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Labor Letter

Why Mediation Is A Preferred Method Of Resolving Disputes

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Mediation is a helpful process for resolving many types of disputes. With its increased use over the past few decades, mediation has proven to be especially beneficial in resolving emotionally-charged disputes in employment and domestic matters. Let's take a closer look at what it is, and why it works.

The Basics

Mediation is basically a structured settlement process facilitated by a neutral third party who engages in "shuttle diplomacy." Mediation works best with a trained mediator who has some subject matter expertise. Of course, the process works only if the parties have a good faith commitment to exploring their respective interests and patience to work through the process. In such cases, mediation can be amazingly successful.

Regardless of whether the underlying dispute is over domestic relations, employment, or other legal disputes, mediation has certain universal advantages. For purposes of alliteration, we'll label these advantages as "The Six Cs:" 1) choices; 2) control, 3) confidentiality, 4) cost, 5) calendar time, and 6) closure.

Choices

The parties involved have choices that don't exist in traditional adversarial litigation such as the place, date, time and ground rules, as well as selection of the mediator. The

parties also may leave the mediation at any time if they are not satisfied with the process and even resume the process at a later date. Finally, participants also can fashion remedies or compromises that may not be available in litigation.

Control

The number of choices in mediation results in the parties having more control over the process and outcome. Most important of all, the parties can decide if they want to settle or not. In other words, a mediator is not empowered to unilaterally impose a remedy upon a party as a judge or an arbitrator may do.

Confidentiality

Absent a special sealing process, court records are open to the public. Thus, allegations of a complaint can be seen by competitors, creditors, customers, employees, even journalists and other parties not involved in the litigation. For example, sexual harassment allegations or offensive remarks by an executive may become news themselves.

As every lawyer knows, there are (at least) two sides to every story and what may be written in a complaint does not always turn out to be true. But the damage from allegations that become public may be irreparable. Mediation may be successful in keeping such allegations private, which alone may make it an attractive alternative.

Cost

Mediation can potentially cost far less than litigation. Especially if the parties get together early, they can engage in effective risk assessment of their respective cases. Full discovery is not necessary for the parties to get a good feel for the likely outcome of a claim.

Sometimes, plaintiffs come to a mediation guarded because they believe the defense is just trying to get information to defend the claim (and to defeat the plaintiff). But there are ways that the parties can effectively share enough information to let the other side properly assess their risk of liability and possible damages. Following discussion of the merits of a case, the parties may decide that it's best to pay to make the case go away or to withdraw the claims – before each "racks up" tens of thousands of dollars in discovery costs, attorneys' fees, and related costs only to have a judge or jury rule against one of the parties.

In many cases, free mediation is offered by a government agency such as the Equal Employment Opportunity Commission or state or federal court. Where offered, such free mediation services should be considered.

Calendar Time

State and federal cases can take years to be processed through the judicial system — especially in these tough economic times, with budgetary limitations on courts and an overwhelming caseload. When parties agree to mediate, they can get their "day in court" much sooner. In some cases, such as when backpay may be accumulating, there is an economic value to resolving the case sooner.

Closure

When the parties to a dispute agree at mediation to resolve their differences, they get closure. They know that they can move forward without the cost, disruption and distraction that can come while a legal claim is pending. The ideal mediation result leaves all parties unhappy to some extent, but they should feel that they got a better deal than they could have if they received an adverse result imposed on them by a court.

Mediation may not be appropriate in every situation but it has significant advantages for the parties to a dispute. It has a proven track record of helping short-circuit the adversarial litigation process. Any party in a legal dispute should seriously consider engaging in this process before submitting to the judgment of a court.

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