

Dealing with Fraught Times: How the Pandemic and Social Tensions Are Impacting Employment Disputes

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It comes as little surprise that the convergence of the pandemic and social tensions across the U.S. have led to employment disputes. Let's face it, a lot of people have been on edge and as a result a multitude of problems have arisen in the workplace, which has inevitably led to conflicts.

A recent National Law Review report found that of the employment claims filed in 2020, more than 55 percent were for retaliation, more than 32 percent were related to race, while 21 percent were based on age-related issues. It is difficult to directly correlate these disputes with the aforementioned issues, but one can reasonably assume they were at least an underlying factor as employers have had to grapple with the many challenges of the past

year. And recent hot-button issues, such as mask mandates and vaccination requirements, have created strong pushback from employees - and no doubt have been a factor behind some employee claims against employers.

Once such claims are filed, employers are faced with the prospect of mediation or litigation. Deciding which path makes the most sense based on the merits often becomes a vitally important decision. This is where neutral analysis can be highly beneficial.

The Important Role of Neutral Analysis in Evaluating Strategy

One example of how neutral analysis might help a company is in the case where an employee has been terminated due to a loss of business. The employee may be convinced that the firing was racially motivated, which leads them to pursue legal action against the business.



For the company, neutral analysis offers an objective, highly effective means of evaluating whether or not the value of the claim and the cost of going forward with litigation is warranted. Such analysis can help with making better informed decisions around engaging in mediation or in the settlement.

Neutral analysis can allow either side of a dispute to assess how their arguments will be reacted to by the court. Which claims might be the riskiest or

most successful? How would a judge, jury or arbitrator respond to witnesses and experts? What's the best way to position dispositive motions? How will controlling legal precedents be applied? Neutrals have subject matter expertise that allows them to thoroughly evaluate the claim and offer insights into how best to defend or prosecute the matter.

It's important to note that neutral analysis is not necessarily confined to the beginning of a case. In fact, it can be employed during a trial to inform on a motion to dismiss or summary judgement, or after trial in the case of evaluating an appeal.

Neutral analysis can be used in unique and creative ways. For instance, case evaluations might involve the use of a panel of three or more neutrals, which allows attorneys to weigh a range of independent, expert opinions that closely replicate sitting judges or an arbitration panel.

Weighing the Choice Between Litigation and Arbitration

Some employment agreements provide for the resolution of disputes through arbitration. For those employers who don't

have such agreements in place, the choice between litigation and arbitration becomes crucial. Clearly, cost is an important consideration, as is the fact that a lot of courts are backed up because of pandemic-related challenges.

Arbitration may be presently the best option for handling a dispute more quickly and cost effectively than through litigation. Here again is another opportunity to leverage the unique value proposition of neutral analysis. Neutral analysis can help employers and employees choose the optimal course of action, determining whether or not arbitration or litigation would be advantageous. This can be true of an immediate dispute or even with future disputes.

Neutral analysis can also be helpful in fashioning agreements that parties can then utilize in trying to determine a course of action in employment situations. Such analysis can provide effective input when drafting contracts or agreements. Having an objective outside expert assess potential pitfalls and suggest different courses of action can prove invaluable.

Once armed with the insights provided by neutral analysis, both sides of a dispute can make more informed decisions about the strengths and weaknesses of their legal arguments. This could lead to a mediation that was not previously considered, or to a settlement. Naturally, the parties need to assess the costs associated with each course of action and determine their appetite for further proceedings, such as a lengthy trial.

After considering available options, neutral analysis can be a highly effective tool for either party to a dispute.

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