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A Most Practical Response to Workplace Discord

By: Maxine Graff Goodman

The use of Alternative Dispute Resolution ("ADR") to resolve workplace issues is not new in the business world. Companies with unionized work forces have been engaged in ADR since Taft Hartley was enacted, using grievance procedures that can culminate in final and binding arbitration to settle disputes arising out of collective bargaining agreements. Arbitration decisions are rarely subject to judicial review. Employees who attempt to bypass the bargained for process by filing lawsuits quickly learn that administrative remedies must be exhausted before redress may be sought in the courts.

The concept of ADR is also not foreign to non-unionized employers, although those that embrace it do not always have formalized policies or practices. In businesses with informal "open door" policies, employees are given the option of bringing a concern to the attention of management through a progressive chain of individuals in the company hierarchy. While these types of processes may be of benefit, historically employees are reluctant to use them because they do not provide a formalized process that protects the employee from adverse action as a consequence of raising potentially sensitive issues.

More recently, many larger businesses have adopted a more formalized process of ADR that requires employees to utilize procedures established to address and resolve employment issues in the workplace. In some instances, the process is a preliminary step that must be taken before an employee can proceed to court; in other cases, it concludes with a final and binding arbitration decision. Some companies use a combination of the two. Where a process provides for final and binding arbitration and the waiver of the right to sue, courts have typically upheld the process if it contains certain features and does not violate an individual's due process rights.

While different types of ADR can be used at different stages of a workplace dispute, it is this writer's belief that it is prudent for a business to adopt an ADR process that gives the parties the opportunity to discuss issues and concerns in the presence of a third party neutral (internal or external). This "early intervention mediation" process is more formal than an "open door" policy, but less stringent than arbitration which results in a final and binding decision. It can lead to both an understanding and resolution of the problem and diffuse an ongoing workplace conflict, which, if left to percolate, can result in costly litigation. Simply put, unhappy employees who believe their job concerns are unheard will turn to the courts for redress. If given the opportunity to engage in an honest and candid discussion, there is often no need or willingness to pursue litigation.

Labor and employment lawsuits are a major concern for businesses of all sizes. Not only are such lawsuits inconvenient and expensive, but also take time to resolve and are tolls on the business. The "human costs" such as lower morale, lost productivity, increased absences and diminished employee retention can be significant. Furthermore, while litigation may resolve the legal problem it does not remedy the underlying dispute, which can then recur in the workplace.

Successful early intervention mediation requires commitment to the process by all parties. Employees, even those required to participate, will "buy in" if they believe that the employer is committed and not just throwing a roadblock in the path to the courtroom. If an employee believes that there is an opportunity to

be heard in a forum that promotes dignity and fairness, is confidential and protects against retaliation, there will be less skepticism and a greater acceptance of the process. The employer must be fully engaged in the conversation, willing to listen to what is being said and open to creative solutions. Both parties must be prepared to participate in honest discussion and early conflict resolution.

While the ultimate goal of early intervention mediation is to resolve the workplace dispute, at times the result might be a "flushing out" of the underlying issues. Even if the conflict is not resolved, the identification and narrowing of issues is always beneficial and thus, worthwhile.

The benefits of early intervention mediation are abundant: (1) the process is more fluid and flexible and provides an opportunity to be heard in a safe environment; (2) the parties can meet before feelings harden, memories fade, individuals get "dug in" to a position and issues get blown out of proportion; (3) it provides the chance to explore core issues (which may be of common concern to other workers and managers) and ultimate goals without "money" being the sole objective; (4) it is typically more responsive to the business culture and instills a belief that problems will be addressed; (5) it permits the parties to gain an appreciation of the other party's concerns, which can enhance empathy and lead to innovative solutions; (6) it allows for a mutually agreeable resolution of a dispute that can lead to the salvaging of the employment relationship itself; (7) it marginalizes the costs of employee unrest because the length of time from the surfacing of the dispute to its resolution is substantially lessened; and (8) it significantly reduces the human and financial costs associated with litigation.

While there may be initial start-up expenses in developing and implementing an early intervention mediation process, utilization of such a process will ultimately result in significant cost savings. Early intervention mediation can be used with both organized and non-union workforces. Companies that embrace early conflict management will reap the benefits in multiple ways, from increased employee loyalty and morale to an improved bottom line.

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