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THE PROS AND CONS OF

EMPLOYMENT ADR PROGRAMS

by

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***EDITOR'S NOTE**: Not every company has found employment dispute management programs to fit its managerial objectives; those that have initiated such programs seldom design identical approaches. Like any other management decision, these programs carry risks as well as benefits. In his essay, Richard Ross articulates some of the considerations that go into deciding whether – and why, and how – to manage employment disputes in a systemic way.*

The recent explosion in employment litigation has become a financial and emotional drain on U.S. employers and employees alike. The uncertainty and emotional strain of employment litigation can cause employees to abandon valid claims. The cost of defending employment litigation, and the liability exposure, can cause employers to settle claims that are not meritorious.

As the cost of defending employment litigation increases, and the potential for damage awards grows, employers are increasingly looking for ways to address and resolve workplace problems without litigation. Employment ADR programs offer one possible solution to this problem.

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Employment ADR Programs

No single employment ADR program will work in all settings or in all business cultures. The best program is one that:

- Emphasizes problem solving over litigation avoidance
- Recognizes the culture or cultures of the business.
- Capitalizes on problem-solving programs already in place.
- Does not take a "one-size-fits-all" approach, but allows the business units to devise an initial complaint process that works for them.
- Creates the least amount of bureaucracy so that managers can concentrate on solving problems instead of filling out forms and reports.

While most courts will enforce a mandatory employment ADR program that is designed to provide an "alternative venue" with no loss of procedural or substantive rights and remedies, an employment ADR program truly succeeds only when the employees use it by choice rather than because they are compelled to do so.

The Pros and Cons of Employment ADR

No employment ADR program will resolve all employee disputes or will totally eliminate the risks of employment litigation. There are many benefits to a well-run employment ADR program, but there are also downsides that must be considered and factored into the decision to implement one.

The Pros

- An employment ADR program provides a structured process where most (but not all) employment disputes can be resolved informally. Too often neither the employee nor the manager knows where to turn when a dispute arises. An employment ADR program provides both sides with a clear understanding of the steps that must be taken and the decisions that must be made to resolve the dispute and get back to work.
- An ADR program should be quick and confidential. The vast majority of the disputes handled by the system (90-95%) should be resolved in two to three months, and without having to resort to arbitration. According to one recent study, 85-95% of all claims under a mandatory program were resolved prior to arbitration and most were resolved without lawyers.[3]
- ADR should be more cost effective than its alternatives. Arbitrator fees generally run $800-1,000 per day, and the average cost of an employment arbitration is $20,000. The average cost of defending a litigated employment claim exceeds $100,000.
- Mediation works so well to resolve apparently insolvable disputes that it should be mandatory. A neutral mediator helps both sides focus on the underlying issues and assess their positions more realistically.
- Arbitration is generally an informal process where the rules of evidence are not stringently applied. In many cases, both the employer and the employee will be able to present their case without the assistance of legal counsel.
- Since grounds for appeal of an arbitration award are limited, neither side can drag a case out indefinitely once an award is issued. The finality of arbitration also plays an

3 David H. Gibbs, *Employment Survey Says that Major Companies Increasingly Use Tailored Programs and Processes*, Alternatives Vol. 19, no. 10, page 237 (November 2001).

important role in the mediation process. Often, the conciliation process will not begin until the parties stand on the brink of failure and are forced to confront the fact that, if a compromise cannot be reached, they will have little control over the next step.

- An employment ADR program should be an effective "early warning" system – allowing employers and employees to identify and resolve internal problems before they become serious. ADR can also help identify poor management practices by highlighting "hot spots" within an organization where multiple problems have arisen.
- An employment ADR program can be an effective training tool for managers. The process encourages managers to address employee problems themselves rather than passing them off to Human Resources or the legal department.

The Cons

- An employment ADR program is not simple to create and roll-out and, once in place, it takes a great deal of care and feeding to remain effective. Employers must be prepared to dedicate time and resources to designing, implementing and administering the program, and then monitoring its operation. This is not a program that will run itself. If not encouraged and closely monitored, it will be underutilized and ineffective. An employment ADR program will lose credibility with employees if it is slow, non-responsive and unenthusiastically endorsed by management. It will bog down and fail if managers are determined to push their problems up or across the organizational chart, or to prematurely mediate or arbitrate claims, rather than resolving the cause of problems themselves.
- The litigation process, for all its faults, does provide several effective screens that prevent many employment disputes from ever reaching the courthouse. The personal

time and expense required to litigate a claim will discourage many employees from pursuing their claims in court. Plaintiffs' attorneys will generally not take a case where damages are limited, or where the employee's claims are based more on fairness than law. Courts will summarily dismiss claims that are not well founded in law and fact. By contrast, employment ADR programs do not dismiss anything. A determined employee who goes all the way to arbitration is guaranteed the opportunity to plead his or her case (no matter the merit of the claims) before someone empowered to grant full and final relief. An employer with an arbitration program may thus end up spending time and money arbitrating an employee claim that would have never survived in litigation.

- Arbitration decisions are final and appeal opportunities are limited. It is inevitable that an arbitrator will issue an award that the employer does not like. An ADR program featuring mandatory and binding arbitration is definitely not for employers who cannot accept the risks that come with that process.
- Many employees represent themselves in mediations and even in arbitrations. The informality of the ADR process seems to encourage self-representation. This situation can create problems at arbitration where the employee must present evidence to support his or her claims. A good arbitrator can generally remedy these problems by explaining the process and the burdens of proof to the employee at the beginning of the arbitration process, However, for employers (and their legal counsel) who are used to the structure and formality of civil litigation, this informality can be disconcerting – especially in a high risk case.

- Arbitrations can be as complex, time consuming, and expensive as litigation. Where the stakes are high, or the counsel contentious, the arbitration process may consume as much time and money as litigation.
- Not all jurisdictions or all judges have embraced the concept of mandatory employment ADR. In any employment ADR program, it is inevitable that some employees will challenge the program and some court will elect to not enforce it. This should be a rare occurrence for well-drafted and well-run ADR programs that concentrate on aggressively resolving disputes, since most employees will chose to use an ADR program that is perceived as fair and equitable.

Implementing an employment ADR program requires a certain leap of faith – faith that the benefits of a well-run ADR program will outweigh any disadvantages, faith that managers will run the program fairly and wisely, and faith that employees will not abuse the process. An employment ADR program will not solve all of an employer's human resource problems. It will not make all employees happy or content with their jobs. It will not turn bad managers into good managers. It will, however, help to bring these issues out into an open forum where they can be addressed by both sides without fear of litigation.