

# Employee Relations LAW JOURNAL

## **The Need for Early Mediation in Employment Cases: Now More Than Ever!**

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*In this article, the author suggests how employers might best approach the subject of how to resolve employment-related disputes with maximum efficiency, and early solutions, rather than waiting for those disputes to fester and become litigated proceedings.*

**I**n the newly redefined COVID-19 world of 2020, much of society has been impacted or dramatically changed. Employment law is no exception nor has it been spared. The laws and rules governing the employer-employee relationship have not only been in a state of flux, but in some respects a fundamental state of change.

In addition, the social distance measures and other restrictions or limitations on workplace interaction have fundamentally changed how employment issues or disputes are addressed. Investigations must still proceed in a timely manner, employees must still be counseled if appropriate, and if employees are to be terminated increasingly that is happening over Zoom or other virtual platforms rather than in person.

The new lack of in-person interaction in the workplace comes with its own challenges, and the seemingly ever-changing laws and regulations, and the constant adaptation needed in a more virtual world, have combined to cause employment lawyers and human resource professionals to have to learn on a steep curve of change. And it is most remarkable that nearly every employer in the country is having to address nearly the same issues at the same time. This brave new world affects both bringing on new employees, dealing with ongoing employee issues and addressing counseling and discipline, and terminating employees. It is a very different world now.

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In short, for lawyers, demand for COVID-19 advice and counsel is up, way up. It remains to be seen what kind of impact the COVID-19 era will have on employment litigation, but it undoubtedly will yield a large number of new cases when the dust settles a bit and the employees who have been laid off find out if there is room for them to return once the economy starts to come back.

This article endeavors to suggest how employers might best approach the subject of how to resolve employment-related disputes with maximum efficiency, and early solutions, rather than waiting for those disputes to fester and become litigated proceedings.

### **EARLY MEDIATION DEFINED, ITS BENEFITS, AND ITS POTENTIAL**

Early mediation occurs any time before a formal complaint process with a third-party agency or with a court is initiated. It can occur remarkably early, perhaps as early as during employee counseling. It does not require imminent termination or diminution of job duties or title to be effective. A neutral third party can always assist an employer to meet their legal obligations in the workplace, to ensure that high performers who might have an issue get directed the right way to continue to be high performers for the employer, and to ensure that problem employees are dealt with appropriately so that legal exposure and costs are minimized.

The following are some of the key benefits and detriments of early mediation (this list discusses benefits of early mediation, not just mediation itself, the latter having a much longer list of key benefits):

- Through mediation, a party is likely to achieve the largest savings in fees, costs and time.
- The parties are less likely to have become wed to their positions, but the issues between the parties may not be well defined, and the parties may not have reached a complete or accurate assessment of the strength of their own cases.
- The parties have greater incentive to settle to avoid the time, stress and – most quantifiably – the costs of litigation (particularly the legal costs).
- The relationships are more likely to be preserved, which can be important in cases where the parties need to deal with each other once the dispute is resolved.
- The parties may not have disclosed or exchanged all relevant documents and information, making it difficult to evaluate the

strengths and weaknesses of each other's case with similar accuracy and making it more difficult to evaluate arguments made by the opposing party in the mediation and counter them effectively. This can be cured by the parties agreeing to undertake a short-form disclosure exercise similar to that used at court before the mediation or each party can make a pre-mediation written submission shared with the other side that includes the documents they think best supports their case.

- The earlier the mediation, the greater likelihood that confidentiality can be maintained, which can be particularly important if the dispute is high profile and risks hitting the press.
- Usually, early in a dispute's life cycle there is more informality and flexibility accepted by the parties as a mechanism of resolving a dispute, before the formality of a dispute proceeding is underway or before the parties have become entrenched in their positions.
- There is evidence to suggest that some lawyers may have little incentive to resolve a case early, putting lawyers in a different interest position than their clients, so it takes a strong client, sometimes, to direct early mediation.
- With the Singapore Convention (in summary, the mediated settlement agreements equivalent of the New York Convention for enforcing arbitration awards internationally) entering into force in September 2020 (with 52 signatories already since its opening for signature in August 2019), mediated settlement agreements (which essentially take the form of a contract between the parties) will be just as enforceable, and as easy to enforce, as arbitration awards are worldwide. So, to the extent companies are addressing disputes with international ex-pats in particular, there can be a final binding outcome that can be enforced internationally without the need for litigation.

Even if it is unsuccessful, early-stage mediation may offer parties the opportunity to narrow or refine the issues between them with the guidance of an expert in their industry. These principles might apply generally to all cases, but they have significant effects in resolving disputes involving employment law issues.

Early mediation can also include offering mediation as a response to receiving a pre-complaint filing demand letter in a case. Sure, prepare for litigation, but perhaps before you spend too much time and money on that effort you suggest to the other side that you explore issues in a mediation that might result in quick, inexpensive resolution or that at least will narrow the issues that need to be addressed in any litigation

that might get filed. Given that the capacity of courts these days is limited by social distancing on top of the capacity issues, mediation might just be the way to get a quicker resolution of employment claims that is just as fair and binding, but involves dramatically less expense. Of course, pre-filing mediation is not mandatory in the United States, but making pre-filing mediation part of the litigation toolkit could be a welcome addition for clients.

On the question of how early is early in terms of mediation, the answer can be earlier than you might otherwise think it to be.

There is no reason parties at impasse in negotiation cannot employ the use of a mediators to facilitate business negotiations, in other words you can use mediators to assist in negotiating the deal just as you might use them for later arising disputes. This is not some pie in the sky rambling of a mediator, but it actually has precedent. The village elder concept across most cultures has been with us for centuries and those elders were often instrumental in solving local disputes at nascent or developing dispute stages. Similarly, recognizing this historical practice in Chinese business, the Shenzhen Court of International Arbitration offers this service as one of many among its offerings.<sup>1</sup> This is not as novel as it sounds upon first hearing!

## **THE QUALITIES OF THE BEST EARLY STAGE EMPLOYMENT LAW MEDIATOR**

Picking your early-stage mediator is of paramount importance. You can find mediators online through a simple search, and many organizations have lists of mediators that they promote.

Mediators do not have to be legally trained so you are not limited to lawyers admitted to your local jurisdiction, though many mediators (and in employment law probably most) are legally trained (in addition to being trained as mediators). One important point to emphasize is that you should select a mediator with requisite industry experience, not just legal experience. Consider the following:

In employment disputes, select a mediator who is knowledgeable about how those relationships are defined contractually and regulatorily, the rights and obligations of the parties and any greater regulatory issues that might govern, and better still find one who has experience hiring and firing employees and addressing claims, aside from just being a lawyer.

If you want a truly effective business solution to your dispute, you should look for a mediator who has run a business and has a sense of how the employer/employee relationship works in practice.

Your mediator should come with the requisite mediation credentials and experience. A professional mediator has a high degree of training

in mediation and its techniques and has a large number of paid mediations under his or her belt. Simply stepping off the bench (having left wearing the robes that made you persuasive), or coming from a law firm (with a focus on advocacy and law and facts), does not qualify you as a mediator. You have to be able to match the ability to muster the facts, the law, and industry context and competence with the skills of persuasion, knowledge of psychology, and being steeped in the craft of mediation to be able to accomplish a final agreed result that the parties can and do live by.

The work of a mediator is difficult, and this author thinks it is far more difficult than the work of an arbitrator, which is why parties should seek the requisite training, experience, and context in their mediator to ensure a successful go of the process.

### **THE COVID-19 EMPLOYMENT MEDIATION PROCESS**

As mediators, we do things quite a bit differently now than we did before. Now, we accept not only that mediation can work virtually, but that it does work. We have learned that perhaps the impact of in person presence has been overstated on the outcome of a mediation process. Of course, the mediation participants have to work harder to size each other up during the process and build rapport, but while it may take a bit more work than before, the focus that a virtual mediation environment places on communication and words chosen really distills the process into an efficient proceeding.

Mediation is an inherently consensual process, where a neutral third party assists the parties to find a solution to their dispute that they can agree on. There is no ruling or order or award that comes out of mediation; there is only an agreement and the parties can choose to consent to that or not. There is no way to compel a party to agree to a mediated resolution; the parties have to want to agree to resolve their dispute or the dispute is not resolved and it continues on. Mediation offers considerable flexibility in outcome for the parties and considerable protections of confidentiality before a dispute becomes public, or rises to litigation, with assistance in an informal environment from an expert in the subject matter of the dispute.

The online environment presents considerable opportunity for use of mediation. With online mediation, scheduling and availability of key players, and specialized mediators, is maximized. All the players that need to be in the virtual mediation session can now be there with no excuses that they are available by phone or somewhere outside of the mediation offices, a tactic that more often than not defined the prior in person mediation practice around the US. There is no need to travel and the process can be conducted from home, an office or from anywhere in the world, time zones permitting.

Mediating online is not very different from mediating in person, if the technology is right. So long as the mediator can bring the parties and counsel together in one virtual room with the mediator and move them into separate rooms for private caucuses, can see documents shared by the parties with the appropriate level of confidentiality, and can otherwise communicate clearly with the parties, the process looks and feels a lot like in-person mediation.

Using and gauging body language beyond the face and upper body is near impossible in the virtual environment, but perhaps this forces the participants to focus more on expressing themselves in language more clearly and persuasively and to use the body language that can be conveyed more effectively.

### CONCLUSION

Early mediation in the employment context offers real benefits to parties. Reduced costs, limited hurt feelings and damage to personal relationships, minimized distraction and a contractually documented final result – all with relatively minimal time and money expended.

Even if a case does not settle at mediation, the cost of a one-day early mediation is nominal compared to that of a fully litigated case and the groundwork undertaken, if the early process does not succeed, can be reused in later efforts to resolve the dispute. And early mediation might well work to save a relationship between an employer and an employee if that relationship is worth preserving.

### NOTE

1. <http://www.scia.com.cn/index.php/En/index/serviceinfo3/sid/32.html>.

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