Why Mediate Employment Issues?

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Considering the ever-increasing costs of litigation and that most employment disputes are either dismissed or settled before ever going to trial, counsel should give serious consideration to early mediation for these matters. Lawyers are, by nature and training, tenacious advocates for their clients and, therefore, are reluctant to suggest to opposing counsel an alternative resolution to litigation. There is no inconsistency, however, between zealous advocacy of the position of the client and seeking an alternative resolution to the matter which avoids the prohibitive costs of litigation and also provides the parties with certainty of outcome.

1. Cost Saving

The costs involved in prosecuting and defending an employment-related dispute are prohibitive and, in many cases, exceed the amount that the plaintiff would be willing to settle for prior to trial. Even in advance of a trial, both sides will likely spend significant amounts on discovery and other pre-trial expenses; costs they will only recover if they win. These costs could likely have been avoided had the parties agreed to mediate the matter with a neutral third party at an earlier stage. This would ideally be prior to the charge being filed with the Equal Employment Opportunity Commission (EEOC) or state agency, but at least after conciliation efforts, if any, failed and/or a notification of right to sue letter issued Even after a case has been filed in court, the parties still should avail themselves of every opportunity to seek mediation, considering the looming costs of going forward and the uncertain outcome.

2. Flexibility in Settlement Terms

In reaching mediated settlement agreements, the parties maintain the ability to agree to terms (within reason) unavailable through a court or administrative agency. For example, the EEOC has a statutory obligation to protect the rights of not only individuals within a protected class but the entire class of which the individual is a member. As such, the EEOC will rarely enter into a settlement that does not require notifying all of a company's employees of the agreement. In addition, the EEOC will often impose mandatory monitoring of the employer and frequent self-reporting, sometimes over several years. A mediated settlement, on the other hand, would not include those requirements, particularly if mediation is engaged in the early stages of a dispute.

3. Confidentiality

For employers, confidentiality is extremely important, particularly with respect to the terms of the settlement agreement. Whether or not the allegations of a complaint are true, it is not in its best interests of the employer to allow them to be made public, nor is it beneficial to have details of a settlement disclosed. If the case is litigated, everything will be a matter of public record, unless settlement terms are placed under seal, which depends on the individual judge. One of the conditions of mediation is that the process is confidential, and nothing may be disclosed or used by either party in any other proceeding.

4. Certainty of Results—Finality

A significant benefit of mediation is that it allows all parties to reach a resolution that everyone can live with in a relatively short period of time. This removes a significant level of anxiety from the process that can be very burdensome during litigation. This advantage cannot be over-emphasized. A victory for either side at the summary judgment stage or trial level of litigation does not necessarily resolve the matter, as appeals may add another year or more to the time and expense already expended on the case. On the other hand, had the parties agreed to mediation rather than litigation, the matter likely could have been resolved, with finality.

With the advantages of mediation over litigation, enumerated above, counsel are encouraged to soften their natural inclination to engage in litigation, after appropriate investigation, and to seek mediation in employment-related cases. This option may be in the best interests of counsel and their clients.

Hon. Arlander Keys (Ret.), recently joined JAMS after nearly 20 years of distinguished service as a United States Magistrate Judge for the Northern District of Illinois. He is widely known for his persistence in and ability to bring parties together in a constructive dialogue and has conducted more than 2,000 settlement conferences in nearly every area of law. He can be reached at akeys@jamsadr.com.