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Whether and when to mediate employment disputes

Effective mediation can keep companies focused on the marketplace, not the courtroom

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Too often the work of in-house counsel resembles the triage department of a hospital emergency room: Attend to the most immediate crisis and hope the routine complaints quiet themselves with the passage of time. Whether and when to mediate an employment dispute depends on similar prioritizing. What complaint(s) warrant escalation and which will resolve on their own?

The following questions help prioritize complaints: Does the complaint implicate a policy applicable to others, or is it individual to the complainant? Will the complaint remain inside the company, or is an administrative complaint or lawsuit likely? Does the subject matter concern a priority for the company, or is it a peripheral matter? What risks does the company face by not resolving the dispute?

Companies can use various techniques to resolve complaints internally. A manager with the proper authority can sort things out; a skilled and trusted HR representative (or ombudsperson) can listen and negotiate a solution; in-house counsel may investigate and present a proposed solution to management. Cases involving allegations of highly sensitive conduct (sexual assault, for example) warrant special attention. Companies often turn to outside counsel or a neutral investigator to conduct a thorough investigation that prevents the chance or the appearance that politics, friendships or other irrelevant factors influenced the outcome.

If internal procedures fail, information gathered during the internal resolution process can still be used to evaluate the costs and benefits of resolving the complaint. First, in-house counsel must understand what the complainant and management each think is an appropriate solution. Complaints that implicate important company policies or that pose a potential for costly litigation need to be resolved. Second, in-house counsel or, if appropriate, outside counsel, should feel comfortable to invite the complainant and/or their counsel to discuss a resolution of the complaint. If, however, the proposed solution(s), the personalities involved or the policies implicated make it impossible to directly negotiate a resolution, in-house counsel should consider whether mediation is warranted.

Mandatory mediation clauses in employment contracts make it easy to initiate a discussion with the complainant about resolution early in the process. (Collective bargaining agreement (CBA) grievance procedures typically include pre-arbitration step(s) for negotiating grievance settlements. Some CBAs also include a formal mediation step.) In the absence of such a clause, companies often volunteer to participate in confidential mediation with a neutral mediator. The company's offer to mediate early (often at the company's expense) not only encourages the complainant to fully disclose the information that prompted the complaint, but also gives both the complainant and the company an opportunity to address a problem before litigation expenses overshadow the cost of other solutions.

Complaints sometimes are supported by beliefs or hunches rather than admissible evidence. If the dispute is significant and counsel concludes it is impossible to evaluate the relative risks without some discovery, the parties can agree to limited pre-mediation discovery, designed to zero in on the issues that frame the dispute and the critical evidence. Mediation, which can be scheduled at the end of limited discovery, can focus the parties' on settlement rather than on more expansive (and expensive) discovery.

Settlement terms often need to be "sold" internally. Including key managers in the mediation

process not only educates managers in techniques for avoiding future disputes, but also helps them understand why the cost of settling is less than the risk and cost of litigating. When a dispute poses a risk of litigation or significant business disruption in-house counsel should consider proposing mediation. Early mediation, designed to control the cost and disruption of significant complaints, is a tool to keep the business focused on success in the marketplace rather than in the courtroom.

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