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Resolving to cut litigation costs

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ABSTRACT:
More employers consider using alternative dispute resolution (ADR) to resolve job disputes in a faster, friendlier, cheaper way. Currently less than 20% of all employers use ADR in their employment contracts, but voluntary ADR programs have recently been endorsed by the Equal Employment Opportunity Commission, which is backlogged with more than 100,000 workplace discrimination complaints. The agency opposed mandatory programs, which would require employees, as a condition of employment, to forgo lawsuits and submit any employment discrimination claims to binding arbitration. Chorda Conflict Management Inc (Austin, TX) president Karl Slaikeu suggests creating a conflict management system with 3 broad sets of options, starting with direct talks, then 3rd party mediation, then binding or non-binding arbitration.

TEXT:
mployers are turning to ADR for workplace disputes

By SALLY ROBERTS

Employers that require use of alternative dispute resolution for employment-related disputes are cutting litigation costs while maintaining workplace harmony.

Though less than 20% of all employers currently incorporate ADR into their employment contracts, more employers are considering using this method to resolve workplace disputes in a more timely, more amicable and less expensive fashion.

Voluntary ADR programs recently won the endorsement of the Equal Employment Opportunity Commission, which is backlogged with more than 100,000 workplace discrimination complaints. But the agency opposes mandatory programs -- those that would require employees, as a condition of employment, to forgo lawsuits and submit any employment discrimination claims to binding arbitration (BI, May 1).

PLAINTIFF'S
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If employers make sure their ADR programs are fair and not perceived as coercive and oppressive by employees, even mandatory ADR programs can be uccessful, experts say.
o do this, employers must provide options to their employees, said Karl Slaikeu, president of Chorda Conflict Management Inc., an Austin, Texas-based consulting firm.

Employers will run 'big risks' if they mandate binding arbitration -- in which a neutral third party enters a final and binding decision or award -- with no other alternatives to resolve employment problems, he said.

Employers need a 'comprehensive system with a range of options,' he said.

Mr. Slaikeu suggested designing a conflict management system that encompasses three broad sets of options to employees.

The first step would be direct talks, in which employees could go 'up and down the chain of command' and negotiate with management to resolve the issue.

If that fails, employees then should have the option of mediation -- in which a third party assists in reaching a negotiated settlement. Mr. Slaikeu suggests having the option of an in-house third-party mediator or an outside mediator.

If those options fail, employees then should have the third option of turning to either binding or non-binding arbitration or litigation, he said, adding that at any point, employees retain the option of filing formal charges with the EEOC.

'In that scenario, an employee's due process rights are not violated,' said -ic R. Galton, a partner with Wright & Greenhill in Austin, Texas, and a .ll-time mediator.

Today, courts are overburdened with employment-related claims and the court system can be inefficient as well as expensive for litigants. 'My theory is that building in ADR procedures as a part of an employment agreement makes sense to both sides of the equation, as long as someone doesn't lose his or her fundamental rights,' Mr. Galton said.

A recent decision highlights the concerns Mr. Galton has expressed. A U.S. District Court judge in Houston recently found that River Oaks Imaging & Diagnostic was infringing on its employees' rights and enjoined it from requiring employees to sign arbitration agreements to settle all internal grievances.

The EEOC in Houston sued the X-ray and diagnostic medical center, alleging the employees were deprived of their rights to utilize the full range of remedies available to them under Title VII of the Civil Rights Act.

According to the suit, the company unilaterally imposed a mandatory ADR policy after 17 charges had been filed by employees with the EEOC.

ıe suit alleged the company's owner, Dr. George Allibone, 'intended to manufacture a reason to terminate employees who had lodged complaints of discrimination with the commission.'

Under the policy, not only were employees required to share the fees and costs of the arbitrator, but employees who refused to sign the agreement were considered to have quit.

The memo sent to all employees explaining the new policy suggested they could consult with an attorney. However, two women who previously had filed sexual harassment claims against the company were dismissed immediately after refusing to sign the agreement before speaking with their attorneys, according to court **papers.**

On April 19, Judge Norman Black revoked the mandatory ADR policy. He further instructed the company that it could not implement an ADR policy that would require employees to pay the costs of the ADR proceeding or which would interfere with employees' rights to file EEOC charges or to file suit once administrative remedies have been exhausted.

Unlike River Oaks' policy, **Brown** & **Root** Inc.'s mandatory conflict management program allows employees to go to any state or federal program and file employment-related charges.

'We never had any intentions of interfering with the government programs,' said Bill Bedman, associate general counsel of human resources for the Houston-based engineering and construction firm.

ˉeginning in 1993, **Brown** & **Root** required employees, as a condition of ployment, to resolve all legal claims against **Brown** & **Root** through an internal program.

Prior to adopting the program, the 60,000-employee company averaged fewer than 20 employment-related lawsuits per year, Mr. Bedman said.

However, after one case cost the company five years of time and $500,000 in legal fees, **Brown** & **Root** decided to develop an alternative to the litigation process, he said.

Brown & **Root's** program includes four options for resolving conflicts:

Open door policy. Under this option, employees can go to personnel or corporate employee relations to try to resolve the problem, or they can call an employee hot line and talk with a confidential adviser.

Conference. Employees sit down with the company representative and the conflict program administrator to decide what process the employee would like to use to settle the dispute. If both parties agree, an in-house resolution process is arranged. If the dispute involves a legally protected right, such as the right to be free of discrimination or harassment, employees can choose to go to mediation or arbitration.

Mediation

Binding arbitration.

'It is a sincere attempt by the company to better resolve conflicts in the workplace,' he said.

Brown & **Root** does not have employment practice liability insurance. Its general liability coverage is from Highlands Insurance Co. of Houston, which, like **Brown** & **Root,** is a unit of The Halliburton Co.

'When a company employs a large number of people, conflicts in the workplace are an inevitable consequence. We though it was a good idea to develop a system....to handle workplace conflicts in a fundamentally different way,' he said.

Part of this 'different way' includes offering legal assistance to employees. **Brown** & **Root** pays 90% of the cost for legal expenses up to $2,500. Employees pay the remaining 10% over a $25 deductible. If a dispute ends in mediation or arbitration, employees contribute $50 to the legal fees.

Within the past two years, roughly 900 of its 60,000 employees have used some form of the conflict-management process, Mr. Bedman said. Of those, only six filed motions to compel arbitration. This resulted in close to an 80% decline in the company's litigation expenses over the first year of the program.

The program has not been challenged in court.

KFC Corp. of Louisville, Ky., offers another possible way to handle employment-related disputes.

Since 1992, everyone applying for a job there has been required to agree that if they are hired, they will submit any wrongful termination or sexual harassment claims directly to binding arbitration, said Chris Mandel, director or risk management for the self-insured company.

KFC is now consulting with its lawyers about whether those agreements will be enforceable after four female employees in California filed a sexual harassment suit.
That suit, filed last month in Alameda County Circuit Court, alleges a supervisor raped one employee and sexually harassed the others at an El Sobrante, Calif., outlet.

The courts are not clear on whether they will enforce employment contracts with mandatory ADR features.

n a 1991 case, the U.S. Supreme Court ruled that an age discrimination claim against a securities firm could be subjected to mandatory arbitration, as required in an employee's registration application with the New York Stock Exchange.

Employment law experts point out that some federal appeals courts have extended the reasoning of that case, Gilmer vs. Interstate-Johnson Lane Corp., to contracts between employers and employees, but others have read the court's holding more narrowly.

Mandatory ADR has entered 'virgin territory,' said Joseph P. Decaminada, executive vp and general counsel for Atlantic Mutual Insurance Co. in New York and also the chairman of the American Arbitration Assn.

'It still needs to be fine-tuned,' but 'I think it is worth trying to resolve discrimination disputes through the ADR method. It makes sense for everyone to do it, particularly if the employee wants to stay on staff. ADR is a much friendlier and quicker resolution.'

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