MEDIATION, ARBITRATION OR LITIGATION: HOW EMPLOYERS CAN EVALUATE THE OPTIONS

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Workplace disputes are something that all employers face at some point. The larger the employer, the more frequently personnel concerns arise, conflicts occur, and claims or grievances are filed. The issues may become so severe that separation from employment is considered. On some occasions, the employee may be terminated; other times, the employee is so upset that he or she resigns and asserts a "constructive discharge", claiming that the working conditions were so intolerable that no reasonable person would have stayed employed.

When preliminary attempts at resolving workplace conflict have failed, human resource professionals are relied upon to decide the next course of action. Termination or other appropriate discipline may be imposed. Administrative claims or grievances may be filed; lawsuits may follow.

Before examining the factors to be considered in choosing which path to take to resolve a workplace claim or conflict, it is helpful to understand the basics of the different dispute resolution alternatives.

Litigation

This is the most traditional, and formal, form of dispute resolution. Litigation is based on the adversarial trial system, where one side is pitted against the other, and only one side will prevail. Both parties are usually represented by legal counsel. The matter is presented in state or federal court, where arguments are made, witnesses testify and are cross-examined, and documentary evidence is presented. Formal rules of evidence and procedure are followed. Ultimately, the trier of fact – the judge or the jury – renders a decision, in accordance with specific applicable law. That decision can be appealed, and then, appealed even further to a still higher court.

Arbitration

Arbitration is a less formal type of dispute resolution. It is similar to litigation in several respects: it is an adversarial process, generally involving legal counsel, where one side is pitted against the other, and only one side will prevail. An arbitrator who is either appointed by the court, or selected by the parties, will hear the case. Arguments are made, witnesses testify, and documents are presented, but the process is more informal in that it occurs in a conference room, instead of a courtroom, and the arbitrator has some discretion with respect to liberalizing the rules of evidence and procedures. The arbitrator will then render a decision, which may or may not be binding, depending on what the parties have agreed to in advance of the hearing.

Mediation

Mediation is a voluntary process which can be initiated by either party to a dispute, or their counsel. Unlike a judge or an arbitrator, a mediator, who can be appointed by a court or administrative agency, or privately selected by the parties, does not listen to a formal presentation of witnesses and evidence and then impose a decision on the parties. Instead, a mediator is trained in facilitative skills, and assists the parties to communicate and negotiate, identify common interests and goals, and resolve underlying issues so that the parties are able to come to an agreement themselves that each side is comfortable with. Legal counsel may or may not be involved. The mediator does not provide legal advice, but may provide the parties with information about the law that the parties may want to consider in reaching a resolution. Finally, a skilled mediator will offer creative options and alternatives to assist in resolving the dispute that the parties may not have previously considered.

WHICH ALTERNATIVE TO CHOOSE?

When evaluating which dispute resolution method will work best in any given situation, the following factors should be considered:

1. Cost

   Litigation is by far the most costly alternative, and for many, can be cost-prohibitive. A typical employment dispute can cost tens to hundreds of thousands of dollars in attorneys' fees to take through trial. Discovery is fact-intensive and can involve many witnesses, adding further costs in lost productivity. Some cases may involve payment of attorneys' fees to the prevailing employees as well. For a large employer, where the budget includes cost of defense for employment claims, this issue may not be as important as it would to a smaller or medium-sized employer without a budget for such costs. Arbitration is the next most costly – discovery still occurs, although it may be limited, and the length of the hearing is likely to be shorter than a court trial. Mediation is the most informal, and the least costly, of the alternatives.

2. Time constraints/need for quick resolution

   In Maricopa County, it takes on the average of a year and a half to two years to get to trial. The appellate process will, of course, lengthen the time until final resolution. Arbitrations can usually be scheduled within a 6-month period, and, if the parties have agreed, the result can be binding and preclude any appeals. Mediations do not require extensive discovery, nor do they require as detailed a preparation as an adversarial process, so sessions can usually be scheduled within a month.

3. Stress level

   The emotional state of the employees, managers and key witnesses involved should be considered, and an assessment made as to the level of stress that the key players are able or willing to tolerate. The more formal the procedure, the higher the stress. (Just ask someone whose ever been personally named in a lawsuit.) There may be a need for counseling during the process.

4. Need for confidentiality

   The need for privacy can be critical. If, for example, there is a claim of sexual harassment, either the victim or the alleged harasser may not want the fact or the details of a claim to "go public." The employer may not wish any negative publicity which could affect public opinion and possibly have economic or political repercussions. Other employees who learn about a claim may think about joining as plaintiffs in a class action. Here, mediation may be the best choice.

5. Setting precedent

   This is a relative of the "confidentiality" factor, above. The employer may be relatively confident in its position, and may want, or need, to set a firm precedent, or to make a public statement about how it reacts to certain situations. In such a case, litigation may be the most preferable option.

6. Existence of ongoing relationship

   Where the claimant is still employed, there may be a desire to preserve or improve relationships. This factor could also exist in a business context where parties are likely to be in contact in the future, even if the current association is ended. If a positive ongoing relationship is important, mediation is the most preferable option, where the focus can be on enhanced communication and preserving relationships.

7. Availability of non-monetary options

   When the employee has left the organization and has expressed no desire to return, in many instances the eventual resolution will likely depend on the payment of a sum of money. In that case, arbitration or litigation may be appropriate, since judgments or awards are made in monetary terms. Where other relief may be available, such as transfers, training, mentoring, use of leave, and long-term disability, mediation allows for "out-of-the-box" solutions.

8. Likelihood of satisfactory resolution

In some extreme situations, the conflict has become so adversarial that the parties or their counsel are out of control with little or no likelihood of any willingness to compromise or reach a negotiated solution. In other situations, the parties have an unrealistic opinion about their likelihood of success and insist on taking it "all the way." While an experienced mediator can provide some useful "reality testing" in private session, parties who are firmly rooted in principle may only be satisfied when a judge or jury validates their position.

USING THEM ALL

It is possible to rely on all of the above methods of dispute resolution. Many employers are turning to mediation as the first step, then proceeding to binding arbitration. In cases where the arbitration is not binding, the parties can then proceed to court if they are unhappy with the result.

Even cases that begin in litigation can later turn to arbitration or mediation, where the parties wish to take a step back to try to resolve the matter in a less adversarial manner, short of reaching "the courthouse steps." Each case is different, and human resource professionals should consult their counsel as to which approach may work best in any given case.

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