

HR Magazine

Why Litigate When You Can Mediate?

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In workplace disputes, mediation can be faster and cheaper than fighting a lawsuit.

By Paul Holtzman 9/8/2015

Not all workplace battles need to land in court. In many cases, there are good reasons to use a third-party mediator to negotiate the terms of a truce. Advantages include saving time and money, being able to customize a resolution, and preserving confidentiality.

As a mediator, I have seen employers and employees achieve prompt resolution and specific results that would have been unattainable in court. But too often, an employer will miss the opportunity for a negotiated resolution and go to court instead, and, unfortunately, litigation has a way of hardening positions and promoting acrimony.

The time to consider mediation is when a dispute first comes to light. Whether the problem is related to termination, noncompete agreements, intellectual property or some other issue, it is best to make a rational assessment of the likely costs and opportunities early in the case, before legal fees and anger on both sides torpedo any chance for a successful mediation. HR professionals are well-positioned to advocate for the careful consideration of mediation. After all, you have seen up close how litigation can play out ... and out ... and out.

Fast Mover

Unlike litigation, which can require your attention and resources for years, mediation moves as fast as those involved are prepared to go. As one measure, the [Equal Employment Opportunity Commission](#) (EEOC) instituted mediation in the 1990s and cut the average time to resolution by 80 percent.

Once each side has prepared to mediate, the mediation itself usually takes a few hours to a day and has a 70 percent to 80 percent success rate.

Due to its speed, mediation helps you avoid losing key witnesses. Moreover, because parties can engage in mediation sooner than they can navigate the court system, employees' memories can be more accurate. Over the years, employees can change jobs or move away and become unreachable, and you may find yourself missing a critical witness by the time you get in front of a judge.

Money Saver

Litigation is expensive, distracting and painful. Not surprisingly—even accounting for preparation time—the cost of mediation is generally less than 10 percent of the cost of litigation.

Beyond legal fees, litigation has hidden costs. For example, workers spend time preparing documents and testifying in depositions instead of adding value to your business. Even when employees are not helping a lawyer to prepare the case, the distraction of the ongoing conflict can take a toll. For example, your business may suffer from a tarnished reputation or damaged relationships from the public airing of a dispute.

Moreover, in cases where a dispute involves a current employee, there is an additional kind of savings: Mediation is more likely to lead to reconciliation between employer and employee. In the long run, this reconciliation yields reduced employee turnover and improved morale.

Confidentiality

Mediation provides an unparalleled level of confidentiality regarding settlement, witness statements and any other details of the ultimate resolution reached.

At the end of a recent mediation of a sexual harassment dispute, the company's president told me that he was delighted to reach an agreement that meant he would never need to explain the case to his customers or business partners.

In fact, the standard agreement to mediate casts a broad umbrella of confidentiality to ensure that the parties feel free to let the mediator know every fact and concern that could be important in negotiating a resolution.

Finally, there is no written decision that can be cited as a precedent—or picked up by a trade publication or blogger. In short, the parties control the flow of information and the result.

Customized Remedies

Typically, a court can 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 come up with to resolve a dispute.

Sometimes the most important outcome for an employee is something that costs little or nothing, such as an apology or a guarantee that new practices will be adopted. In many instances, a neutral party can identify a solution that serves everyone's interests.

A Startling Discovery

Contrary to popular belief, you don't have to complete the discovery process before mediating. In fact, you don't even have to wait for an employee to file a lawsuit.

That's good news, given that the bulk of the cost of litigation derives from discovery costs—in particular the massive expenses associated with mining vast amounts of electronic information for relevant facts.

As one point of comparison, the amount of data that a typical midsize American company stored electronically between 2004 and 2007 was double that collected by the Hubble Space Telescope over 20 years.

A good mediator is able to look beyond the immediate dispute to see what everyone's larger objectives are. 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 a confidential environment can lead to surprisingly satisfying results.

Too often in hotly contested disputes, the parties are so focused on how to "win" that they fail to think about what can be achieved through negotiation. For example, the parties could issue joint statements to control press coverage. Or an employer could implement strict new limitations on the use of confidential business information, such as customer leads or software. You might even ensure that the employee will not go to work for a competitor or solicit your employees or clients. Particularly in situations where an employee is not currently bound by a noncompete agreement, such provisions can be a valuable element of a mediated settlement.

Finally, all parties are more likely to accept a result that they crafted with a mediator's help. The "we built that" mindset can work in dispute resolution as well as it does in political discourse. The experience of mediating may strengthen collaborative skills between the employer and the employee and improve working conditions for the future.

HR's Role

None of these advantages can be realized if an employer fails to pause early on and consider alternative dispute resolution methods such as mediation. HR professionals play a critical role here. They are the keepers of the institutional memory related to messy cases and litigation horror stories.

In sum, HR should ensure that key executives throughout the company are educated about mediation.

If employees know that mediation is valued, they won't hesitate to consider it as an option when disputes crop up. When issues are resolved quickly, privately and without undue expense, everybody wins.

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