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Alternative Dispute Resolution

ADR in Employment Cases: Choosing the Right Arbiter

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How times have changed. Not so long ago, courts and litigants were unreceptive to alternative dispute resolution (ADR). Now parties make much more use of these alternatives to litigation, in part because courts often order it, but also because parties have come to realize the shortcomings of litigation. ADR has become a cottage industry within the legal profession, and certainly within the area of employment law, so practitioners should familiarize themselves with some basic principles.

Be Prepared and Be Reasonable

While the number of arbitrations and mediations has dramatically risen, generally speaking, attorneys still are not making the best use of these options. Often the attitude, at least with regard to mediation, is: "It isn't binding so I don't have to prepare for it." Similarly, counsel often conclude that it does not matter who is selected as the arbitrator or mediator because he or she can't make any rulings. This is a big mistake.

With age often comes at least some wisdom, and the longer one is a trial attorney, the clearer it should become that traditional litigation is often not the best option for clients, be they plaintiff or defendant. Litigation, because of its costs, can be described as the "sport of kings." Yes, there are times when litigation is necessary, but the cost of litigation is often prohibitive and can be avoided in many cases if arbitration and/or mediation are used effectively.

With the costs of litigation being so high — with regard to finances, time, expenditure of emotional capital and potential for bad publicity, to name just a few — how should counsel approach nonbinding ADR? First, be prepared to present your best case. Second, when representing the claimant, know your client's objectives and bottom line and start with an appropriate settlement demand. One that is too high may be a nonstarter. When representing a respondent, take into consideration the costs noted above that can be avoided if you settle now. Third, select the right arbitrator or mediator. Like everything else, there are good and bad ones out there. He or she could be the difference between an expeditious resolution and costly, time-consuming litigation.

Selecting the Right Arbiter for Employment Cases

How does one select the right arbitrator or mediator? Hire someone who has been in the litigation trenches, either as an attorney or a judge. He or she is best able to tell your client what to expect if nonbinding ADR is unsuccessful. While it is not always necessary, often it is advisable to also hire someone with expertise in the subject matter of the dispute.

Employment disputes often involve issues that do not arise in commercial litigation. Therefore, it is important for the arbiter to understand such things as the burdens of proof in disparate treatment, disparate impact and mixed-motive cases (to know whether one side is likely to obtain summary judgment if the matter doesn't settle), the differences between an opt-in FLSA collective action and a Rule 23 class, the same-actor inference, the after-acquired evidence doctrine and its impact on damages, tax considerations of a settlement, the law with regard to health insurance, pensions and benefits, equitable remedies such as reinstatement and what courts are likely to award in fee-shifting cases should the matter not resolve.

These employment arbiters also need to be selected with particular care because, unlike in commercial litigation, they typically have either a management or employee slant. The best are those who have credibility with both sides in the dispute. Arbiters of employment dis-

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putes also need to know how to handle the unrealistic former employee, who thinks he or she is entitled to millions of dollars for emotional distress and/or punitive damages, as well as the employer who is concerned that any settlement will open the floodgates to litigation from other employees.

The most important attributes of a good arbiter, however, are creativity, tenacity and being a good listener. When the parties appear to be at the end of their ropes, the arbiter needs to find common ground and must be relentless in pursuing the ultimate goal of resolution, even when the parties have thrown in the towel. Making the right selection will go a long way toward enabling both sides to save money as well as craft a result they both can live with, rather than having a judge or jury decide their fates. ■