Avoiding a Stalemate

Mediation approaches differ, overlap between employment and labor disputes

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Mediators might have one of the toughest jobs of them all — getting two entrenched sides of a dispute to come to the table and hash out the issue. The processes in labor and employment law have unique dynamics and present different hurdles to be navigated, but sometimes techniques to reach a compromise can work in both contexts.

There are several noteworthy distinctions between labor and employment disputes. When a union needs to mediate with an employer — usually to negotiate the terms of a collective bargaining agreement — a mediator is typically appointed by the Federal Mediation and Conciliation Service to facilitate those discussions. L2S Legal founder Bill Berger said, in the employment world, the mediator's job is to bring opposing sides together, whereas the union representative and employer in a labor context are usually experienced negotiators.

"In my experience, mediators through FMCS who do collective bargaining mediation aren't really there to bring the parties together," Berger said. "They're there more to articulate what each party is saying to the other party. Both sides in labor negotiations typically want to make a deal, they want to listen better."

Mediation is used between individuals and employers to settle a case or avoid litigation in instances of alleged discrimination concerning protected classes — gender, race, age, disability, pregnancy, national origin, sexual orientation and religion. The nature of the relationship between employee and employer usually comes into play as well. Interpersonal factors and emotions play a different role between an individual and a long-term employer when there's a claim of discrimination.

"In America, besides your family and children, work is the biggest part of our identity, so when you lose that after years, it's emotional for the charging party," U.S. Equal Employment Opportunity Commission mediator Maria Vela said. She said the respondent usually bristles at these types of allegations, especially if it's a small business owner.

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"For smaller companies if the owner [is part of mediation], they get offended. They say it's never happened, they don't discriminate, they get emotional about it. I don't know if they think it's a black mark, but it's hard to work beyond that whether or not there was discrimination that took place."

Stacy Sdanowich was a mediator with the EEOC for 14 years. When emotions are running high, she advises the charging party to create two lists — one for "wants" and one for "needs." The first is just for them — "it helps them to express some of that anger," she said. The second is ideally more based on necessity — things like an agreement not to contest unemployment or to receive a good reference from the employer.

In a labor context though, parties have likely worked together for some time and will continue to do so in the future. Both parties also have a legal obligation to bargain in good faith, but that doesn't always mean that leads to an agreement. Although both parties strive to avoid impasses, sometimes the "weapons of war" — strikes and lockouts, for example — get activated. When both sides have said and heard everything that can be discussed on the mandatory bargaining subject, negotiations become intractable.

Berger described these impasses as "the third rail on the train tracks." "We're both cowboys on the street staring at each other, and guns are going to get fired. In that situation, you're usually not going to have mediation — it's time to go in guns blazing," he said.

Berger noted that a few factors come into play as trends of mediation and union participation have shifted.

Mediation has become an increasingly popular alternative to litigation as gaps in judiciary funding prevent the courts from handling the sheer volume of cases.

In recent years, there has also been a marked decline in union membership as regulation has moved away from collectivization to an individual focus, something he attributes to the rise of community colleges.

Sdanowich has had unions present at mediations and noted that though the case primarily pertains to the individual who filed a charge, an investigation might be expanded to include the entire work group.

"It's a challenge when a union says there are other members who can benefit, you can try to work with that, but the main goal is to remedy the initial charge. If the employer is willing to consider benefiting others, then that's a plus," she said. Sdanowich recently mediated a case between a hearing-impaired individual and an employer who ended up offering sign language classes to anyone in the workplace who was interested in taking them. She said it's one way of including others in the workplace, which is typically what union representatives want to do in these cases.

Sdanowich said regardless of the dynamic, mediation provides everyone the opportunity to air out their grievances and when it works like it's supposed to, it feels good to be the peacemaker.

"In mediation, it's the most amazing feeling when you can get the parties to come to an agreement," she said. "You just watch the body language, their shoulders begin to relax, you get hugs and thank yous. It's just a good feeling." •

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