MEDIATING YOUR EMPLOYMENT CASE - SOONER OR LATER?

Andrew S. Albert, Esq.
Michelle A. Reinglass, Esq.

Plaintiffs in employment cases are often out of work and in need of money to make ends meet while they get their lives back on track.

Employers face the prospect of paying their own lawyer, even if successful, and the employee's attorney if not.

For these and other reasons, many employment cases come to mediation early, often before the action is filed.

Here are some things to keep in mind when mediating the employment case sooner rather than later.

Who Knows What

The first step in an early mediation is to assess who knows what!

The foundation for a meaningful mediation at any stage of litigation is both sides knowing their case. The impetus to settle the case before a lot of money has been spent means little, if any, discovery has been done. The evidence has not been fully developed, presenting different challenges at mediation.

Claims and defenses must be presented credibly if they are to be factored into the negotiations, yet counsel are often reluctant to show their hand before they know if settlement is achievable. The manner in which this tension plays out can be the key to a successful early mediation.

Early on, the lawyers' familiarity with the case comes primarily from their clients.

The plaintiff may have access to a friendly witness or two, including former employees. The plaintiff's lawyer may have contacted them. The plaintiff may have a copy of a job performance review, but rarely has their full personnel file before suit is filed.

The defense has the personnel records and access to current employees. If a FEHA claim has been filed, the employer has the claim information**,** and should have conducted an investigation, including witness interviews.

Setting the Stage - Before Convening the Mediation

Before agreeing to go to early mediation, you should evaluate the documents that are available and to speak with accessible witnesses.

Speak directly to counsel, feeling him or her out on what they know. Explain that you believe your client has a credible claim or defense, that it is in the clients' best interests to resolve it early and that it would be foolish and against the clients' respective interests to play hide the ball. If you are missing something, invite them to show you, as you have no desire to pursue a meritless claim or defense.

Agree to exchange as much as possible voluntarily to give the mediation the best chance of success. If you get the feeling that the other side is not being forthcoming, suggest that perhaps the time is not yet ripe for mediation. Maybe a document exchange and a deposition or two of key witnesses are needed. Remind your adversary that you will eventually get the information, albeit after a lot of time and money have been spent.

Err on the side of going to mediation too soon, rather than too late. Many cases are settled in follow up or in a second session. Much like a meal, you can never un-cook an over done lawsuit.

Setting the Stage - Convening the Mediation – Who and How Long

Discuss with counsel what style of mediator is best for the case. This discussion will provide useful information. Do they need 'help' from the mediator with their client? Do they want a forceful, evaluative mediator to 'beat up' on their client, or yours?

Always vitally important, both sides must trust the mediator due to the need to encourage an exchange of as much information as possible; and, because of the emotions that have not yet been fully exposed by the litigation process. A positive outcome is far more likely with the steady hand of a trusted mediator.

Extra time is needed to address all of the issues presented in the early employment mediation, usually a full day to allow things to play out. A longer process is required to inform both sides and to allow the newly realized information to be processed.

Setting the Stage – Talk to the Mediator Before Hand

The most often missed opportunity in mediation is the pre session call between counsel and the mediator. There is no such thing as ex parte communication in the mediation setting. Take advantage of that. A variety of topics can be covered, should always include the following:

Briefs

Counsel are encouraged to exchange briefs so that the clients can see the case they will be up against. Doing so by email facilitates the brief being easily forwarded to the decision makers. Truly confidential information may be separately communicated to the mediator.

During the pre-mediation call, counsel is encouraged to exchange as much information as possible. The mediator should know what information has been shared, and what has been held back. Counsel is encouraged to be prepared to share additional information at the mediation if progress is being made.

If not exchanged, counsel are encouraged to bring witness statements to the mediation or have witnesses available by telephone. Sharing the existence of, or at least some information about these statements is critical to persuading the other side.

Counsel need to appreciate that in order for a witness, or any evidence to become a factor in negotiations, the other side needs to be informed and given reason to believe its credibility.

Having the Right People Present

The mediator should make sure to know in advance who will be present and who has the authority.

Does the employee have a friend or family member needed for him or her to make a settlement decision? Is the person from the employer side with the settlement authority the person who initiated the adverse employment action over which the claim is being made? The human tendency to try and defend one's actions could stand in the way and needs to be accounted for.

Insurance, Emotion and the Joint Session

Is there insurance, and if so, has the carrier come to a position? Is there a consent clause in the policy? What is the deductible?

The mediator needs to know what level of emotion to expect on both sides. Issues of trust and betrayal should be explored.

The joint session is always controversial. The pre mediation call is the best time to explore whether a joint session is likely to help or to hurt, which takes us back to the level of emotion anticipated.

Draft Settlement Agreements

Both sides are encouraged to come to mediation with a draft settlement agreement that can be modified and signed before the parties leave the session, once settlement has been reached.

The Stage – The Mediation

Who Knows What

Verification of who knows what is the mediator's first order of business, while continuing to encourage the free exchange of information.

Measures can be taken to shield part and to share part of the information. Disclosure can be made in stages, first informing the existence witnesses, perhaps later sharing more information, such as expected testimony.

The verification process can help poke holes in the others' claims or defenses and move people from their positions. It can lead to one or more attorneys realizing that their client's version of the facts is either subject to another interpretation, or simply not very credible.

Joint Sessions

Although already addressed in the pre mediation calls, whether and when to convene a joint session should be re-evaluated as the mediation proceeds. The power of seeing and putting a face on real people in the other room, of hearing the other side's perspective has to be weighed against the adversarial nature of the parties facing one another.

It rarely works to turn the parties loose in a joint session without first having identified specific goals and ground rules. The mediator needs to shape the scope of the exchange and the specific goals.

It is often more productive to just have the lawyers meet with the mediator. They tend to be more realistic and more candid with the mediator without their clients present. Breakthrough on a simple issue of law or fact can jump start the discussion in the right direction.

Assessing Needs and Managing Expectations

Once the facts begin to be flushed out and the credibility of the players taking shape, the parties' expectations need to be redirected. The mediator must proceed with respect and reassurance that the parties have been heard and their needs addressed.

Is anything needed beyond the obvious monetary considerations? Is an apology of value? How financially strapped is either party?

Does the employer see benefit in avoiding disruption of the workplace, possible public exposure of allegations or past incidents? Will settling one employee's claim encourage others? Is that risk or threat stronger after a public trial, or if the case goes away with full confidentiality agreements?

At early mediation, each party holds high expectations that their case is strong. They have not yet felt the "pain" of litigation. Facts which challenge a party's view must be discussed in depth to show that the things may not be quite so clear cut, the outcome in a courtroom never so certain.

Giving the parties a positive vision of their life after the claim is resolved can make the difference in settling the case.

The parties should understand what they face in trying the case, what they will need to do to assist their attorney in trying the case. This discussion has a sobering effect, often moving parties from stubborn positions.

Settlement Agreements and 'Oh, By the Ways'

Before agreement is reached on money, make sure you have all of the non-monetary issues resolved. The 'Oh By the Ways' include confidentiality, allocation of settlement proceeds to wages, indemnification for tax liability and timing of payment.

The draft settlement agreements discussed during the pre mediation calls should be exchanged, differences resolved and a signed agreement executed before the parties leave the mediation and buyer's remorse can play a roll.

Investing in Early Mediation

If not successful in resolving the case, the early mediation will provide more efficient and focused discovery. The parties can continue to work with the mediator through telephone follow up as the discovery unfolds, and return for a second session so that settlement can be cocluded. A good mediator becomes the neutral partner to both sides throughout the litigation process to the benefit of all concerned.

The litigation of employment cases is a long, arduous and expensive process. Early mediation is an opportunity to weigh the risks and costs early in a case. Clients will better appreciate a realistic litigation budget and the many benefits of early settlement.

Getting together with the other side and a good mediator is always a wise investment of time and money. One day is a rather small commitment compared to months and years saved by resolution.