

TMG Update

WHAT'S NEW WITH ADR TOOLS USED IN EMPLOYEE PROBLEM RESOLUTION PROCEDURES?

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The resolution of employee issues and complaints can be a significant step in creating a positive employee relations environment. Many progressive employers have looked to new trends in complaint resolution procedures and Alternate Dispute Resolution (ADR) mechanisms to assist them in achieving that sought-after goal. While grievance and problem resolution procedures have been around for decades, the use of creative ADR mechanisms in them has been a more recent phenomenon. This article discusses ADR approaches and suggests things employers may wish to consider in designing or modifying their complaint procedures.

THE VALUE OF PROBLEM RESOLUTION PROCEDURES

First and foremost, satisfactory processes can provide employees with an opportunity to air their complaints and contribute to their feeling of being valued by their organizations. Moreover, such processes can contribute to the employer's ability to attract and retain quality employees. In this litigious age, the processes assist an employer in avoiding the costs and time associated with battling before an administrative agency or in the courtroom to resolve employment-related problems.

While a good process may not be a "cure-all", as discussed below, it may provide an option that avoids trying a case before a court or agency, bad publicity and negative impact on employee morale.

Effective problem resolution processes can also take a pre-emptive strike at union organizers who may promise to fill the niche left by the lack of a satisfactory problem resolution mechanism by providing employees a means to be heard and to avail themselves to a "fair hearing". In addition, they respond to the fact that most employees currently labor under the common law policy of "employment at will".

Also, having a problem resolution process "on the books" avoids legal issues associated with initiating a new process during union organizing, an activity that may result in unfair labor practice charges.

While most internal non-union problem resolution procedures are valuable, some of them can be seen as lacking objective credibility and thus may be perceived as providing less than a "fair hearing". ADR alternatives respond to this concern.

INCORPORATING ADR APPROACHES INTO EMPLOYEE COMPLAINT PROCEDURES

Employee complaint procedures provide a mechanism for an employee to present and to seek resolution of their employment-related problem or complaint, without the fear of retaliation. Such problems may be caused by a variety of factors, including the application of wage policies, promotion decisions, performance appraisals, discipline and/or discharge and work assignments. Factors including discrimina-

tion and sexual or other kinds of harassment may also be raised under a complaint procedure, however, many employers provide distinct procedures for discrimination and harassment complaints in that complaint procedures in these areas generally contain elements recommended by the Equal Employment Opportunity Commission (EEOC).

Problem resolution procedures may be as simple as an "open door" policy or more complicated as a step/appeals process or a procedure creating a "peer review committee" to review disciplinary terminations. (*See Exhibit A*). Most formal procedures address time limits for filing issues that can be raised, the mechanics of filing a complaint and identify the terminal decision-maker.

More formal problem resolution procedures may utilize step procedures and may restrict the categories of issues that can be raised. They may define a point that terminates the process with a decision by a senior manager, a third party or an employee panel. The decision may be advisory in nature or it may intend to be final. Employers develop their problem resolution procedure so that it meets the needs of their organization and employees. (*See Exhibit B*)

Some employers may add their own creative "bells and whistles". For example, some programs create the position of an ombudsman staffed by an employee who provides informal, confidential assistance for employ-

ees who desire a resolution to their problems maintaining confidentiality. Other procedures may introduce ADR processes such as mediation and arbitration.

In the employment setting, problem resolution procedures may include ADR approaches that typically include utilizing the assistance of neutral third-parties such as conciliators, mediators and arbitrators chosen to assist employers and employees in resolving conflicts and grievances without the necessity of seeking the external decision-making authority of an agency or a court.

MEDIATION AND RELATED ADR PROCESSES.

While most internal non-union problem resolution procedures are valuable, some of them can be seen as lacking objective credibility and this may be perceived as providing less than a "fair hearing". ADR alternatives respond to this concern. (*See Exhibit C*)

In **mediation**, a neutral third party may meet with the respective parties both jointly and separately in a voluntary process to move the parties toward a resolution of an employee's complaint. During joint sessions and "shuttling" between the parties, the mediator will attempt to find common ground upon which a settlement may be devised. During the process, the mediator explores strengths and weaknesses in the respective positions and may raise for consideration the

parties' risks in pursuing litigation. The mediator may discuss the potential outcomes of pursuing more adversarial actions or litigation. A skilled mediator uses multiple talents and skills to facilitate the parties' own evaluation of their positions and to help the parties to move toward a compromise or resolution. Importantly, the mediator lacks any authority to make a decision or to compel resolution. The mediator's role is to facilitate and assist the parties in forming their own resolution.

Other mediation-type processes have been incorporated into ADR policies. **Conciliation**, a less intrusive form of mediation whereby the third party assists the parties, as necessary, and plays a less assertive role in fashioning the resolution. A conciliator typically refrains from directing the dialogue. **Facilitation** relies on a collaborative approach to resolve disputes and can be utilized in group settings with the goal of reaching consensus.

Fact-finding is related in that the third party has no authority to make a decision related to an employee's issue or complaint. Rather, the fact-finder acts as a hearing officer listening to the presentations of the parties and then issues a decision that is typically non-binding, but which provides an impetus for the parties to resolve the dispute after considering the third party decision.

Moving along a spectrum of third party authority, ADR processes include **med-arb** (mediation-arbitration) where the parties authorize the neutral to mediate and, if mediation is not successful, to arbitrate. In arbitration, the third-party acquires the authority to render a binding decision. A process called **med-fact-finding** authorizes the third party to act as a mediator, and if unsuccessful, to serve as a fact-finder. The neutral is not empowered to make a binding decision in either role, but, as a fact-finder, has significant utility in assisting the parties to focus on the facts of the matter and, thusly, to allow the parties to evaluate their standing in the event the unresolved matter proceeds to an external agency or to a court room.

A creative ADR approach enables the parties to "dry-run" their case through an internal, **mock mini-trial** and enables the parties to present their cases where a neutral or advisory jury renders a non-binding decision.

ARBITRATION

Another ADR process utilized by employers of non-union employees, **arbitration**, is different from mediation and similar approaches discussed above, in that it may result in a binding decision. In binding arbitration, the parties select a neutral third party to conduct a hearing in which evidence is presented, arguments are considered and a decision is rendered.

Exhibit A

Committees or peer review panels are often found in processes involving discipline. A recent case decided by the National Labor Relations Board (NLRB) in *Syracuse University*, 350 NLRB No. 63 (August, 15, 2007), reviewed an employer's complaint panel and procedure and determined that the University's Staff Complaint Process (SCP) did not violate the National Labor Relations Act (NLRA) by creating a "labor organization" within the meaning of Section 2(5). The NLRA prohibits an employer from creating and controlling employee committees that meet the Electromation standards and the Act's definition of a labor organization. Under *Electromation, Inc.*, 309 NLRB 990 (1992), an entity is a "labor organization" if employees participate, on the committee and there is evidence that they represent other employees in their representative capacity. The committee deals with the employer on conditions of employment including statutory subjects such as grievances, labor disputes, wages, rates of pay, or hours of employment. In *Syracuse University* the NLRB concluded that the SCP did not "deal with" the University on terms and conditions of employment, but rather was limited to making final determinations on the propriety of actions taken by the University against employees. No proposals or counterproposals were exchanged between management and the employees through operation of the SCP. Rather, convened panels worked jointly to effect group decisions. Given the final decision-making power of the SCP and the lack of "dealing" between the panel and management, the NLRB held that the panel was not a labor organization under the NLRA and, therefore, the University did not violate the NLRA by establishing or maintaining it.

The process is internal, quick and, generally less expensive and risk-burdened than litigation before an administrative agency or court. Some processes may authorize the third party to render a non-binding resolution.

It should be noted that ADR approaches to employee complaint resolution are often set by policy. However, the resolution of such complaints through the process of arbitration is typically set through a written agreement between an employer and the employee. It should be noted that arbitration decisions and their underlying agreements have been legally challenged and the courts have not uniformly enforced the procedures. Unconscionability and the inability of a private ADR/arbitration agreement to affect the EEOC's statutorily granted rights (and the rights of state and local fair employment practice agencies) have been the basis for challenge. In other words, since employees may attempt to take a "second-bite" from the apple, the ADR process may not always bring finality to an employee's complaint.

Because of the legal complexities in the area of binding arbitration in the ADR processes, employers should consult with legal counsel before implementing ADR processes, including arbitration.

MECHANICS OF ESTABLISHING A COMPLAINT PROCESS AND CONSIDERATIONS RELATED TO COMPLAINT RESOLUTION

Once the Employer has concluded its analysis of needs and available tools, it must also consider the mechanics and other elements related to the process of complaint resolution in the employment setting:

- **Developing the Process.** An employer should make the important choices in creating a problem resolution process that meets the needs of the organization and its employees.
- **Complaint Initiation.** The employer must consider how an employee will raise his/her issue or concern. In addition, the employer must consider training for the supervisors and managers who engage in complaint handling, including communication and interviewing skills with due consideration given to an employee-complainant's emotional state. Policies of documentation should also be considered.
- **Investigations.** Among issues to be reviewed are the development of an investigation and information-gathering policy which may address interviewing employees and attorney involvement.

- **Complaint Resolution.** Resolution includes planning and potentially dealing with third-party neutrals, the methodology of solution development, monitoring the results, and, finally, evaluating the effectiveness of the complaint resolution process, including the use of appropriate ADR tools.

An employer considering the establishment or the modification of an existing complaint resolution process should ask itself several questions:

- What vehicles exist in the organization to raise and resolve employee issues and concerns? If one exists, does it work? How is it perceived by employees? Is it credible and trusted? If one does not exist, what process would work best for the organization and its employees?
- Is the process well-communicated to employees as to philosophy and structure?
- If a process exists, is it utilized?
- Are Human Resource staff members and others on the management team well-versed and trained in the process? Are they supplied the tools to fairly and legally discuss and administer the process with due consideration given to privacy and other issues?

Exhibit B

EXAMPLES OF EMPLOYEE PROBLEM RESOLUTION PROCEDURES

- "Open Door" Policies
- Progressive step/appeal procedures similar to those in Union contracts
- A senior manager final decision
- Peer review or grievance committee makes recommendation to decision-maker or renders a final decision

Exhibit C**EXAMPLES OF ADR PROCESSES IN PROBLEM RESOLUTION PROCEDURES**

Mediation	Arbitration	Conciliation
Facilitation	Fact-Finding	Med-Arb
Med-Fact Finding		

- Has the organization emphasized its policy prohibiting retaliation for an employee's use of an existing program? In establishing a new plan, has the employer planned to provide a guarantee of "no retaliation"?
- Does the process resolve disputes at the lowest possible level so as to require the least involvement from external sources? Are those directly involved with the dispute encouraged to directly resolve the problem? Are options available when the goal of problem resolution is not achieved at the lowest and most direct level?
- Has the employer considered all ADR options available, including the use of neutral third parties, in its goal of resolving employment-related problems internally? Mediation? Arbitration?

CONCLUSION

Complaint resolution models exist that may be adopted or tailored to fit the needs of most organizations. In unique situations an employer may need to apply its creative skills to developing a program that works best for its organization and employees. The final result, a complaint resolution process, whether it is a simple process or one that utilizes an ADR option, sends a valuable message to employees — that they are important to the organization and that the organization is willing to listen to and resolve their work-related problems. For the organization, a well-conceived program contributes to the employer's ability to resolve employee problems, to maintain a positive employee relations environment and to deal with problems before they are handed over to outside decision-makers such as administrative agencies and courts

(Please note: Nothing contained in this publication should be considered legal advice or constitute a consulting recommendation for any specific client situation.)

The Mickus Group provides assistance to its clients desiring to establish, review or modify their complaint resolution processes. The Firm also offers neutral third party mediation and conflict resolution services.

Please contact one of the Firm's team members using the e-mail addresses listed on the front page or call us at the number listed below for more information.

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