Workplace ADR

Top 10 Reasons to Mediate Employment Cases

BY RICHARD S. WEIL

What is the most effective way to resolve employment disputes, whether they involve discrimination, executive severance or former employees' breaches of restrictive covenants?

Direct negotiation is great but may be hindered by the dispute's emotional charge or the parties' divergent views of the facts. Arbitration, despite its benefits, has its pitfalls.

Why not mediation? Here are 10 top reasons why employers and employees should consider using mediation to resolve workplace disputes:

1. Mediation can diffuse emotional impediments to resolution.

Strong emotions on both sides can underlie employment litigation. Plaintiffs often feel they have been treated unfairly. Defendants may believe they have done nothing wrong and are being extorted.

Mediation provides an opportunity for both to speak narratively and to express their feelings, which they generally cannot do in court, as well as the satisfaction of being heard by an empathetic neutral person.

2. Plaintiffs who want their day in court are unlikely to get one because few employment discrimination cases go to trial.

In FY 2017, only 2% of employment cases filed in federal courts were tried through verdict. Admin. Office of U.S. Courts, Federal Judicial Caseload Statistics, Table C-4 for period ending (March 31, 2017) (available at https://bit.ly/1HbeYVH).

Some were dismissed; the vast majority settled. Since employment cases are likely to settle, it makes sense to settle early, before positions harden and costs rise. Mediation can help people accomplish this.

3. Mediation can occur early in most employment discrimination cases because extensive discovery usually is not required.

In most employment cases, parties can mediate without extensive discovery. The plaintiff usually wants his or her personnel file. Defendants often want to see relevant documents the plaintiff has; a breakdown of monetary damages claimed, and, in termination cases, evidence of the plaintiff's mitigation efforts.

4. Mediation is especially well-suited to particular employment situations.

- When the employee still works for the employer, mediation allows the parties to maintain or re-establish a good working relationship.
- When private or sensitive matters are involved, such as sexual harassment.
- When reasonable accommodations are sought under the Americans with Disabilities Act.

See, generally, Wayne Outten, "Executive Compensation," Editors Tauber & Levy, Bureau of National Affairs (2003) (excerpt available at https://bit.ly/2lmkFzy).

5. Employment mediation generally costs less than arbitration and litigation.

Accurate data on the cost of litigation and arbitration is difficult to gather because it involves so many variables.

But one survey found that the median cost for outside counsel in single plaintiff employment cases was $102,338 for arbitrated cases, and $70,491 for litigated cases. Alan Dabdoub and Trey Cox "Which Costs Less: Arbitration or Litigation?" *Inside Counsel* (Dec. 6, 2012) (available at http://bit.ly/2tuXC9Q).

In contrast, the cost of mediation includes the mediator's fee, sometimes an administrative fee, and participants' attorneys' fees for one or two days of mediation plus preparation time. As an example, DuPont has reported that employment mediations save an average of $61,000 per case. F. Peter Phillips, ADR: The Customer's Perspective (Oct, 21, 2010) (available at http://bit.ly/2GV906u) (quoting David Burt, a DuPont attorney) [published by the CPR Institute, which also publishes this newsletter; Burt now serves as a CPR Institute consultant].

6. Parties can choose a mediator experienced in the area of employment law involved in the case.

Unlike trials, where assigned judges may have no knowledge or practical experience with employment law, parties who decide to mediate can select a mediator best suited by experience and temperament to their case.

7. Mediation can keep the dispute and its resolution confidential.

Lawsuits and settlements sometimes generate publicity that can damage a company's name and reputation and encourage other employees to file similar lawsuits. Mediating parties can

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ADR on the Job

The call: Mediate more employment matters.

The reasons: They are listed, one to 10, in the article. The overarching reason is that workplace dispute resolution is a flash point for employees, human resources professionals, and the lawyers, and after months of national anger over the role of conflict resolution this reminder of a better method is a timely ADR booster.

The key point: They're all essential to understanding the purpose of workplace ADR. No. 9, on mediation's unique ability to put emotions in context, is often forgotten or overlooked in exploring ways to resolve the dispute.

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agree to keep the dispute and settlement terms confidential. But note: a new tax law makes any settlement, payout or lawyers' fees related to sexual harassment non-deductible as a business expense when the payments are subject to a nondisclosure agreement. Christina Caron, "Tax Bill Would Curb Breaks for Sexual Abuse Settlements," *N.Y. Times* (Dec. 16, 2017(available at https://nyti.ms/2t92scU).

8. Mediators can provide both sides with a realistic view of summary judgment scenarios.

Parties often have unrealistic views of their chances of prevailing on summary judgment motions. Plaintiffs may have a rosy view of the merits of their claims that blinds them to the risks of losing. Confident defendants often threaten dispositive motions as leverage in settlement negotiations.

But a study showed that, in fact, such motions are denied in 46.4% of employment discrimination cases. Vivian Berger, Michael O. Finkelstein and Kenneth Cheung, "Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits," 23:1 *Hofstra Labor & Employment J.* 45 (Fall 2005) (available at https://bit.ly/2JZ1juN). For plaintiffs, a grant can mean the case is over. For defendants, denial can increase the settlement value of a case.

A mediator can help both sides evaluate the chances of a summary judgment motion's success and the effects of a grant or denial.

9. Mediators can help lawyers educate their clients about the realities of employment discrimination litigation.

As noted in No. 1 above, plaintiffs and defendants often see cases emotionally and may not hear what their attorneys tell them about the realities of litigation.

For example, plaintiffs may not know how few employment discrimination cases go to trial; that plaintiffs win less than 15% of such cases (Nathan Koppel, "Job-Discrimination Cases Tend to Fare Poorly in Fed. Court," *Wall Street Journal* (Feb. 19, 2009) (available at https://on.wsj.com/2ApBxPV)), or that their feeling of being treated unfairly falls short of stating a cause of action.

Employers may not know that almost 50% of summary judgment motions are denied, or the high likelihood that plaintiffs will prevail on retaliation claims, which are easier to prove than discrimination claims. One study reported that 40% of winning discrimination claims were for retaliation. Vivian Berger, "Winners and Losers: Employment Discrimination Trials in the Southern and Eastern Districts of New York: 2016 Update," *NYSBA Labor and Employment Law J.* (Spring 2017) (available at https://bit.ly/2I5MOU9).

But both sides may listen to reality checks from a neutral person.

10. Mediation can avoid some of the criticisms of mandatory employment arbitration.

Back to the beginning: Many employees and their attorneys believe arbitration is biased toward employers. A study by Prof. Alexander Colvin of Cornell University largely confirmed this. It showed that employees have a dramatically lower winning percentage in arbitration than litigation; damages they receive when they prevail are significantly lower, and arbitrators tend to favor employers in the hope of getting future business. Alexander Colvin, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes," 8:1 *J. of Empirical Studies* 1 (March 2011) (available at https://bit.ly/2MAe157).

The limited appeals of arbitration awards exacerbates these concerns. Mediations, at least successful ones, avoid them.

Court Decisions

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The disputed employment contract contained a clause providing that the "Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement. …"

Despite that delegation clause, the plaintiff filed the case in court and argued that the contract as a whole lacked consideration and mutuality, and was unconscionable, and that those same issues infected the delegation clause.

The court rejected those arguments based on the severability doctrine, finding that most of the plaintiff's arguments were not specific challenges to the delegation clause (and therefore could not be decided by the court), but instead were the same as the arguments the plaintiff made about the contract as a whole.

Missouri Chief Justice Zel M. Fischer, writing for the 4-2 majority, noted, "Soars failed to direct any specific arguments to the delegation provision apart from merely tacking on the phrase 'disputed delegation clause' to each argument made against the Agreement itself."

In addition, the plaintiff argued that the delegation clause lacked consideration, but that failed because the delegation clause applied equally to the employee and employer.

Last but certainly not least, the U.S. Supreme Court issued its unanimous opinion in *Henry Schein v. Archer & White Sales,* 139 S.Ct. 524 (2019) (available at https://bit.ly/2CXAgPw), in January, making clear that there is no "wholly groundless" exception to the Federal Arbitration Act's enforcement of delegation clauses.

The case involved a contract dispute seeking both money damages and injunctive relief. While the contract between the parties included a broad arbitration clause, it carved out actions seeking injunctive relief. The arbitration clause also stated the AAA rules would govern arbitration.

When Archer & White sued, Schein invoked the FAA and asked the court to compel arbitration, arguing that the arbitration agreement's express incorporation of AAA rules was a delegation clause, because those rules empower an arbitrator to decide threshold questions.

In response, Archer & White contended the district court should determine the threshold question of arbitrability because Schein's argument for arbitration was wholly groundless.

Before *Henry Schein*, a circuit split had developed over the wholly groundless exception. Some U.S. Circuit Courts, including the Fifth Circuit, concluded that even when parties have delegated questions of arbitrability—i.e., whether an arbitration agreement is valid or covers the disputed issue—to an arbitrator, courts have the right to conduct a "smell test" before sending a case to arbitration.

If the court finds the defendant's argument for arbitrability stinks, and is "wholly groundless," then it can refuse to send it to the arbitrator.

Other circuits, however, including the Tenth Circuit, found room for no such exception in Scotus's decisions. In *Henry Schein,* the Supreme Court rejected the wholly groundless exception, finding it is inconsistent with