

## FAQs for the Employment-Related Mass Claims Protocol

### **What is the Employment-Related Mass Claims Protocol?**

The Protocol is a procedure designed by the International Institute for Conflict Prevention & Resolution (CPR) to help with the administration of a mass of arbitration cases that are of nearly an identical nature brought against the same company.

### **What are cases of a nearly identical nature?**

Cases of a “nearly identical nature” are claims that arise out of a factual scenario and raise legal issues so similar one to another that application of the Protocol will reasonably result in an efficient and fair adjudication of the claims.

### **Why was this Protocol necessary?**

It can be difficult to bring resolution efficiently and effectively when many, nearly identical cases are brought at or around the same time. The Protocol is designed to facilitate resolution in a more effective and efficient manner than other currently available options either in court or in arbitration.

### **How does the Protocol work?**

When more than 30 individual employment-related arbitration cases are initially filed with CPR under any CPR arbitration rules, the Protocol provides that CPR will randomly select, from among the total filed arbitrations, a group of 10 “Test Cases.” The lawyers for each side can nominate another 5 Test Cases each.

These 10-20 Test Cases will proceed to arbitration first, and a neutral arbitrator will be assigned to each Test Case. These cases should finish in most circumstances within 120 days with a written decision from each arbitrator.

In order to protect the confidentiality of each claimant, CPR will remove the identifying information about each claimant from the decisions, and then these anonymized decisions will be given to a mediator selected by both sides to help resolve the cases. Working with both sides, the mediator will be able to use these anonymized decisions to better understand the nature of these cases and what factors are important in determining the outcome, and to try and find a global solution for resolving all of the remaining arbitration cases without individual arbitration of each case.

The mediator and the lawyers for both sides will have 90 days to come up with a global solution, which will likely be an objective set of criteria that can be applied to make an offer to settle each case that had been filed prior to the expiration of the 90 days. If they can come up with such a global solution, then an offer to settle will be made to each of those remaining claimants.

Each claimant can accept the offer and resolve his or her case or reject it and proceed with an individual arbitration.

If the mediation does not produce a global solution, then either the defense or the claimants can opt out of arbitration and proceed in court or, if the defense has not opted out, the claimants can still choose to proceed with individual arbitrations of each remaining claim.

### **Who pays the fees under the Protocol?**

Generally speaking, under the Protocol, all fees of CPR and of the arbitrator or mediator are paid by the Employer.

### **When does the Protocol apply?**

The Protocol applies only if:

- 1) there is an agreement between the employer and the claimant (either pre- or post-dispute) that provides for arbitration under CPR rules
- 2) the employer has agreed to afford each claimant the [Due Process Protections](#)
- 3) there is a specific reference in the agreement between the employer and claimant to the Protocol and the employer has provided access to the Protocol to the claimant prior to the claimant's acceptance of the agreement
- 4) the employer has not in its arbitration agreement with the claimant fundamentally altered the terms of the Protocol
- 5) more than 30 individual employment-related arbitration cases of a nearly identical nature have been filed with CPR against the same employer

### **What does the Administrative Arbitrator do?**

The Administrative Arbitrator is an independent arbitrator working with CPR who will help facilitate management of the cases under the Protocol. Thus, if there is a disagreement between the parties as to whether cases are of a "nearly identical nature" (defined above), the Administrative Arbitrator is authorized to resolve that dispute quickly.

The Administrative Arbitrator is also able to determine whether the Test Cases should be increased by up to 5 more nominated by each side, or whether additional cases should be substituted amongst the Test Cases were any of the Test Cases to resolve in advance of an award being issued.

The Administrative Arbitrator may provide other assistance as well, such as helping coordinate selection of a mediator, in conducting discovery across cases, or otherwise in facilitating resolution.

**What are test cases? What is the purpose of the test cases?**

The Test Cases are the initial cases that will proceed to arbitration. Experience with the Test Cases and decisions made on those cases are intended to help inform all parties participating in the mediation process and make it more likely everyone can come to a global solution for resolving all the cases. Reasoned awards deciding from between 10-20 cases should provide enough information about the nearly identical cases to optimize the chances for global resolution.

**Why are the other cases paused during the Test Cases?**

The objective of the initial phase of the Protocol is to drive toward resolution of the cases as a whole without spending resources on more arbitrations than are necessary. So, during the Test Case phase and during the Mediation process, the other cases are paused with all rights preserved to give everyone a chance to explore a global resolution. CPR believes that this procedure will actually encourage faster overall resolution of mass claims – especially when compared to the substantial delay that employees inevitably face while waiting for appointment of an arbitrator for, and the proceedings on, their case when their case is one of dozens, hundreds or thousands of mass arbitrations filed at the same time.

**What is the purpose of the mediation?**

The purpose of the mediation is to identify a Substantive Methodology for resolving the remaining arbitrations. The Substantive Methodology reflects an agreement by the parties to the mediation on all the terms that will ultimately be necessary for reaching an agreement – and the identification of objective criteria – to enable resolution of the remaining cases. The Substantive Methodology does not resolve all of the remaining arbitrations but establishes a framework for doing so.

**How is the mediator selected?**

Once the reasoned awards from the Test Cases have been finalized, the parties will all be given a chance to promptly agree upon a mediator, who shall be identified from CPR’s Panel of Distinguished Neutrals; if the parties are unable to do so within ten days, CPR will nominate three candidates for the role, and the parties shall have seven days to agree upon whom they wish to select from the three nominees or 15 days to send in their rankings for each of the three. The mediator who is most preferred by the parties will be selected.

If for any reason this procedure fails to select a mediator, CPR shall promptly appoint a suitable mediator from its list of three nominees. CPR may enlist the assistance of the Administrative Arbitrator to help the parties identify a mediator.

**How will the mediation work?**

The anonymized reasoned awards from the Test Cases will be provided to the mediator and to those involved in the mediation. Using this information and whatever additional information would be helpful, the mediator and the parties will work together to arrive at a Substantive Methodology.

**Following the mediation, how will claimants be able to settle their cases?**

If the mediation is successful in arriving at a Substantive Methodology, offers shall be made to each claimant who filed their case prior to the end of the 90-day mediation period in an efficient and fair fashion. If the claimant accepts the offer, the parties shall fully and finally resolve the case. If the claimant rejects the offer, then his or her case will proceed to individual arbitration.

**Can the parties still settle their arbitrations even if the mediation is unsuccessful?**

Yes, nothing stops the parties at any time (before, during or after the mediation process) from reaching an agreement to settle their individual arbitrations or groups of arbitrations, even if the mediation process was not successful in identifying an agreed-upon Substantive Methodology for resolving the remaining arbitrations.

**Why do the parties get to opt-out of the arbitration process and go to court if the mediation process was unsuccessful?**

If the mediation was unsuccessful, then it may be that arbitrations will not be the most efficient and effective way for resolving these claims. Accordingly, all the parties are given the option to exit the arbitration process and go to court.

**Can a class action be formed upon opting out?**

That is a question that parties should discuss with their lawyers.

**What about arbitrations asserting claims of a nearly identical nature that were not brought early enough to be part of the mediation process? Will they be given a chance to opt out and go to court if the mediation was unsuccessful? Will they be given offers if the mediation was successful?**

For a period of time, arbitrations that were not filed in time to be part of the mediation process will also be given the opt-out option if the mediation was unsuccessful. If the mediation was successful, the Substantive Methodology will not include offers to resolve arbitrations filed after the close of the 90-day mediation period. These newly filed arbitrations shall proceed to arbitration in accordance with the Protocol.

**How will the remaining arbitrations proceed for claimants that do not settle or opt out?**

CPR shall proceed with as many arbitrations simultaneously as possible. If the mediation was unsuccessful and the employer has not opted out, then those claimants who have decided to continue with arbitration instead of going to court will have their arbitrations proceed in accordance with the numbers assigned to their cases when they were filed.

If the mediation was successful but a claimant chooses to proceed with arbitration, the sequence shall be determined in part by the timing of notifications of a rejection of settlement and whatever other factors are necessary for the efficient and orderly arbitration of the remaining claims. The object will be to resolve as many arbitrations as quickly as possible.

### **How long will these arbitrations take?**

The object of the Protocol is to proceed as efficiently as possible. Like with the Test Cases, the arbitrators for these cases should render reasoned awards in most circumstances within 120 days of the initial prehearing conference, and any extensions of time that would result in a longer period of time need to be approved by CPR. Precisely how long this will take will turn on how many arbitrations there are after the mediation process is complete. CPR will also continue to explore innovative ideas with the parties around discovery and other issues to help expedite matters.

### **How does the arbitrator selection process work under the Protocol?**

In order to make the arbitration selection process as efficient as possible, CPR first will canvas the Panel of potential arbitrators with information about the case and ask them to identify any potential conflicts. CPR will then randomly generate a list of arbitrators from those who have not excused themselves from selection. And, if the random selection does not generate a list that is 30% diverse, in keeping with [CPR's Diversity Commitment](#), it will randomly identify additional diverse candidates until the slate is 30% diverse.

The parties will then be given an opportunity to rank the candidates on the slate. CPR will then collect information from the top three jointly selected candidates regarding any potential conflicts, fees for serving, and availability to serve, and will share the information with the parties. The parties will be given an opportunity to object to any candidate only on the ground that there is justifiable doubt as to the arbitrator's independence or impartiality. An independent Challenge Review Committee may be asked to resolve any objections. CPR will then appoint any suitable candidate who has received no objections or for which no objection has been sustained, and who is available to handle the arbitration within a reasonable timeframe.

### **What is the Challenge Review Committee?**

The Challenge Review Committee is a group of three independent arbitrators who are assigned to resolve challenges or objections to particular arbitrators serving in arbitrations. For more information, see [this link](#).