

Employer Update

TO MEDIATE, OR NOT TO MEDIATE – THAT IS THE QUESTION

By Portia L. Jenkins

Cases involving employment disputes are prime candidates for requests or orders for mediation. But deciding whether and when to mediate are difficult decisions. Mediation has emerged as the favored form of alternative dispute resolution and can offer important advantages to those involved, at various stages of the dispute.

Generally, the overall atmosphere of a mediation is more pleasant than in a courtroom, the parties are afforded more privacy, the parties' stress level is typically decreased, transactional costs are lower, the parties have more say in the remedy, and the focus is centered more on the parties' interests as opposed to legal positions.

There are times when mediation is appropriate even before an administrative claim or law suit has been filed. Employers often know well in advance of actual litigation when an employee has an alleged claim against them. After thorough investigation of the alleged claim, you will be in a better position to assess the pros and cons of the alleged claim going through litigation and can determine whether mediation is a better alternative. The



following information on mediation will hopefully put you in a better position to make the determination of whether mediation is a better option.

What benefits do I gain from litigation?

In some cases, trial may be the most "appropriate" form of dispute resolution. The biggest benefit of litigation, if you have good facts and good law on your side, is that you won't have to pay the plaintiff a dime. If you prevail in litigation with a defense verdict, the plaintiff will pay most, if not all, of your costs (but not attorney fees) to defend the case. In a few types of cases, the plaintiff might end up paying your attorney fees, as well. You will be vindicated!

What are the risks of litigation?

You could lose the case and end up with a verdict for more than the plain-

Next month's topic:

We will discuss some of the recent changes to USERRA, the Uniformed Services Employment and Reemployment Rights Act.

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tiff even wanted, including an award of his/her costs associated with bringing the action, as well as the plaintiff's attorney fees in discrimination cases. Another down side is the length of time it takes in the judicial system. The wheels of justice can grind slowly, so it may take several years for your cases to come to a final resolution. Of course, there are your own attorney fees that you will be expected to pay, as well as the high emotional cost of going through several years of litigation and a trial. Time will be demanded for many of your employees, and even former employees. If you have bad facts on your side, there is also the big risk of exposing bad company behavior to the business community, which could have a negative impact on your reputation.

What is this thing called "mediation?"

Mediation is a get-together between the parties, their attorneys, and a neutral third party who will be the go-between among the parties to assist in reaching a settlement of the case. The process is private, voluntary, and informal, although it also may be required by court order. In federal court, our magistrate judges also conduct "settlement conferences," much like the mediation process. A mediation can occur before any actual claims are filed with the court or with an agency such as the Idaho Human Rights Commission. Bear in mind also that, if the employee files a claim with the Idaho Human Rights Commission or the Equal Employment Opportunity Commission, those agencies will request that you consider mediation as an alternative method to resolving your disputes. Understand, however, that reaching a settlement through mediation is NOT an admission of liability.

It is also important to note that, for a mediation to be effective, it should not be commenced before enough time has passed to gather all of the relevant facts. The strengths and weaknesses of each side of the case need to be discovered so

that each party is in position to effectively mediate.

The mediation usually is held in conferences rooms, rather than a courtroom. Each party has his/her own, private room to meet with the mediator. In some cases, both parties will agree to an initial joint meeting with the mediator to openly discuss legal positions. The parties then break into separate groups. The mediator visits each party separately to discuss the details of the case. It is the mediator's job to discuss each party's strengths and weaknesses. The mediator will have asked for your statement of the case, in advance, so that he/she is "up to speed" on the issues and your viewpoint about the outcome.

Eventually, the mediator will discuss with each party what might be required to settle. However, the mediator has no power to impose a settlement. The mediation continues as long as there seems to be forward movement by each party toward resolution of the matter. Some mediations take an entire day, or longer, unless one party makes no movement at all or the parties reach impasse, wherein the mediator will end discussions.

Who chooses the mediator?

The mediator is often selected together by the attorneys representing the parties. The mediator may be a senior investigator for the Idaho Human Rights Commission, another attorney from the community who has employment law or mediation experience and has been certified as a mediator, or a judge. The mediator will not be the judge who will try the case. Also, the Ninth Circuit has a staff of attorneys who serve as mediators for cases on appeal.

What needs to be done before the mediation?

As mentioned above, typically your attorney will prepare a mediation statement that will be sent to the mediator. The mediation statement usually is confidential, sent only to the mediator, and informs the mediator about your case as you see it. Mediators gen-

erally want to know the good, the bad, and the ugly about your case. And, it is important for you, as the client, to have a good grasp of your case, which includes all the facts and the strengths and weaknesses, in order for the mediation to be effective.

Try to come up with creative settlement options that do not require money, such as reinstatement in certain cases. Also, come up with various case outcomes and settlement scenarios from best to worst and be aware of how the employee views the case and his/her expectations. It is also beneficial to know in advance how much it might cost you to take the case clear through a trial, since the mediator may likely use this figure as leverage.

Consider, too, who will be the company representative at the mediation. It must be one who has full authority to negotiate on behalf of the company. The higher the position in the company the representative holds, the stronger the message that your company takes the matter seriously.

What is the role of the company representative at the mediation?

The person attending the mediation for your company must achieve and maintain credibility with the mediator. Statements or assertions must be well-reasoned and supported by facts and documents. It is important to avoid situations that could have a negative impact on the mediator, such as speculation or overstating the case to the mediator.

While credibility is important, the art of persuasion is equally important. Here, the key to persuasion is to present a concise, simplified version of your case. Repeating important facts, testimony, and documents helps to enforce your version of events. The more objective and concrete the evidence, the more persuasive it is.

It is also important for the company representative to be cooperative and polite. It is often difficult for the parties to put aside their differences and listen to the other party. Mediations work best when the parties come to the mediation ready to compro-

mise. Being deeply entrenched in your position is a poor way to start things off. It is human nature for an employee to harbor negative feelings towards the company. Recognizing those feelings and trying to overcome the employee's anger and distrust will go a long way toward resolving the case early in the process.

How does the actual mediation process work?

The process is both the same and unique for each mediation. We often say that each mediation "takes on a life of its own!" Typically, the employee makes the first offer and sets the settlement value at much more than is obtainable. The employer responds with a reciprocal low offer in an attempt to show its valuation of the claim and adjust the employee's expectations downward. In some cases, though, the mediator proposes the initial settlement terms and attempts to persuade the parties to make concessions.

The offers go back and forth between the parties until the gap is sufficiently narrow that a settlement at a particular figure begins to look acceptable to all. It is unrealistic to believe that either party is ready at the beginning of the process to resolve the case at the final compromised figure. Time and patience are an integral part of this process. For practical purposes, the employer is usually seen as being in the driver's seat when it comes to mediation because the employer controls whether any money gets paid; however, don't let this go to your head since it can get in the way of a successful mediation.

What happens when the parties finally agree on a settlement?

When the general terms of a settlement have been reached, the mediation is not necessarily over. It is important to memorialize the settlement before you leave the mediation. Too many times parties leave the mediation without all terms discussed, which could jeopardize the settlement. Terms such as a full release, confidentiality, tax treatment of the settlement funds,



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etc., should be covered. A formal and complete document will then be prepared for signature by all parties sometime after the actual mediation session.

Who pays the mediator?

If the mediator charges a fee, each party starts by bearing a proportionate share of the mediator's expenses. However, we have come to expect a request by the employee for full payment

by the employer as a final term in most successful mediations.

Mediation is most successful when the parties focus on key issues and can point out the strengths of their own case and the weaknesses of the other's in a respectful and persuasive way. Mediation requires a balance between the desire to win and the realization of the benefits of compromise.

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