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Mediating Employment Law Claims

Law360, New York (August 25, 2010) -- While growing in popularity, mediation still remains underutilized in employment disputes.

From the employee's perspective, mediation should be a "no-brainer." In fact, if the parties cannot amicably resolve the matter themselves, mediation usually should be requested at the outset. While employees often do not have all of the information at that time to prove their discrimination, whistleblower or common law wrongful discharge claims, plaintiff's counsel can always request as a precondition to mediation that the defendant company produce certain key documents in advance of the mediation.

On the other hand, if the company refuses to mediate, that decision could later come back to haunt it when a plaintiff, after successfully prosecuting his or her claims under a fee shifting statute, makes an application for attorneys' fees.

It is no secret that mediation is significantly faster than traditional litigation, even without factoring in time for an appeal. Mediation also enables parties to discuss a settlement upfront, before plaintiff's counsel has invested significant time on the matter and hopefully before attorneys' fees become the "tail wagging the dog," making these time-consuming cases difficult to settle.

There are other benefits to plaintiffs as well. Mediation can be cathartic. Many times, this is the first opportunity for the employee to express to the employer his or her feelings concerning the termination decision or to vent about other perceived injustices — opportunities that often do not present themselves in a deposition setting.

Mediation is also less stressful than litigation, particularly when the mediator is nonjudgmental and acts as a facilitator for the exchange of information and settlement positions.

Finally, mediation affords plaintiffs the ability to control how to allocate settlement dollars for tax purposes, which a jury verdict does not.

The benefits of mediation to employers are equally substantial. A good management-side employment attorney should be able to predict early in the litigation the likelihood of getting the suit dismissed on summary judgment.

If summary judgment appears unlikely — and counsel recognizes what it will cost to defend the suit: the potential for adverse publicity, the psychological impact litigation will have on business operations, and that the company cannot afford to take the risk of a jury deciding its fate and having to pay the plaintiff's attorneys' fees — defense counsel should also recommend mediation wholeheartedly.

Both sides potentially have much to lose by pursuing justice through the court system. So does counsel. Plaintiff's counsel, on a contingency fee arrangement, could end up empty-handed; defense counsel could lose a valuable client if the employer is told to fight the case in court, only later to be told — after spending significant dollars — that the claims survived summary judgment and should be resolved or else face the wrath of a jury.

With so much at stake, mediation should be approached with much forethought; this might be your client's only chance to settle prior to incurring significant expense. Even in voluntary, nonbinding mediation, where the mediator does not have any authority to decide issues or to force a settlement, choosing the right mediator for your case is extremely important. Retired judges are often great, but keep in mind that they may not have the same ability to twist arms as they did when they were wearing robes.

Employment disputes are different from other types of litigation and it is important to select a mediator knowledgeable of the law in this specialized area. Unique employment issues — such as the same actor inference, the after-acquired evidence doctrine, tax considerations, health insurance and other benefits, reinstatement, letters of recommendation and amending information on Form U-5's for securities industry employees — all can play a part in helping to settle a case. Someone who has not handled these types of claims simply will not have credibility when telling one side or the other what risks they face should they choose not to settle.

Consider also why your case could not settle without a mediator. If you have an unrealistic plaintiff who is demanding millions when the facts do not support such a large award, you might want an evaluative mediator who will offer a second opinion about the problems with the employee's case, the likelihood of success and range of potential recovery.

If you have an emotionally fragile plaintiff, you might want an especially compassionate mediator and one who takes a more facilitative approach.

If you represent a hardheaded employer, you may insist upon your client selecting the mediator as a condition for agreeing to mediation. It also might not be a bad idea for the employer to hear from a defense-side attorney or retired judge acting as mediator about the expense and risks of litigating and why the employer should view the claims dispassionately in order to make the best business decision.

Finally, you want a mediator who is creative. Maybe he or she has suggestions you have not thought about to get the case settled. In this regard, the mediator needs to know what is permissible — whether under a collective bargaining agreement, COBRA, the Employee Retirement Income Security Act or the myriad of other employment laws that impact the parties' relationship.

After almost 30 years of litigating employment claims, it has become obvious that litigation — while sometimes necessary to convince the other side of weaknesses in their case — is not the most efficient or cost-effective way of disposing of cases. In fact, it often causes a larger schism between the parties. Don't ignore the benefits of mediation when handling your next employment case.

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