New England IN-HOUSE

July 2008 DOLAN MEDIA COMPANY www.newenglandinhouse.com

ADR

# Mediation can quickly resolve employment disputes

**By Paul Holtzman**

As companies' internal alternative dispute resolution programs continue to grow, in-house counsel and human resources managers should consider adding mediation to their ADR options.

As an alternative to arbitration at the pre-litigation phase, mediation offers many of the same advantages as mediation between parties already embroiled in litigation.

In fact, mediation of internal workplace disputes offers a number of advantages over the common alternatives of company-directed internal investigations and mandatory arbitration.

Time and cost savings, enhanced buy-in or legitimacy, and flexibility of results are just some advantages of mediation as a tool for resolving internal employment complaints related to sexual harassment, promotions, work assignments, compensation or even terminations.

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**Quicker results**

Mediation moves faster than arbitration and litigation, allowing the company and its employees to focus on what they do best. Unlike litigation, which can require your attention and resources for years, mediation moves as fast as those involved are ready to move. This means HR and supervisors spend less time dealing with a grievance and more time on your company's business.

As one measure, the Equal Employment Opportunity Commission in the 1990s started using mediation and cut resolution time to one-fifth of what it had been. In fact, mediation is often faster than an internal investigation because the parties are focused on resolving the dispute – typically in a half- or full-day session. This avoids multiple submissions and responses to an investigator over the course of weeks or months.

**Lower costs**

Mediation reduces the costs of employee disputes by avoiding discovery and promoting mutual cooperation. It saves money by avoiding litigation and promoting mutual cooperation.

Litigation is expensive, distracting and painful. A recent study found that half of the cost of litigation arises from discovery. This does not even include the opportunity cost of employee time wasted on depositions and assisting with discovery. In the appropriate case, mediation before the outset of litigation can avoid costly discovery by allowing both sides to get their versions of the facts out in the open through an informal exchange. Minimizing attorneys' fees on both sides is another dramatic cost savings.

Mediation is more likely to lead to reconciliation between employer and employee (and in some cases even between employees), which in the long run yields reduced employee turnover and improved morale.

**No precedents**

Confidentiality in mediation avoids costly precedent-setting. At the end of a recent mediation of a sexual harassment dispute, the company president told me he was delighted to reach an agreement because he would never need to explain the case to customers or business partners.

By statute in Massachusetts, mediation provides an unparalleled level of confidentiality for any settlement offers from the employer, any admissions by the accused, as well as the ultimate resolution. In fact, the standard agreement to mediate casts a broad net of confidentiality to ensure parties feel free to let the mediator know every fact and concern that could be important in negotiating resolution. Also, mediation does not include an investigative report, which avoids the creation of a potentially discoverable document.

**'Customized' remedy**

You can build a customized remedy in mediation, which saves money and preserves the employer-employee relationship. A court or arbitrator can usually only declare a winner and loser and decide how large a check the loser writes. In mediation, there is no limit to what a knowledgeable mediator and creative parties can design to resolve a dispute.

Sometimes the most important goal for an employee is something (like an apology) that costs little or nothing. Sometimes a neutral party is able to identify something which serves everyone's interests – maybe a reassignment or change in work schedules. A good mediator is able to look beyond the immediate dispute to see what larger objectives are driving the parties.

For example, both an employee and the company may be interested in implementing training to minimize the chance of a future incident of the kind that triggered the dispute. Exploring such win-win outcomes in the protected, confidential environment of mediation can lead to surprisingly satisfying results.

**Preserving relationships**

Mediation helps preserve relationships that are valuable to the employer. Through the interest-based method of talking through complex issues, mediation makes it more likely that a company seeking to maintain its relationship with an employee who filed a grievance can achieve that goal.

The dynamic is strikingly different than that of the adversarial process we often assume is the only way to resolve a complaint. Moreover, bringing in a skilled neutral to mediate demonstrates that your company is taking the problem seriously – which is often what an employee is most interested in seeing.

Not surprisingly, the collaborative, non-adversarial format of mediation is satisfying for both employers and employees. One study found that 91 percent of employee-complainants and *96 percent* of employer-respondents would choose mediation again. This high satisfaction rate is achieved in part because mediators are trained to focus on interests, rather than positions, which allows all involved to fully express their frustrations and concerns. All parties are more likely to accept a result that was mutually developed, as opposed to being dictated by one side.

**Developing a policy**

If you think your company could benefit from early mediation of disputes with your employees, you should design a policy so that you are ready to go when the dispute lands on your desk.

First, you need to decide whether to engage an ADR provider or retain individual mediators for particular matters. Second, who will participate in the mediation on behalf of the employee and the company? Third, there is the issue of who pays the cost of mediation. Many employers have found that covering the cost of mediation can be a wise investment – one which leads to reduced litigation, resolved disputes, and loyal employees.

Rather than trying to patch up a relationship after a bruising lawsuit, or after an internal investigation the complaining employee views as having had a preordained outcome beyond her control, companies and their employees can emerge from a successful mediation with a mutually respectful relationship. That's because all involved know that their concerns have been addressed and resolved through a consensus solution.