

# **ARBITRATION TRAINING AND CERTIFICATION IN EMPLOYMENT AND LABOR LAW 2022**

**LIVE SEMINAR AT DSBA WITH ZOOM OPTION**

SPONSORED BY THE DELAWARE STATE BAR ASSOCIATION

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**TUESDAY, OCTOBER 18, 2022 | 10:00 A.M. – 12:00 P.M.**

**2.0 hours CLE credits for Delaware and Pennsylvania Attorneys**

## **ABOUT THE PROGRAM**

Attorneys who wish to be certified by DSBA as an Employment and Labor Law Arbitrator should take this course, along with the General Arbitration Training course (offered February 10, 2022). Experienced arbitrators in these areas of law will provide attendees with wisdom and insight as to the best practices for handling an Employment and Labor Law arbitration.

## **CLE SCHEDULE**

### **Employment Law Arbitration**

Katherine Witherspoon Fry, Esquire  
*Offit Kurman P. A.*

G. Kevin Fasic, Esquire  
*Offit Kurman P.A.*

### **Labor Law Arbitration**

Aaron M. Shapiro, Esquire  
*Connolly Gallagher LLP*

Anthony N. Delcollo Esquire  
*Offit Kurman, P.A.*



Visit <https://www.dsba.org/event/arbitration-training-and-certification-in-employment-and-labor-law-2022/> for all the DSBA CLE seminar policies.

*Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.*

# Employment Law Arbitration

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Katherine Witherspoon Fry, Esquire  
*Offit Kurman P.A.*

G. Kevin Fasic, Esquire  
*Offit Kurman P.A.*

## **Katherine Witherspoon Fry**

Katherine Fry is a principal attorney in Wilmington, Delaware, at the law firm of Offit Kurman, a firm of 250 lawyers. She has been peer-elected as a Best Lawyer in America, a designation given to only 5% of American lawyers. For almost 30 years, Katherine has represented companies in all facets of the employment relationship, including hiring, termination, contracts, policies, discrimination, non-competition, wage and hour matters, whistleblowers' complaints, and regulatory matters. She has litigated cases before many courts nationwide, including the U.S. Supreme Court. She also works on merger and acquisition deals as an employment and Delaware law specialist. Katherine is a certified mediator, arbitrator, and court-appointed hearing officer for employment and commercial disputes. She is an adjunct professor at the University of Delaware Lerner School of Business and guest lectures at other universities. She has a B.A. from Duke University and a J.D. from N.Y.U. School of Law.

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# Labor Law Arbitration

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Aaron M. Shapiro, Esquire  
*Connolly Gallagher LLP*

Anthony N. Delcollo Esquire  
*Offit Kurman, P.A.*





## Aaron M. Shapiro

302-888-6204

[ashapiro@connollygallagher.com](mailto:ashapiro@connollygallagher.com)

### Education

- Widener University School of Law (J.D., *cum laude*; 1995)
- California State University, Los Angeles (B.A., 1992)

### Bar Admissions

- Delaware
- Pennsylvania
- United States District Court – Delaware
- E.D. Pennsylvania

Aaron Shapiro has been representing and counseling public sector, private, and higher education clients for more than 20 years, with an emphasis on labor relations, collective bargaining, employment law, administrative law matters, and government relations. Prior to joining the firm, Aaron served as the Labor Relations and Employment Practices Administrator for the state of Delaware where he managed an extensive portfolio of labor contracts and employment policies, and counseled several administrations on labor, employment and operational matters. He regularly developed strategy initiatives and programs that prioritized cost containment, measurable outcomes, and achieving long-term sustainable results. Aaron has served as the Chief Negotiator for many contracts, and developed strategy for global collective bargaining efforts covering police officers, firefighters, medical professionals, correctional officers, educators, bus drivers, technical specialists, maintenance employees, and support and service personnel.

Aaron has extensively litigated claims for interest arbitration, wages and benefits, compensable time and compensation standards, contract enforcement, employee accountability, performance standards, drug and alcohol testing, impact bargaining, bargaining unit formation and composition, elections, bargaining unit jurisdiction, scope of bargaining, and unfair labor practice charges. Prior to his service with the State, Aaron worked as the corporate counsel and CEO of a Delaware non-profit behavioral health services agency with a focus on criminal justice diversion and rehabilitation programs.

Aaron earned a BA in Philosophy and Biology at the California State University at Los Angeles, and his JD Doctor *cum laude* from Widener University School of Law, Delaware. At Widener, Aaron was a member of the Widener Law Symposium Journal and the Moot Court Honor Society, and was honored to win Widener's moot court competition.

# ARBITRATION TRAINING

## CERTIFICATION AS AN EMPLOYMENT AND LABOR ARBITRATOR

Kevin Fasic, Esquire - Offit Kurman.  
Katherine Witherspoon Fry, Esquire - Offit Kurman  
Aaron M. Shapiro, Esquire - Connolly Gallagher, LLP  
Anthony DelCollo, Esquire - Offit Kurman

Delaware State Bar Association  
October 18, 2022

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## Labor Arbitration

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## Labor - Introduction

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- ❖ Labor vs. Employment Arbitration:
  - Practices are similar but rely on different authorities and systems.
- ❖ History
- ❖ Law
- ❖ Key Concepts
- ❖ How to Start a Practice

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## Labor Arbitration

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Arbitration is the predominant method for resolving disputes arising from interpretation and application of a collective bargaining agreement (CBA), where authorized by law. There is no general right to arbitration absent a mutual agreement to arbitrate.

Typically, the final stage of a grievance challenging employee discipline, or the enforcement (interpretation) of a term in a CBA.

May also be used to resolve disputes about the formation and terms of a CBA – interest arbitration.

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## Labor Arbitration

CBA should be the primary source of an arbitrator's authority. The scope of authority will be defined by—and confined to—the CBA (or binding practices).

Through negotiations, parties will determine how an arbitrator is selected, what can be arbitrated, what system of rules will be used, who will pay fees, availability of a stenographic record, etc.

The right to arbitrate does not necessarily survive an expired contract.

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## History

- ❖ No common law right to engage in collective bargaining or secure collective rights and protections; result of specific legislative action.
- ❖ NLRA (29 U.S.C. Chp. 7, Sec. 151-169) & LMRA (Taft-Hartley Act) authorize and define bargaining for private sector employees; application of the interstate commerce clause. State and local gov't excluded.
- ❖ Federal gov't and each state independently authorize collective bargaining for public employees.

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## Delaware Law

Three collective bargaining laws in Delaware:

- ❖ Public employees – 19 Del. C. Chp. 13
  - ❖ Police and firefighters – 19 Del. C. Chp. 16
  - ❖ Teachers – 14 Del. C. Chp. 40
- (Statutes all follow the same internal structure.)

Other states often diversify laws based on job classification: teachers; police; firefighters; and “other” public employees.

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## Delaware Law

Collective bargaining laws establish:

- ❖ Employee/union representation rights.
- ❖ Collective bargaining process, scope of bargaining, mediation and impasse resolution.
- ❖ Unfair labor practice standards – representation rights.
- ❖ Requirement for a negotiated grievance procedure.
- ❖ CBAs are not subject to the Delaware Uniform Arbitration Act (10 Del.C. § 5725).

There are often “jurisdictional” disputes over whether resolution of a claim is a statutory vs. a contractual grievance matter.

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## Delaware Law

Statutory obligation for a grievance procedure:

PERA & POFFERA do not require arbitration to be included in the negotiated procedure.

PSERA requires arbitration and defines terms that may and may not be arbitrated.

Both approaches will impact—in different ways—questions about the scope of an arbitrator's authority.

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## Important Cases

*Steelworkers Trilogy* – Three decisions by the US Supreme Court that confirmed arbitration as the predominant, binding method for resolving private sector labor-management grievances; followed in the public sector.

*United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960)

*United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960)

*United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

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## Important Cases

### *United Steelworkers v. American Manufacturing*

Confirmed that arbitration is the preferred and expected method for resolving CBA disputes—with an arbitration clause—and that courts are to defer to arbitrators and the arbitration process for interpretation and resolution of disputes about the enforcement or interpretation of a CBA.

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## Important Cases

### *United Steelworkers v. Warrior & Gulf*

Established broad authority for arbitration to resolve contractual disputes.

“An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” 363 U.S. 574, 582-83.

The Court also opined that arbitrators are integral parts of a continuous bargaining process and must have knowledge of an industry’s and location’s custom and practices in order to apply informed judgment to reach a fair solution.

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## Important Cases

### *United Steelworkers v. Enterprise Wheel*

Established that arbitrators must exercise fidelity to the CBA:

“[An] arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.” 363 U.S. 593, 597. (emphasis added)

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## Important Cases - Delaware

*Meades v. Wilmington Housing Authority*, C.A. 2003 WL 939863, at \*4 (Del. Ch. 2003) (internal citations omitted):

“The role of courts in post-arbitration judicial review is limited. Delaware has long had a policy favoring arbitration, and its courts have applied a deferential standard when reviewing labor arbitration awards.”

“Where a grievance is arbitrated under a collective bargaining agreement, courts will not review the merits of the arbitration award other than on the grounds listed above. To do otherwise would give courts the final say on the merits of arbitration awards and undercut the benefits of labor arbitration—namely, speed, flexibility, informality and finality.”

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## Important Cases - Delaware

*Meades v. Wilmington Housing Authority*, C.A. 2003 WL 939863, at \*4 (Del. Ch. 2003) (internal citations omitted):

“This Court will not disturb a labor arbitration award unless (a) the integrity of the arbitration has been compromised by, for example, fraud, procedural irregularity, or a specific command of law; (b) the award does not claim its essence from the CBA; or (c) the award violates a clearly defined public policy.”

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## Key Concepts

Two similar, but competing views of the role of a labor arbitrator:

Labor arbitrators are the interpreters, or readers of a contract. This suggests a level of independence for interpreting terms, with fidelity to the CBA as a whole.

vs.

An arbitrator should confirm the parties' mutual understanding when negotiating a term.

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## Key Concepts

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The general rule is that an arbitration will determine the scope of the arbitrator's authority over a particular dispute. The exception is where the parties have expressly defined and / or limited that authority, or if there's a determination that arbitration is not available as a matter of law.

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## Key Concepts

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### Just Cause

This is the definitive, perhaps universal standard for employee accountability.

Parties may define "just cause" in their CBA, or in an enforceable policy.

If parties do not define this standard, it will be up to the arbitrator to define and apply.

If the term is not included, it is assumed as a matter of precedence and convention.

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## Key Concepts

Seven Tests for Just Cause (Enterprise Wire, Professor Carroll Daugherty, 1966):

1. Notice of rule and consequences?
2. Rule reasonably related to business?
3. Determination of responsibility?
4. Fair investigation?
5. Substantial evidence?
6. Fair, consistent application of the rule?
7. Is the penalty proportionate?

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## Key Concepts

### Past Practice

A longstanding, consistently followed practice that creates an enforceable term, even if it is not expressly included in a CBA. If well established, it may even override an express provision.

It must be well known to all parties, in existence for a reasonable period, and consistently followed.

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## Key Concepts

### Contemporary Employment Law Standards

Parties may—and often do—agree to authorize arbitration of private employment law claims such as Title VII, ADA, etc. Parties will typically negotiate for the equal application of the express terms of a CBA—which can also obligate a union to avoid disparate treatment—but with increasing frequency, parties are agreeing to arbitrate employees' personal employment law rights and protections.

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## Key Concepts

### The Labor Arbitration Hearing:

1. Typically, there is no formal pre-hearing discovery. Earlier grievance steps may fill this role; parties may have negotiated a document request process.
2. Rules of evidence are relaxed: “arbitral” standard.
3. Parties often choose an ADR forum for selection of an arbitrator and procedures.
4. Pre-hearing matters; opportunity for resolution (also post-hearing).
5. Create the necessary record.
6. Time for issuing the decision.
7. Scope of award / authority.
8. *Functus Officio*.

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## Getting Started

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1. Work with an established arbitrator.
2. No requirement for an arbitrator to be a licensed attorney.
3. Qualify for an ADR organization panel. (ex: AAA or FMCS).
4. Seek selection for established “in house” arbitration / mediation panels. (ex: USPS)
5. Presentations and networking.
6. Can be selected directly by parties.
7. Compensation rate typically set by arbitrator, commensurate with experience.

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## Labor Arbitration Resources

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American Arbitration Association

[www.adr.org/labor](http://www.adr.org/labor)

[https://www.adr.org/sites/default/files/document\\_repository/Labor\\_QualificationsCriteria\\_AAAPanel.pdf](https://www.adr.org/sites/default/files/document_repository/Labor_QualificationsCriteria_AAAPanel.pdf)

Federal Mediation and Conciliation Service

[www.fmcs.gov](http://www.fmcs.gov)

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## Labor Arbitration Resources

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National Academy of Arbitrators

[www.naarb.org](http://www.naarb.org)

Labor and Employment Relations Association

[www.leraweb.org](http://www.leraweb.org)

Labor Arbitration Institute

[www.laborarb.com](http://www.laborarb.com)

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## Labor Arbitration Resources

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ABA, Section of Labor and Employment Law, ADR  
Committee – publications and awards

Bureau of National Affairs / Bloomberg

Elkouri & Elkouri: How Arbitration Works, Eighth Edition,  
Bloomberg / BNA, 2020.

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## Labor Arbitration

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QUESTIONS?

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