plant. *Id.* at 25.

33. *Id.* at 10.

34. *Id.* at 25. The company’s theme parks include two locations of Busch Gardens, three locations of Sea World, Sesame Place, Aquatica, and Discovery Cove. *Id.* “Sea World, Busch Gardens, and Discovery Cove care for the largest zoological collection in the world.” 2006 ANNUAL REPORT, *supra* note 26, at 22. In addition, within the entertainment business unit, the company “[o]perates resort, residential, and commercial properties,” as well as real estate developments. THIS IS ANHEUSER-BUSCH, *supra* note 26, at 25.

35. THIS IS ANHEUSER-BUSCH, *supra* note 26, at 13.



Beverages category of both America's Most Admired Companies, as well as the magazine's list of the World's Most Admired Companies.<sup>36</sup>

Throughout its U.S.-based operations, Anheuser-Busch employs roughly 45,000 employees.<sup>37</sup> The company has an estimated 8,600 salaried employees, 9,400 union employees, 6,400 non-union hourly employees, and 20,000 temporary/seasonal workers.<sup>38</sup> Among its three business units, the workforce of Anheuser-Busch is both nationwide and global in terms of distribution of employees.<sup>39</sup>

#### IV. THE ANHEUSER-BUSCH ADR PROGRAM

The Anheuser-Busch Companies (the "company") currently run one of the most extensive and well-developed programs for the non-judicial resolution of employment disputes.<sup>40</sup> The Dispute Resolution Program (the "program" or "DRP") combines binding arbitration with a comprehensive dispute resolution process, focusing on early resolution, fairness, and open communication.<sup>41</sup> During its ten years of existence, the program has been very successful at both early resolutions of problems as well as reducing the company's outside legal fees.<sup>42</sup> In doing so, Anheuser-Busch's program demonstrates that compulsory

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36. *America's Most Admired Companies*, FORTUNE, reprinted in FORTUNE Excerpt: America's Most Admired Companies (Mar. 17, 2008), <http://www.anheuser-busch.com/PDF/4-16-08ab.com.pdf> (last visited Oct. 21, 2008); *World's Most Admired Companies*, FORTUNE, reprinted in FORTUNE Excerpt: World's Most Admired Companies (Mar. 17, 2008), <http://www.anheuser-busch.com/PDF/4-16-08ab.com.pdf> (last visited Oct. 21, 2008). The industry rankings were derived by averaging each company's score on nine important attributes: innovation, people management, use of corporate assets, social responsibility, quality of management, financial soundness, long-term investment, quality of products/services, and globalness. *Id.* The company was ranked first in eight out of these nine categories. *Id.*

37. Telephone Interview with Richard R. Ross, Senior Assoc. Gen. Counsel, Anheuser-Busch Cos., & Susan Brueggemann, Dir., Human Res. Serv. Ctr. & Dispute Resolution Program, Anheuser-Busch Cos. (Sept. 5, 2007) [hereinafter Telephone Interview with Richard R. Ross & Susan Brueggemann].

38. *Id.* The majority of those employees classified as seasonal/temporary work at one of the company's nine parks. *Id.* As of December 31, 2006, Anheuser-Busch employed a total of 30,183 individuals on a full-time basis. 2006 ANNUAL REPORT, *supra* note 26, at 34.

39. See THIS IS ANHEUSER-BUSCH, *supra* note 26, at 25.

40. See ANHEUSER-BUSCH COS., DISPUTE RESOLUTION PROGRAM GUIDE 1 (1997) [hereinafter ORIGINAL DRP GUIDE] (on file with authors).

41. *Id.*

42. Interview with Richard R. Ross, Senior Assoc. Gen. Counsel, Anheuser-Busch Cos., in St. Louis, Mo. (Aug. 14, 2007); Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 51. The program was rolled out in phases, beginning with the entertainment subsidiary in August 1997 and finishing with the corporate headquarters in August 1999. Interview with Richard R. Ross, *supra* note 42.

arbitration and employee fairness do not have to be mutually exclusive.

### *A. Development and Implementation*

Several factors combined to lead the company to begin investigating the possibility of creating a workplace ADR program. First, the company sought to open the lines of communication between employees and management in order to resolve workplace disputes.<sup>43</sup> This goal emerged from a lawsuit in which the company identified the lack of any effective mechanism for employees to approach management with concerns.<sup>44</sup> Lacking such a process, the company was left in a situation of potentially first learning of a conflict when a lawsuit was filed or the conflict was otherwise unnecessarily protracted.<sup>45</sup>

Second, the company also sought to reduce its legal expenses.<sup>46</sup> Because of its size alone, the company was forced to devote an enormous amount of time and money to litigation.<sup>47</sup> This investment was required to be in place whether or not a lawsuit actually resulted or not.<sup>48</sup> That is, the anticipation of litigation alone prompted significant spending on the part of the company.<sup>49</sup> A program that would allow for fair adjudication of employee conflicts, while also allowing for a reduction of the legal budget, therefore, would be extremely beneficial to the company.

Third, and perhaps a consideration growing out of the first two goals, the company sought quick and fair resolution of employee disputes—i.e., a dispute resolution process that would allow conflicts to be resolved in a manner more efficiently and quickly than litigation.<sup>50</sup> These concerns ultimately prompted the company to begin researching the possibility of a workplace ADR program.<sup>51</sup>

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43. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 49.

44. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 49.

45. Interview with Richard R. Ross, *supra* note 42; *see* Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 49.

46. Interview with Richard R. Ross, *supra* note 42; *see* Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 51.

47. Interview with Richard R. Ross, *supra* note 42.

48. *Id.*

49. *Id.*

50. *Id.*; *see also* Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 49 (discussing some of the company's considerations which led to the development of its Dispute Resolution Program).

51. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard

In late 1996, Senior Associate General Counsel Richard R. Ross began investigating the possibility of implementing an ADR program by first benchmarking other companies currently operating such programs.<sup>52</sup> His research resulted in proposals to the company's management committee, as well as the Board of Directors, by the end of 1996.<sup>53</sup> Ross then spent the better half of 1997 reviewing the case law to confirm the viability of such a program.<sup>54</sup> As the case law developed, Ross realized that a correctly designed ADR program "could be a [great] opportunity for both employees and employers."<sup>55</sup>

In developing the program, Ross partnered with Human Resources from the outset.<sup>56</sup> Focus groups were also assembled with employees, as well as meetings with a number of company executives, managers, and supervisors.<sup>57</sup> Throughout the development process, the goal was to gain a sense of what would work within the company's corporate culture, and where potential sources of resistance existed.<sup>58</sup> Ultimately, the design of the program sought to accommodate the needs of each business unit with respect to addressing employee problems.<sup>59</sup> In doing so, the company did not retain any outside resources, but did consult at

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R. Ross, *supra* note 14, app. at 49.

52. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 50. Based on this research, Ross concluded that most of these companies were generally pleased with the results, and were not meeting significant opposition from employees or seeing a rise in frivolous complaints. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 50.

53. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 49. The backing of senior management and the Board would be of significance as the program was rolled out. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 49.

54. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 50.

55. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 50. In large part, the Supreme Court's opinion in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), was the defining moment for Ross. Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 50. In *Gilmer*, the Court held for the first time that pre-dispute arbitration agreements between employers and employees in the non-union setting were enforceable, despite the statutory discrimination rights at issue. *Gilmer*, 500 U.S. at 35. For a more detailed examination of the progression of case law handling employment arbitration programs, see Bales, *supra* note 21, at 335-40.

56. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 50.

57. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 50.

58. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 50.

59. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 50-51.

times with ADR organizations and outside counsel.<sup>60</sup> The development and implementation of the program chiefly from within the company resulted in minimal start-up costs.<sup>61</sup>

### *B. An Overview of the DRP*

Anheuser-Busch finalized its program in 1997 and implemented the program through a phased roll-out beginning with its entertainment subsidiary in August 1997.<sup>62</sup> The program applies to all salaried and non-union hourly employees of the Anheuser-Busch companies, and any of its U.S. subsidiaries.<sup>63</sup> The company invested significant time in rolling out the program, visiting almost all business sites, meeting with employees, reviewing the program, answering questions, and meeting with managers.<sup>64</sup> Significant efforts were concentrated on managers

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60. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 51. The company's outside litigation counsel was asked to review the program for observations and suggestions. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 51. CPR and AAA were also useful resources, supplying "written materials and also putting [the company] in touch with [other] companies that had already implemented employment ADR programs." Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 51. The company looked at Brown & Root, which, at the time, was operating a program that was "ahead of the curve." Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37. Among the unique characteristics of the Brown & Root program was the provision of attorney fees. For a detailed examination of the Brown & Root program, see BALES, COMPULSORY ARBITRATION, *supra* note 1, at 102-44. The company also looked at TRW and J.C. Penney. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37. The TRW program included mandatory arbitrations but voluntary consequences. *Id.* Ultimately, the company hoped to pick the best elements from the currently existing programs and mesh those characteristics into its program. *Id.* The company also relied on EEAC, an organization of major corporations, which ultimately formed a subgroup that served as a resource. *Id.*

61. Interview with Richard R. Ross, *supra* note 42; Interview by Peter Phillips with Richard R. Ross, *supra* note 14, app. at 51.

62. Interview with Richard R. Ross, *supra* note 42.

63. *Id.* Coverage of the program includes roughly 8,600 salaried employees in the United States, 6,400 active non-union hourly employees, and 20,000 temporary employees (mostly employed at theme parks). Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37. The program does *not* cover approximately 9,400 union employees. *Id.* The program covers only U.S. employees. *Id.* Ross believes the program will not expand to include foreign employees, based primarily on the legal differences abroad. Interview with Richard R. Ross, *supra* note 42. The several Asian and European countries in which the company operates tend to have administrative bodies that handle employment disputes. *Id.* In addition, damages are typically set by law and limited and the process moves much quicker. *Id.* The result of these differences is a lack of need for such a program abroad. *Id.* A covered employee who is terminated is also subject to resolving any disputes through DRP. ANHEUSER-BUSCH COS., DISPUTE RESOLUTION PROGRAM POLICY 23 (2d ed. 2003) [hereinafter CURRENT DRP POLICY] (on file with authors).

64. Interview with Richard R. Ross, *supra* note 42. Ross estimated that both the legal

because of their critical role in implementing the new program.<sup>65</sup>

The initial roll-out of the program also included three publications—a program guide, a policy statement, and a highlights brochure.<sup>66</sup> Within these materials, both a flow chart of the DRP was included, as well as a section containing “Questions and Answers for Employees.”<sup>67</sup> Throughout these materials, a clear and consistent message was delivered. A letter from Vice President-Corporate Human Resources, William L. Rammes, explained to employees:

The company supports a workplace atmosphere that encourages employees to speak up about problems and seek solutions to them. . . .

DRP is intended to enable employees to more freely and effectively express their concerns and seek resolution of workplace problems. . . .

[W]e believe that the DRP process can enhance problem resolution in a simple, fair, timely and economical way, which is in all of our best interests.<sup>68</sup>

The materials also highlighted the benefits of the program, including simplicity, quick resolution, economy, and the availability of full remedies.<sup>69</sup> The significant time and energy dedicated to the program roll-out focused on creating buy-in from employees and managers alike, while also building the program’s credibility.<sup>70</sup>

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department and the program administrators conducted face-to-face, open meetings with ninety percent of employees. Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37. This took the form of both a presentation as well as answering any employee questions. *Id.*

65. Interview with Richard R. Ross, *supra* note 42. Because the great majority of disputes are to be resolved in Level One, managers were put in a new role of problem solver. *Id.* This specific task to having to address employee problems created a new experience for many managers, a process the company viewed as an ongoing process, centered primarily on common sense. *Id.*

66. ANHEUSER-BUSCH COS., DISPUTE RESOLUTION PROGRAM (DRP) POLICY STATEMENT (1997) [hereinafter ORIGINAL DRP POLICY] (on file with authors); ANHEUSER-BUSCH COS., DISPUTE RESOLUTION PROGRAM HIGHLIGHTS (1997) [hereinafter HIGHLIGHTS] (on file with authors); ORIGINAL DRP GUIDE, *supra* note 40.

67. ORIGINAL DRP GUIDE, *supra* note 40, at 8-12; *see also* CURRENT DRP POLICY, *supra* note 63, at 19-23 (containing a more current version of the flow chart and the “Questions and Answers for Employees” section). For a complete list of the questions answered, *see infra* note 153 and accompanying text.

68. ORIGINAL DRP GUIDE, *supra* note 40, at 1.

69. HIGHLIGHTS, *supra* note 66; ORIGINAL DRP GUIDE, *supra* note 40, at 2.

70. Interview with Richard R. Ross, *supra* note 42. Ross noted that he believed marketing was one of the most important elements of a successful employment ADR program. *Id.* In fact, he viewed the biggest deficiency of many other programs as being designed by outside counsel with a

Following the program's initial implementation, new employees now receive DRP training as part of new hire orientation, including a presentation and question and answer session, similar to the initial roll-out meetings.<sup>71</sup> In addition, management teams are provided periodic "refresher" trainings.<sup>72</sup>

The materials also delivered the consistent message that covered employees must use the program to resolve workplace disputes and that by remaining employed with the company, "employees agree, as a condition of employment, that all covered claims are subject to the [program]."<sup>73</sup> Finally, the materials reinforced that the at-will employment relationship continued to exist.<sup>74</sup> The company reserves the right to alter or terminate the program at any time by giving thirty days' notice, at which point both the company and employees remain obligated to "complete the processing of any dispute pending in DRP at the time of the announced change."<sup>75</sup>

The current program covers all types of employment disputes.<sup>76</sup> In fact, employees may submit any employment dispute to the program for

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view toward legal enforceability, rather than focusing on credibility. *Id.*

71. Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37.

72. *Id.*

73. *E.g.*, HIGHLIGHTS, *supra* note 66 ("After the effective date, covered employees must use the Dispute Resolution Program to resolve workplace disputes. By accepting an offer of employment or by continuing employment with any Anheuser-Busch company on or after the effective date of the DRP, new or current employees agree, as a condition of employment, that all covered claims are subject to the DRP."); *see also* CURRENT DRP POLICY, *supra* note 63, at 1 ("THIS POLICY CONSTITUTES A BINDING AGREEMENT BETWEEN YOU AND THE COMPANY FOR THE RESOLUTION OF EMPLOYMENT DISPUTES. By continuing your employment with Anheuser-Busch Companies, Inc. or any of its subsidiary companies ("Company"), you and the Company are agreeing as a condition of your employment to submit all covered claims to the Anheuser-Busch Dispute Resolution Program ("DRP"), to waive all rights to a trial before a jury on such claims, and to accept an arbitrator's decision as to the final, binding and exclusive determination of all covered claims.").

74. ORIGINAL DRP POLICY, *supra* note 66, at 1 ("[T]his procedure does not change the employment at-will relationship between the company and its employees."); *see also* CURRENT DRP POLICY, *supra* note 63, at 1 ("This program does not change the employment-at-will relationship between you and the Company."). Some have argued that an employer amending the at-will relationship in any way risks converting the relationship to a just-cause relationship. *See, e.g.*, Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-At-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. REV. 443, 481 (1995).

75. CURRENT DRP POLICY, *supra* note 63, at 3. To date, the program has had almost no modification. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37. The only modifications occurred in December, 2003 which further addressed administrative issues (timing issues and additional explanations) but provided no substantive changes regarding rights or remedies. *Id.*

76. CURRENT DRP POLICY, *supra* note 63, at 5.

Level One resolution.<sup>77</sup> The program allows covered claims to proceed to Level Two and Level Three.<sup>78</sup> Such disputes are: those that “the [c]ompany may have against an employee,” or those that “the [e]mployee may have against the [c]ompany and/or an individual employee. . . acting within the scope of . . . employment with the [c]ompany, where the [e]mployee alleges unlawful termination and/or unlawful or illegal conduct on the part of the [c]ompany.”<sup>79</sup> The current DRP policy specifically enumerates a number of examples of covered claims, including claims associated with involuntary terminations, discrimination, retaliation, workplace accommodation, breach of a duty of loyalty or fiduciary duty, breach of employment contracts or covenants, promissory estoppel, tort claims, and violation of public policy.<sup>80</sup> The policy also lists those claims excluded from the program’s coverage, including ERISA, workers’ compensation, intellectual property, NLRA, claims outside the scope of an individual’s employment, and “[c]laims that seek to establish, modify or object to the Company’s policies or procedures, except claims . . . of discriminatory application.”<sup>81</sup>

The program’s policies contain a number of technical elements that bring it into compliance with relevant legal restrictions.<sup>82</sup> For example, the program makes clear that employees are still free to contact the EEOC and other government agencies.<sup>83</sup> The program also provides language relevant to coverage under the Federal Arbitration Act.<sup>84</sup>

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77. *Id.* at 5; *see infra* notes 90-95 and accompanying text regarding the level classification of the DRP.

78. CURRENT DRP POLICY, *supra* note 63, at 5.

79. *Id.*

80. *Id.*

81. *Id.* The majority of claims excluded are handled by pre-existing internal procedures that prevent such claims from entering the program. Telephone Interview Richard R. Ross & Susan Brueggemann, *supra* note 37. Many programs existing prior to the Anheuser-Busch program excluded intellectual property claims. *Id.* DRP also excludes intellectual property claims, based primarily on the need for injunctive relief, such as a temporary restraining order. *Id.*

82. *See infra* notes 83-86 and accompanying text.

83. CURRENT DRP POLICY, *supra* note 63, at 3 (“Nothing in this program is intended to discourage or interfere with the legally protected rights of Employees to file administrative claims or charges with government agencies. Such agencies include, but are not limited to, the Equal Employment Opportunity Commission (EEOC), the Office of Federal Contract Compliance Programs (OFCCP), and related state fair-employment agencies.”). The program does provide that, “if an Employee files a charge with the EEOC, OFCCP, or with a state fair-employment agency, the Company may request the agency to defer its processing of the charge until the Employee and the Company complete the DRP.” *Id.*

84. 9 U.S.C. §§ 1-16 (2006); CURRENT DRP POLICY, *supra* note 63, at 6 (“This program constitutes a written agreement to arbitrate pursuant to the Federal Arbitration Act, 9 U.S.C.A.

Language is also included that reinforces the applicability of the program in the face of judicial challenges.<sup>85</sup> Finally, from a logistical standpoint, the program established the position of DRP Administrator within the company.<sup>86</sup>

The Anheuser-Busch DRP builds off previous successful programs by going beyond the standard arbitration agreement used by many other employers instituting compulsory arbitration programs.<sup>87</sup> The goal of the program is a timely and effective resolution to workplace disputes.<sup>88</sup> The company acknowledges that workplace disputes occur, but an

Sections 1-14. The parties acknowledge that the Company is engaged in transactions involving interstate commerce and Employees eligible to participate in the DRP are not employed by the Company as seamen, railroad employees, or other class of worker engaged in foreign or interstate commerce.”).

85. CURRENT DRP POLICY, *supra* note 63, at 6 (“If a court of competent jurisdiction determines that the DRP is not the exclusive, final and binding method for the Company and its Employees to resolve disputes, and/or that the decision and award of the arbitrator is not final and binding as to some or all of the claim(s) in dispute, the Company and the Employee agree that they will first use the DRP for any covered claims before filing or pursuing any legal, equitable, administrative or other formal proceeding. If a court determines that any provision of the DRP is invalid or unenforceable, the validity, legality and enforceability of the remaining provisions shall not be affected by the determination and each remaining provision of the DRP shall be valid, legal and enforceable to the fullest extent permitted by law.”).

86. *Id.* at 3. The Administrator position is responsible for:

1. Coordinat[ing] the receipt of [e]mployee disputes with managers and HR representatives;
2. Answer[ing] questions about the [program];
3. Monitor[ing] compliance with and requests for extensions of all time limits for submission of claims;
4. Coordinat[ing] the scheduling of mediation and arbitration . . . ;
5. Schedul[ing] training sessions for [e]mployees and managers;
6. Schedul[ing] the [c]ompany’s participation in pre-arbitration communications with arbitrators and [e]mployees regarding . . . discovery [requests];
7. Work[ing] with [c]ompany representatives, [e]mployees, and their attorneys, to select and schedule mediators and arbitrators;
8. Administer[ing] and interpret[ing] the terms and conditions of the [program] . . . ;
9. [Serving] as the [c]ompany administrative liaison with the [organization of professional mediators or arbitrators (such as AAA)]; and
10. Attend[ing] mediations and arbitration hearings.

*Id.* at 3-4. Currently, the Administrator position is supported by a Coordinator position. Telephone Interview Richard R. Ross & Susan Brueggemann, *supra* note 37. The travel time involved with the Administrator position depends on the volume of claims. *Id.* The position currently does not travel to mediations and arbitrations in which inside or outside counsel is representing the company, but does attend all proceedings with pro se parties. *Id.* The company has maintained the Administrator position as a neutral, with an interest in resolution. *Id.* In doing so, a vice president or other manager will serve as the company’s representative in the DRP process. *Id.* The Administrator’s decision making power starts and stops in deciding whether a claim is eligible for participation in the DRP. *Id.*

87. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37.

88. See *supra* note 68-69 and accompanying text.



overriding interest of all involved parties is “resolving these disputes expeditiously and fairly.”<sup>89</sup> In the most succinct description, the brochure highlighting the program explains that, “[t]he purpose of the DRP is to enable employees to more freely and effectively express their concerns and seek resolution of workplace problems through a process that emphasizes fairness and due process while minimizing bureaucracy.”<sup>90</sup>

To this end, Anheuser-Busch has developed a three-step process for the resolution of employment disputes after informal efforts do not resolve an employee’s dispute.<sup>91</sup> Level One, Local Management Review, is an attempt to settle the dispute involving the employee and management team, the procedures of which are designed to suit the needs of each business unit.<sup>92</sup> If the employee is not pleased with the results, the employee may pursue a covered claim at Level Two with mediation.<sup>93</sup> If, at Level Two, a resolution is not achieved, the employee may then seek binding arbitration at Level Three.<sup>94</sup> Employees are required to “complete each level of the process before proceeding to the next level.”<sup>95</sup> Throughout the program, retaliation is prohibited “against anyone who submits a dispute to the [program], or who participates as witness or otherwise in the DRP process.”<sup>96</sup>

### *C. The Three-Step Process*

#### **1. Local Management Review (Level One)**

Level One of the DRP involves “Local Management Review,” the

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89. ORIGINAL DRP GUIDE, *supra* note 40, at 1.

90. HIGHLIGHTS, *supra* note 66.

91. CURRENT DRP POLICY, *supra* note 63, at 2. The program provides: “Employees are encouraged to resolve work-related disputes informally through dialogue with their managers, a Human Resources (HR) representative, or the Anheuser-Busch Personnel Communications department. However, when informal efforts do not resolve an Employee’s dispute, and the Employee wishes to pursue the matter further, an Employee must submit his or her dispute to the DRP.” *Id.*

92. *Id.*

93. *Id.*; see *supra* text accompanying note 80 for a discussion of covered claims.

94. CURRENT DRP POLICY, *supra* note 63, at 2.

95. *Id.*

96. *Id.* at 6. Both Ross and the Dispute Resolution Program Administrator, Susan Brueggemann, explained that retaliation has been a non-issue in the program. Telephone Interview Richard R. Ross & Susan Brueggemann, *supra* note 37. Ross explained that the company closely guards the integrity of the program and has stopped any effort to retaliate at the earliest stages. *Id.*

procedures for which change based upon what is required for the "individual subsidiary or business unit."<sup>97</sup> The common element of a Level One dispute, however, is the submission of a DRP Notice of Dispute form<sup>98</sup> to the local Human Resources representative.<sup>99</sup> The form is one page and includes basic personal information and a description of the dispute.<sup>100</sup> There are no time limits for an employee to submit disputes to Level One.<sup>101</sup> However, if an employee intends to submit a covered claim to Levels Two or Three, the employee must submit the dispute to Level One within the applicable time limitation.<sup>102</sup>

## 2. Non-Binding Mediation (Level Two)

Level Two, involving nonbinding mediation, is available for any covered claim previously submitted to Level One within the applicable time limits.<sup>103</sup> Under the program, the mediation is confidential and private, and the mediator has the ability to meet with the parties

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97. CURRENT DRP POLICY, *supra* note 63, at 7. In an effort to tailor the Level One procedures in the most effective way, each business unit has created unique procedures. *Id.* For example, the packaging group currently utilizes a peer review process, which serves the functions of the Level One. Telephone Interview Richard R. Ross & Susan Brueggemann, *supra* note 37. From an administrative standpoint, each business group has a different tri-fold brochure highlighting the DRP. *Id.* The company, however, is moving away from separate materials for each group. *Id.*

98. ANHEUSER-BUSCH COS., ANHEUSER-BUSCH DISPUTE RESOLUTION PROGRAM LEVEL ONE: LOCAL MANAGEMENT REVIEW (2007) [hereinafter Level One] (on file with authors). A full set of forms was developed from the outset of the program in order to ensure the formality and consistency of the DRP. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37.

99. CURRENT DRP POLICY, *supra* note 63, art. 1.1 at 7. The local HR manager is responsible for forwarding a copy of the form to the DRP Administrator. *Id.*

100. Level One, *supra* note 98. The form also confirms the employee's participation in the program with the following language: "I submit the above dispute to the Anheuser-Busch Dispute Resolution Program ("DRP") for resolution. I acknowledge and agree that if any covered claim is not resolved at Levels 1 or 2 and if I wish to pursue the matter further, I must request arbitration for resolution of such claim, and that the arbitration decision will be final and binding on both me and the Company." *Id.*

101. CURRENT DRP POLICY, *supra* note 63, art. 2.1 at 7.

102. *Id.* See *supra* Part IV.B as to which claims are "covered claims."

103. CURRENT DRP POLICY, *supra* note 63, at 8. In order to submit a covered claim to Level Two, "the dispute must have been submitted to Level One within 180 days of the date the dispute arose or before the expiration of the statute of limitations applicable to the alleged unlawful conduct or violation of law, whichever is longer." *Id.* at 6. The company describes mediation as

a process that seeks to find common ground for the voluntary settlement of covered claims. Mediation involves an attempt by the parties to resolve their disputes with the aid of a neutral third party not employed by the Company. The mediator's role is advisory. The mediator may offer suggestions and question the parties, but resolution of the dispute rests with the parties themselves.

*Id.* art. 1.1 at 8.

mutually or separately in order to facilitate resolution.<sup>104</sup> Similar to Level One, the Level Two process is initiated by the employee via a form.<sup>105</sup> The employee is required to pay a \$50 fee when submitting the claim to Level Two and must do so within thirty calendar days from the finalized Level One resolution.<sup>106</sup> The program Administrator then determines whether the claim can qualify for the DRP procedure.<sup>107</sup> If so, the company then pays any administrative fees related to the mediation, the mediator's fees, the expenses associated with renting meeting space, and the "[e]mployee's salary or wages . . . for the time spent at the mediation."<sup>108</sup>

In a detailed fashion, the program outlines the logistics of the mediation. First, the mediator is jointly selected by the employee and the company.<sup>109</sup> If there is no agreement regarding the selection of a mediator, the program Administrator requests that an organization of professional mediators and arbitrators (such as the American Arbitration Association) appoint a mediator in compliance with its procedures.<sup>110</sup> Second, the program requires that typically the mediator should have a minimum of five years' experience in either the practice of employment law or the mediation of employment claims.<sup>111</sup> Third, the parties agree

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104. *Id.* arts. 1.1-1.2 at 8. The entire mediation is confidential except for the fact that the process has taken place. *Id.* art. 9.1 at 10. The program stipulates that the parties and mediator shall not disclose any information regarding the mediation process, the settlement, or the outcome unless required by law or agreed among the parties. *Id.* The settlement terms may be disclosed in an action to enforce compliance with the terms of the settlement. *Id.* Furthermore, no formal record or transcript takes place at the mediation. *Id.*

105. Anheuser-Busch Cos., Anheuser-Busch Dispute Resolution Program Level Two: Request for NonBinding Mediation, (2007) [hereinafter Level Two] (on file with authors). The two-page form requests personal information, the nature of the claim, details of the claim, remedies sought, and legal representation (if applicable). *Id.* The form also contains the following language:

I submit this covered claim(s) for Non-Binding Mediation under the Anheuser-Busch Dispute Resolution Program ("DRP"). I understand that the mediation proceedings will be confidential and that the mediator does not have authority to bind the parties. I further understand that if the dispute is not resolved during mediation and if I wish to pursue this matter further, I must submit this dispute to arbitration under the DRP for a determination of the matter that will be final and binding on both me and the Company.

*Id.*

106. CURRENT DRP POLICY, *supra* note 63, arts. 2.1-2.2 at 8.

107. *Id.* art. 2.4; *see supra* text accompanying note 80 for a discussion of which claims are covered under the program. The decision of the Administrator as to the eligibility of the claim is "final and binding on [both] the [c]ompany and the [e]mployee." CURRENT DRP POLICY, *supra* note 63, art. 2.5 at 8.

108. *Id.* art. 10.1 at 10.

109. *Id.* art. 3.1 at 9. It is provided that mediator candidates will reveal any possible conflicts of interest. *Id.*

110. *Id.*

111. *Id.* art. 4.1 at 9. In addition to the requisite experience, the procedures prohibit any

on a date, time and location for the mediation;<sup>112</sup> however, if the parties do not agree, the mediator schedules the mediation on a normal business day during normal business hours.<sup>113</sup>

Prior to the mediation, each party has the option of providing to the mediator a written summary of the dispute, which sets forth the party's position concerning the claims.<sup>114</sup> Once commenced, the mediation typically takes a full day but may be extended if necessary.<sup>115</sup> During the mediation, either party or the mediator may end the mediation at any point.<sup>116</sup> In addition, either party may choose to be assisted or represented by an attorney,<sup>117</sup> however, the program stipulates that if the employee elects not to have an attorney present at the mediation, then the company cannot have an attorney present either.<sup>118</sup> Because of the private and confidential nature of the mediation, the only people present at the mediation are the mediator, the employee, his or her spouse and attorney, company representatives, and the company attorney.<sup>119</sup>

### 3. Binding Arbitration (Level Three)

If an employee and the company do not reach a resolution at Level Two, an employee wishing to pursue the covered claim(s) further must submit the covered claim to Level Three, binding arbitration.<sup>120</sup> As opposed to mediation, under the arbitral method the arbitrator decides the merits of the claims and issues a written decision, which is final and binding on both parties.<sup>121</sup> The arbitration process begins when the

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mediator from having any direct financial or personal interest in the outcome of the mediation. *Id.*

112. *Id.* art. 5.1 at 9. Unless the parties agree otherwise, the mediation takes place within twenty-five miles of the work location where the dispute arose. *Id.* If the mediation takes place outside that mileage radius, the DRP Administrator has discretion to pay the employee's reasonable travel expenses. *Id.*

113. *Id.* art. 5.1 at 9.

114. *Id.* art. 7.1 at 9.

115. *Id.* art. 6.1 at 9.

116. *Id.*

117. *Id.* art. 8.1 at 9. DRP Administrator, Susan Brueggemann, estimates that in about half of all Level Two disputes employees choose to bring an attorney to mediations. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37.

118. CURRENT DRP POLICY, *supra* note 63, art. 8.1 at 9. The employee must notify the company within fourteen days of the mediation whether an attorney will be present. *Id.*

119. *Id.* art. 8.2 at 9. The program does provide, however, that the parties may agree to have other parties in attendance. *Id.*

120. *Id.* art. 1 at 11. The program provides: "Binding arbitration is a dispute-resolution process in which the Employee and the Company present their respective positions concerning their covered claim(s) to an impartial third-party arbitrator who determines the legal merits of the claim(s)." *Id.*

121. *Id.* art. 1.2 at 11. The arbitration hearing is similar to a court proceeding in that both

employee submits the Request for Binding Arbitration form<sup>122</sup> and a \$125 fee.<sup>123</sup> The Company then pays for any filing and other administrative fees, the arbitrator's fees, meeting space, employee's salary or wages up to a maximum of seven hearing days for the time spent at the arbitration hearing, and the salary or wages of employees called as witnesses up to a maximum of two hearing days per employee.<sup>124</sup> Each party is responsible for other normal costs, such as expert and attorney fees.<sup>125</sup>

As would be expected, the program provides many more details regarding the arbitration hearing, each of which will be discussed in turn. The selection of the neutral arbitrator begins when the program Administrator requests an association, such as AAA, to provide a list of qualified candidates.<sup>126</sup> The company and the employee then attempt to agree on the selection of the arbitrator, with each party retaining the right to request a list of additional candidates.<sup>127</sup> Procedures are also provided if the parties cannot agree on an arbitrator.<sup>128</sup>

The parties are free to agree on a date and time for the arbitration hearing, which normally takes place within twenty-five miles of the work location where the dispute arose.<sup>129</sup> Similar to the Level Two

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parties may be represented by an attorney, make opening statements, present testimony of witnesses and introduce exhibits, cross-examine the other party's witnesses, and make closing statements. *Id.*

122. *Id.* art. 2.1 at 11. The two-page form requests personal information, nature of the claim, details of the claim, requested remedies, and legal representation (if applicable). ANHEUSER-BUSCH COS., ANHEUSER-BUSCH DISPUTE RESOLUTION PROGRAM LEVEL THREE: REQUEST FOR BINDING ARBITRATION, (2007) [hereinafter LEVEL THREE] (on file with authors). The form contains the following language: "I submit the covered claim(s) for Binding Arbitration under the Anheuser-Busch Dispute Resolution Program ("DRP"). I understand and agree that this matter will be decided by an arbitrator, not by a court or by a jury, and that the decision of the arbitrator will be final and binding on both the Company and me." *Id.*

123. CURRENT DRP POLICY, *supra* note 63, art. 2.1 at 11.

124. *Id.* art. 18.1 at 18.

125. *Id.* art. 18.2 at 18. These costs may be awarded to the employee by the arbitrator as provided under applicable law. *Id.*

126. *Id.* art. 3.2 at 11. All arbitrator candidates must also disclose potential conflicts of interest. *Id.* art. 3.5 at 12. In addition, the arbitrator must be a licensed attorney, with at least five years experience in practicing employment law or arbitrating employment law claims, and cannot have any direct financial or personal interest in the outcome of the arbitration. *Id.* art. 4.1 at 12.

127. *Id.* art. 3.4 at 12. Each party is also able to interview arbitrator candidates, provided that the other party is notified and given the opportunity to participate. *Id.* art. 3.6 at 12.

128. *Id.* art. 3.7 at 12. The program Administrator will request that the association, such as AAA, appoint an arbitrator in accordance with the organization's procedures. *Id.*

129. *Id.* art. 5.2 at 12. If the parties agree on a location beyond the twenty-five mile radius, then the Administrator may pay reasonable employee travel expenses. *Id.* However, if the parties fail to come to an agreement on the date and time of the hearing, then the arbitrator will so decide. *Id.* art. 5.1 at 12.

mediation, the employee may be assisted or represented by counsel at Level Three.<sup>130</sup> In addition, if the employee is represented by an attorney at the arbitration, then the company must also be represented.<sup>131</sup> Either party may call witnesses, including experts, the total of which may not exceed ten.<sup>132</sup> The arbitration is a private hearing that may be attended only by the arbitrator, an official recorder, the employee and his or her spouse, company representatives, attorneys, experts, and witnesses.<sup>133</sup>

Under the program, discovery is conducted "in the most expeditious and cost-effective manner practicable and shall be limited to that which is relevant and material to the covered claim(s) and for which each party has a substantial, demonstrable need."<sup>134</sup> In carrying out this philosophy, all discovery must be completed no later than ten days before the start of the arbitration hearing.<sup>135</sup> Depositions, interrogatories, and production of documents are all available under the discovery provisions of the program.<sup>136</sup> Should a discovery dispute arise, the arbitrator is responsible for its resolution no later than ten days

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130. *Id.* art. 6.1 at 13.

131. *Id.* The company estimates that two-thirds of employees are represented by counsel at Level Three hearings, with the remaining one-third proceeding without representation. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37.

132. CURRENT DRP POLICY, *supra* note 63, art. 6.2 at 13. The number of witnesses called by each side may exceed 10 if agreed to by the parties or if granted by the arbitrator after a request based on good cause. *Id.* Additionally, during the hearing the arbitrator may sequester the witnesses. *Id.* art. 6.4 at 13.

133. *Id.* art. 6.3 at 13. However, the parties may agree, in writing, to allow other individuals to attend the arbitration. *Id.*

134. *Id.* art. 7.2 at 13.

135. *Id.* art. 7.3 at 13.

136. *Id.* art. 7.3(a)-(c) at 13. Each party may depose expert witnesses and two additional individuals; all depositions are conducted under oath and transcribed by a court reporter. *Id.* art. 7.3(a) at 13. The party requesting the deposition pays all costs related to the court reporter and the original transcript, while the other party retains the option of purchasing a copy of the transcript. *Id.* Depositions tend to be taken more often in disputes in which the employee is represented by counsel. Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37. Up to ten interrogatories, including subparts, may be submitted by either party. CURRENT DRP POLICY, *supra* note 63, art. 7.3(b) at 13. Whether the questions are labeled as such, interrogatories tend to occur frequently from employees both represented by counsel and those proceeding without representation. Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37. Each party may request the production of relevant documents at the cost of the requesting party, yet the producing party retains the right to object to the request. CURRENT DRP POLICY, *supra* note 63, art. 7.3(c) at 13. In addition, neither party is required to produce documents that are proprietary, confidential, privileged, confidential, or trade-secret information. *Id.* Similar to interrogatories, the production of documents tends to occur at the same rate between both represented and unrepresented employees. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37.

before the start of the hearing.<sup>137</sup> Additionally, at the request of the parties the arbitrator is empowered to authorize additional discovery beyond the scope outlined under the DRP,<sup>138</sup> and may also issue subpoenas, pursuant to section 7 of the Federal Arbitration Act, with respect to witnesses or documents.<sup>139</sup> Thirty days prior to the arbitration hearing, each party provides written notice to the other party of the names and addresses of all witnesses, copies of all documents intended to be introduced, and the names and addresses of attorneys attending the hearings.<sup>140</sup> Either party may arrange for stenographic record and transcript of the arbitration hearing.<sup>141</sup>

With respect to evidence, the DRP provides that “[t]he Arbitrator shall afford each party a full and fair opportunity to present any proof relevant and material to the covered claim(s), to call and cross-examine witnesses and to present argument.”<sup>142</sup> All testimony must be under oath, and the arbitrator determines the weight and relevance afforded to evidence.<sup>143</sup> Within the parameters of these guidelines, however, the arbitrator is not bound by formal rules governing evidence, except for the attorney-client and work-product privileges.<sup>144</sup> Rather, the arbitrator determines the admissibility of the evidence offered by the parties, and that determination is both final and binding.<sup>145</sup> While the evidence standards are relaxed during the arbitral hearing, each party still bears the burden of persuasion on its claims in accordance with applicable law.<sup>146</sup>

At the conclusion of the arbitration hearing, each party has the opportunity to submit a written brief to the arbitrator.<sup>147</sup> The arbitrator,

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137. CURRENT DRP POLICY, *supra* note 63, art. 7.3(d) at 14.

138. *Id.* art. 7.3(f).

139. CURRENT DRP POLICY, *supra* note 63, art. 9.1 at 14 (citing 9 U.S.C. §§ 1-14). The arbitrator is also authorized to issue protective orders in response to a request by either party, such as sealing the record of the hearing in order to protect privacy, trade secrets, proprietary information, or other legal rights of the parties and witnesses. *Id.* art. 7.5 at 14.

140. CURRENT DRP POLICY, *supra* note 63, art. 7.4 at 14. This list may be supplemented up to twenty days prior to the hearing. *Id.*

141. *Id.* art. 8.1 at 14. If only one party requests a record of the hearing then that party pays the entire cost of the record; however, if both parties request that a record be made, then the cost is shared equally between the parties. *Id.* art. 8.2 at 14. In either event, if a transcript is in fact produced, the arbitrator is provided a copy. *Id.* art. 8.3 at 14.

142. *Id.* art. 10.1 at 15. The program stipulates that the arbitrator shall not receive evidence by affidavit or that submitted after the hearing, unless agreed to by the parties. *Id.*

143. *Id.* arts. 10.2-10.3 at 15.

144. *Id.* art. 10.4 at 15.

145. *Id.* art. 10.5 at 15.

146. *Id.* art. 11.1 at 15.

147. *Id.* art. 12.1 at 15. If a party so chooses, the brief must be submitted within thirty days of

in turn, issues a written opinion to the parties.<sup>148</sup> In granting relief, the arbitrator has the same power and authority as a judge or jury and may grant any relief available under applicable law.<sup>149</sup> Except as provided by the Federal Arbitration Act, the arbitrator's award is generally not subject to review or appeal, notwithstanding otherwise applicable law.<sup>150</sup> Finally, the program stipulates that the arbitrator's award is not to be published and has no legal effect on employees not party to the arbitration.<sup>151</sup> The confidential nature of the arbitration is reinforced with a complete description of the parameters of such confidentiality.<sup>152</sup>

At the conclusion of the CURRENT DRP POLICY, a list of "Questions and Answers for Employees" is provided that summarizes these program guidelines in a concise and understandable fashion.<sup>153</sup> As mentioned previously, the CURRENT DRP POLICY encompasses a flow chart that illustrates the various stages of the program, and the company also produces a tri-fold brochure that outlines the highlights of the DRP.<sup>154</sup>

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the close of the arbitration hearing or receipt of the transcript, whichever is later. *Id.* The parties waive the right to file a brief if they fail to notify the arbitrator of their intent to do so by the end of the hearing. *Id.* The company tends to always submit a written brief as it helps to firm up a position. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37. Generally, employees tend to follow the company lead and also submit written briefs. *Id.*

148. CURRENT DRP POLICY, *supra* note 63, art. 12.4 at 15. This written opinion is issued within thirty days of the close of the hearing or within thirty days of receipt of the parties' briefs, whichever is later. *Id.* Among other things, the opinion contains a summary of the claims arbitrated and decided; findings of fact and conclusions of law; and the rationale for any grant of relief. *Id.* art. 12.5 at 16.

149. *Id.* art. 14.2 at 16. Both parties are obligated to mitigate damages and the arbitrator shall take such mitigation into account in granting relief. *Id.* "The arbitrator may sanction either party by awarding the other party its reasonable attorneys' fees and costs . . . upon a finding that a claim was frivolous or brought to harass the employee, the employer, or the employer's personnel." *Id.* art. 15.1 at 17. The arbitrator may also sanction either party for unreasonable delay, failure to cooperate in discovery, or failure to comply with requirements of confidentiality. *Id.* art. 15.2 at 17. The arbitrator may also issue a supplemental award to a terminated employee that grants reasonable front pay instead of reinstatement. *Id.* art. 15.2 at 17.

150. *Id.* art. 17.3 at 17. The Federal Arbitration Act allows for review or appeal of an arbitration award only in limited circumstances. *See* 9 U.S.C. § 16 (2006).

151. CURRENT DRP POLICY, *supra* note 63 art. 17.4 at 17.

152. *Id.* art. 19.1 at 18. Generally, all aspects of the arbitration hearing are confidential. *Id.* However, confidentiality may be waived to (i) the extent that both parties agree in writing; (ii) as may be appropriate in any subsequent proceedings between the parties or (iii) as appropriate in response to a governmental agency request or otherwise provided by law. *Id.*

153. *Id.* at 20-23.

154. HIGHLIGHTS, *supra* note 66.



## V. RESULTS

### A. Outcomes Assessment

A thorough assessment of the DRP's results begins with evaluating the program against its initial objectives.<sup>155</sup> With respect to the first goal, creating an open system of communication with management in order to facilitate resolution of employee disputes, the DRP has succeeded in creating such a process. On a macro-level, the DRP creates a stream-lined process for identifying conflicts to management. Indeed, any matter may be submitted for Level One resolution.<sup>156</sup> Moreover, and on the micro-level, Level One disputes are subject to local management review.<sup>157</sup> That is, the local manager and the employee meet face-to-face and attempt to resolve the conflict using non-judicial methods. The Program Administrator is involved throughout the process, with an eye toward resolving the conflict.<sup>158</sup>

The company's second goal, reducing legal expenses, has also been achieved through the DRP. The company initially benchmarked the program's success, based on previous litigation costs.<sup>159</sup> The company quickly saw a roughly fifty percent reduction in legal costs, as well as a fifty percent reduction in administrative costs.<sup>160</sup> This amount of savings has continued as the company has maintained consistent spending since the initial savings were realized.<sup>161</sup> Furthermore, the company has not experienced any spike in fees or settlement costs.<sup>162</sup> In doing so, the DRP has satisfied one of the company's major goals.<sup>163</sup> Indeed, the current litigation budget of the company is primarily allocated to matters not covered by the DRP.<sup>164</sup>

The company's third goal, the quick and fair resolution of conflicts

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155. See *supra* Part IV.A (outlining the initial goals of the program).

156. See *supra* Part IV.C.1 and accompanying text.

157. See *supra* Part IV.C.1 and accompanying text.

158. See *supra* note 86 and accompanying text.

159. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*; see *supra* Part IV.A

164. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37. These matters include union employees, applicants, non-employees, and the like. *Id.*; see *supra* note 81 and accompanying text (listing of non-covered claims). In addition, a small portion of the budget is allocated to motions to compel. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37.

at the lowest possible level, may perhaps be the most striking evidence of the DRP's success.<sup>165</sup> Of the claims submitted to DRP, 95% are resolved at Level One (Local Management Review).<sup>166</sup> Of the remaining five percent, four percent are resolved at mediation (Level Two), with only one percent proceeding to Level Three binding arbitration.<sup>167</sup> The following chart tracks historical data, beginning in 2003 and remaining current through July 2007.

YEAR	LOCAL MANAGEMENT REVIEW (Level One)	MEDIATION (Level Two)	ARBITRATION (Level Three)	TOTAL
2003	592 – 96.1%	19 – 3.1%	5 – 0.8%	616
2004	569 – 95.8%	21 – 3.5%	4 – 0.7%	594
2005	217 – 92.3%	14 – 6%	4 – 1.7%	235
2006	113 – 85%	18 – 13.5%	2 – 1.5%	133
2007	78 – 100%	0 – 0%	0 – 0%	78
Total	1569	72	15	1656
CLAIMS RESOLVED	95%	4%	1%	
ACTIVE CLAIMS	16	6	3	

Figure 1. Historical data of claims settled, indicating the level at which disputes were settled under the DRP. Total Claims in Data Set = 1656.<sup>168</sup>

165. See *supra* Part IV.A.

166. DRP METRICS (July 12, 2007) [hereinafter DRP METRICS] (on file with authors).

167. *Id.* Throughout the DRP process, the company encourages the settlement of disputes, which can also occur between levels (e.g., settling after an unresolved Level Two mediation, settling between filing a Level Three binding arbitration and the actual mediation). Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37.

168. DRP METRICS, *supra* note 166. The company purges historical data more than five years old. Therefore, the historical data presented is the most comprehensive set available. Some may consider a comparison of “parallel” union numbers useful (i.e. number of grievances filed vs. number of arbitrations conducted), however the authors believe this would be comparing two distinct sets of employees, both operating under unique processes and varying influences, rendering such a comparison of little value.

The company credits much of the reduced number of claims submitted to the program on the informal communication taking place between employees and management in order to resolve disputes prior to even submitting the dispute for resolution.<sup>169</sup> Although it is likely not possible to track such information, data concerning the pre-DRP resolution of conflict would bolster this hypothesis. While this certainly may be the case, an alternative explanation would suggest that employees are simply unconvinced of the program's utility and fail to submit claims in the first place. Under this theory, however, one would likely expect to see increased judicial challenges to the program as well, an event that has failed to happen.<sup>170</sup>

The resolution of disputes at the lowest possible level obviously saves the company litigation costs, but the remarkably low number of arbitrations also saves the company significant time and money. In addition to successfully resolving disputes at the lowest possible level, the program has also achieved such results in a much quicker fashion than that provided by traditional litigation options. Across the same historical period, Level One disputes are resolved in an average of four weeks.<sup>171</sup> Level Two disputes are resolved, on average, in six months, with Level Three disputes being resolved in an average of fifteen months.<sup>172</sup>

There are also a few anecdotal pieces that should be considered when evaluating the outcomes of the program. First, the confidentiality provisions of the program, to the extent of management's knowledge, have been universally accepted.<sup>173</sup> Ross attributes much of this to the internal respect for the DRP.<sup>174</sup> Some of the internal culture of Anheuser-Busch, including a constant focus on high quality, certainly contributed to this success as well.<sup>175</sup> In fact, this slice of the company's corporate culture has lent itself to the overall integrity of the program.<sup>176</sup> Both Senior Associate General Counsel Richard Ross and Human Resources Director Susan Brueggemann explained that they have failed to see any employee who used the program and vocally felt they had

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169. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37.

170. *See infra* note 176.

171. DRP METRICS, *supra* note 166.

172. *Id.*

173. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37. Employees may be speaking in violation of the confidentiality terms, but no reports have been brought to the attention of management. *See id.*

174. *Id.*

175. *Id.*

176. *Id.*

been taken advantage of, cheated, or the like at the conclusion.<sup>177</sup> Indeed, some have used the program and failed to prevail on their claim, but finished with an appreciation for the process.<sup>178</sup>

Second, the integrity of the program, and perhaps successfully protecting its integrity, may be the most critical element of the program's success. From its initial roll-out, through its current operation, the integrity of the program is what keeps employees submitting their disputes to the DRP.<sup>179</sup> This voluntary submission of the dispute for resolution has limited the number of judicial challenges involving the DRP. Indeed, the company has faced judicial challenges in less than a dozen cases.<sup>180</sup> In all but one of those cases, the company's motion to compel was granted, removing the dispute to DRP for resolution.<sup>181</sup>

### *B. Follow-up and Future Challenges*

In terms of future follow-up planned for the program, the company plans to send out a "reminder" of the program to refresh people on the program's availability and features.<sup>182</sup> Perhaps one of the greatest challenges the company faces is allocating additional resources, including time and money, to modify or otherwise tweak the program because it currently works so well.<sup>183</sup>

The program currently faces two significant challenges. First, in particular geographic regions, there is a shortage of qualified neutrals to serve as mediators and arbitrators.<sup>184</sup> Unlike regions with an abundance of quality neutrals such as Florida, the northeast, and Texas, the Midwest lacks a significant population of qualified neutrals that fit the program's

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177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* In the one case involving a denied motion to compel, the company's motion for summary judgment was subsequently granted. *Id.* The denied motion to compel was by a federal judge in Florida in the early days of the DRP. *Id.* No information regarding the denied motion was available in published format or from the company. *Id.*

182. *Id.* This is important from a legal perspective to notify and remind employees that the program is a term and condition of continued employment. *Id.*

183. *Id.* There has been no further discussion of providing for attorneys' fees, but the issue may be reconsidered when other parameters of the program are adjusted. *Id.*

184. *Id.* See, e.g., David B. Lipsky & Ronald L. Seeber, *Top General Counsels Support ADR*, 8-APR BUS. L. TODAY 24 (1999) (noting that, in 1999, 30% of the largest 1,000 U.S. corporations identified a lack of qualified and experienced neutrals). Given the rapid growth of ADR since 1999, it appears the lack of quality neutrals has undoubtedly swelled to a general sentiment.

criteria.<sup>185</sup> This problem is somewhat relieved, however, by the employee's participation in the selection of a neutral.<sup>186</sup> The far more troubling challenge is various emerging state laws and regulations regarding the unauthorized practice of law with the presence of out-of-state counsel at mediation and/or arbitration.<sup>187</sup> Furthermore, some jurisdictions suggest that a licensed attorney is required to be present at arbitration, a proposition that is directly at odds with the employee's option of self-representation under the DRP.<sup>188</sup>

These challenges, however, seemingly demonstrate the success of the program. Because the most significant hurdles to the program remain external to the company, the internal mechanisms of the program remain efficient. As the law continues to respond to and shape the ADR landscape, it is likely that Anheuser-Busch will modify its program to ensure its continued success at achieving the company's goals—quick and fair resolution of employee disputes and reduced legal exposure.

## VI. ANALYSIS

In addition to evaluating the success of the program relative to

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185. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37.

186. *Id.* See *supra* notes 109-110, 126-128 and accompanying text (explaining the employee's role in the selection of a neutral).

187. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37. See, e.g., CAL. CIV. PROC. CODE § 1282.4(b) (West 2005) (providing restrictions on non-California attorneys serving as counsel in a California arbitration); RULES REGULATING THE FLORIDA BAR R. 1-3.11, *available at* <http://www.floridabar.org/divexe/rrtfb.nsf/FV/60A2F6198D8AD63C852570DF0052D642> (limiting a non-Florida attorney's participations in arbitrations taking place in Florida). See generally Lane Hornfeck, *The Pitfalls of Mediating and Arbitrating on the Mainland: Are You Inadvertently Committing the Unauthorized Practice of Law?*, 11-JUN HAW. B.J. 4 (2007) (discussing that an attorney may engage in the unauthorized practice of law when involved in ADR without knowledge because of various rules and regulations across the country); D. Ryan Nayar, *Unauthorized Practice of Law in Private Arbitral Proceedings: A Jurisdictional Survey*, 6 J. AM. ARB. 1 (2007) (outlining the requisite credentials of a neutral arbitrator on a state-by-state basis). If an attorney licensed in another state is committing the unauthorized practice of law by virtue of serving as a neutral arbitrator in a proceeding, it clearly follows that another company representative's presence at such hearings (such as HR or local managers) is also the unauthorized practice of law. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37.

188. See *Disciplinary Counsel v. Alexicole, Inc.*, 822 N.E.2d 348, 350 (2004) (a non-attorney engaged in the unauthorized practice of law in Ohio when representing his client in a securities arbitration taking place in Ohio). If the employee elects to proceed without counsel, the company would follow suit and be represented by a Human Resources representative or other manager. Telephone Interview with Richard R. Ross & Susan Brueggemann, *supra* note 37. This case, however, would suggest that such representation would constitute the unauthorized practice of law. *Disciplinary Counsel*, 822 N.E.2d at 350.

Anheuser-Busch,<sup>189</sup> the program must also be considered as to its viability as a model for a fair dispute resolution program. This section seeks to evaluate the program in such a light, answering the questions of whether employers can use the program in drafting fair, ethical, and enforceable arbitration agreements and whether courts could use the program as a benchmark in deciding the enforceability of other employment arbitration programs.<sup>190</sup> Our analysis will consider the DRP in light of *The Employment Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*,<sup>191</sup> the AAA Employment Arbitration Rules and Mediation Procedures,<sup>192</sup> and applicable case law.

The Due Process Protocol was designed “as a means of providing due process in the resolution by mediation and binding arbitration of employment disputes involving statutory rights.”<sup>193</sup> The Protocol specifically recognizes the timing of an agreement to mediate and/or arbitrate as an issue but takes no position on the issue.<sup>194</sup> The Protocol specifies that the agreement should be knowingly made, a standard met by Anheuser-Busch’s DRP.<sup>195</sup> The Protocol outlines three broad standards regarding the right of representation: choice of representative, fees for representation, and access to information.<sup>196</sup> The DRP meets the standards outlined in this section, allowing the employee to choose her representative, leaving the issue of payment of representation to be determined by the employee and the representative, and providing for pre-trial discovery.<sup>197</sup> The protocol suggests the provision of partial employer reimbursement for representation costs, which the DRP does not provide.<sup>198</sup> After the initial fee paid by the employee, however, the

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189. See *supra* Part V.

190. See *supra* Part I.

191. AMERICAN ARBITRATION ASSOCIATION, EMPLOYMENT DUE PROCESS PROTOCOL (2007), available at <http://www.adr.org/sp.asp?id=28535> [hereinafter PROTOCOL]. For an in-depth examination of the Protocol and its effectiveness as a benchmark, see generally, Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165, 178-84 (2005); Margaret M. Harding, *The Limits on the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369 (2004).

192. AMERICAN ARBITRATION ASSOCIATION, EMPLOYMENT ARBITRATION RULES & MEDIATION PROCEDURES (2006), available at <http://www.adr.org/sp.asp?id=32904> [hereinafter RULES].

193. PROTOCOL, *supra* note 191.

194. *Id.*

195. *Id.* See also *supra* note 73 and accompanying text (regarding knowingly made agreement).

196. PROTOCOL, *supra* note 191.

197. See *supra* Part IV.C and accompanying text.

198. PROTOCOL, *supra* note 191. The Protocol merely recommends the provision of attorney

company does cover all mediator and arbitrator fees.<sup>199</sup>

The Protocol outlines the qualifications necessary for mediators and arbitrators, including provisions for roster membership, training, panel selection, conflicts of interest, authority of the arbitrator, and compensation of the mediator and arbitrator.<sup>200</sup> Again, the DRP explicitly covers each of these standards.<sup>201</sup> Finally, the Protocol provides that the arbitrator's award is final and binding, with a limited scope of review.<sup>202</sup> The company's program also provides for such a standard.<sup>203</sup> When evaluated against the Protocol's standards, Anheuser-Busch's DRP not only meets the outlined standards, but in many cases, exceeds them.<sup>204</sup> In doing so, the program could serve as a model of what at least one coalition has deemed to be the important safeguards to employees' due process.

The DRP also complies with the Employment Arbitration Rules and Mediation Procedures outlined by AAA.<sup>205</sup> Indeed, Ross consulted with both AAA and CPR in designing the DRP in order to ensure its compliance with applicable rules and procedures.<sup>206</sup> The continued compliance with such provisions is ensured by the fact that AAA will decline to administer employment ADR cases if it determines that a company's program does not comply with the Protocol or the Employment Arbitration Rules and Mediation Procedures.<sup>207</sup>

Consistency with the Protocol is often cited by courts to determine whether an arbitration rule fair and enforceable.<sup>208</sup> Likewise, courts will often cite an arbitration rule's variance from the Protocol as proof that a rule is unbalanced, and therefore, unenforceable.<sup>209</sup> The Anheuser-Busch program does not contain any of the unbalanced provisions that often render an arbitration agreement unenforceable.

Anheuser-Busch appears to have developed a model dispute resolution program and demonstrates how a company can implement a

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fees, but does not require them. This was one of the features of the Brown & Root program. BALES, *COMPULSORY ARBITRATION* *supra* note 1, at 109.

199. See *supra* notes 108 and 124 and accompanying text.

200. PROTOCOL, *supra* note 191.

201. See *supra* Parts IV.C.2 and IV.C.3.

202. PROTOCOL, *supra* note 191.

203. See *supra* note 150 and accompanying text.

204. Compare PROTOCOL, *supra* note 192, with CURRENT DRP POLICY, *supra* note 63.

205. Compare RULES, *supra* note 192, with CURRENT DRP POLICY, *supra* note 63.

206. Interview with Richard R. Ross, *supra* note 42.

207. RULES, *supra* note 192.

208. Bales, *supra* note 191, at 179.

209. *Id.* at 180.

compulsory arbitration system. Procedurally, the company ensures that the program is meticulously fair to employees. Its financial contribution to the process, its contractual promise of no retaliation, its commitment to early resolution, and its provision of mediation are all examples of the company going beyond the legal requirements of a compulsory arbitration system. This demonstrates that the company's use of arbitration is not simply a litigation avoidance strategy, but a comprehensive dispute resolution strategy.

## VII. CONCLUSION

Examining the results of the DRP from both the company perspective, as well as through the lens of prevailing ADR standards, Anheuser-Busch demonstrates that it is possible to both meet the company's goals, while simultaneously delivering a fair dispute resolution process to employees. Indeed, the resolution of the vast majority of disputes short of mediation or arbitration accurately sums up the satisfaction of the company's goals.<sup>210</sup> And as noted in the previous section, the program was developed and implemented with the necessary precision to ensure that it was unyieldingly fair to employees.<sup>211</sup> The resulting program ultimately fulfills the stated objective—"resolution of workplace problems through a process that emphasizes fairness and due process while minimizing bureaucracy."<sup>212</sup> In doing so, the program serves as a model program for companies and courts alike as a benchmark for the effective implementation of ADR in the workplace.

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210. *See supra* Part IV.A.

211. *See supra* Part VI.

212. HIGHLIGHTS, *supra* note 66.