

PEO Network Articles Archive 1997 (January thru June)

ADR Programs Help Avoid Costly Lawsuits

Alternative Dispute Resolutions gives PEOs and clients a way around the costs associated with employment litigation

"The notion that most people want black-robed judges, well-dressed lawyers and pine-paneled courtrooms as a setting to resolve their disputes is not correct. People with problems, like people with pain, want relief, and they want it as quickly and inexpensively as possible"

- Hon. Warren Burger

Chief Justice, United States Supreme Court

What started four years ago as a way for employee leasing companies to further distance themselves from nuisance employment lawsuits may well be the ticket for today's full service PEOs to eventually insure clients from any employment litigation. This relatively new concept is called Alternative Dispute Resolution (ADR).

What is ADR?

ADR is a method by which an employer or PEO and employee/former employee seek to resolve disputes over employment matters without the costs and time usually involved with court litigation. ADR can take a variety of forms and mean several things. Commonly considered ADR options are binding arbitration, non-binding arbitration, and mediation.

Mediation and arbitration have been used since early biblical times, and the 1925/1947 Federal Arbitration Act (FAA) has recently been interpreted by the Supreme Court as establishing complete federal control over arbitration under the provisions of the Supremacy Clause of the United States Constitution.

Why is ADR Popular?

ADR has been given the green light in both the Civil Rights Act of 1991 and the Americans with Disabilities Act. In addition, the Gilmer case [Gilmer vs. Interstate/ Johnson Lane Corporation, 111 S. Ct. 1647 (1991)] set an important precedent in reducing judicial hostility to ADR agreements and to place these agreements on the same footing as other contracts.

Why PEOs are Interested in ADR

George Gersema, CEO of Employers Resource, said that implementing an ADR program three years ago was probably the best business decision he has ever made. To date, he says that 100 percent of employment claims have been settled in mediation and have not even gone to arbitration.

Richard Faulkner, Executive Director of NADR, claims to have more than 10 employee leasing clients and is endorsed by NAAS. Faulkner says that "92.9 percent of disputes are settled by mediation within 45 days and the remainder of the disputes are settled within 180 days in arbitration. For PEO clients, the bulk of the disputes are sexual harassment complaints, ADEA claims, and a few ADA disputes."

Dr. Gregory Firestone, private ADR consultant and recent FAPEO speaker, believes that "ADR and PEOs are a good match because the ADR program brings added value and reduced costs which are the hallmark of the PEO industry."

For the small business owner (less than 100 employees), the PEO can provide the ADR program at a more palatable cost. For the large employer who could afford the program on their own, the PEO can offer an advantage in implementing the program when there is a question about new hires vs. existing employees. An ADR requirement is easiest to impose on new hires by making it a part of the conditions of accepting employment. When a PEO program is implemented, all employees fill out a new personnel file and receive a new handbook. The wording in the signed employment application and employee handbook are the two strongest sources of enforcement on mandatory mediation and binding arbitration cases. In addition, people who sue because they did not get hired are also covered under ADR because they filled out an employment application. PEOs can also utilize ADR language in contracts

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with clients and vendors to cover commercial disputes outside of the courts.

How to Design And Implement an ADR Program

There are many forms of ADR and it is imperative that a great deal of research, thought, and communication go into the final program design and implementation.

Five Basic Steps Of an ADR Program

Communication: How the ADR program is communicated to the worksite employees, especially during the orientation process, is paramount. There must be a perception of value in that the PEO cares deeply and wants all violations and complaints handled fairly and expeditiously through the ADR process. It is imperative that employees understand that, when the employer is sued, the employee is often sued as well; this system protects them, too, and in the case of sexual harassment, the employee should have the same interest in a private, confidential resolution.

Prevention: Education through worksite postings, informative meetings, the employee manual, and continued reminders through payroll staffers can prevent frivolous claims from even being brought forth. Training is a very important part of prevention.

Negotiation: Typically, an open-door policy is utilized in this step. The PEO has the advantage of naming an internal employee as the ADR coordinator. This will give the employee incentive to come forth with their complaint to a neutral party rather than airing dirty laundry to fellow employees. This also gives the PEO an advantage of knowing immediately what is happening at the client locations instead of finding out six months later when an attorney sends a letter informing that a suit has been filed.

Mediation: This is a process whereby a neutral third party facilitates a meeting between the parties in question. The role of the mediator is not to prescribe a determination but to facilitate a solution. The goal of the ADR process is to resolve as many complaints as possible by the time it reaches this step. If mediation is unsuccessful, then the case goes to arbitration. Mediation can be set up as mandatory or voluntary, but agreement must be voluntarily reached by all parties.

Arbitration: Arbitration is similar to a court proceeding in that it is formal and the determination can be binding. The advantages over litigation are not only a reduced time factor but, more importantly, the arbitrators are experienced in employment law unlike a jury that can capriciously award punitive damages.

What's the Catch?

The law in this area is relatively new and questions remain as to the enforceability of final and binding arbitration. Thus, PEOs run the risk of going through ADR and then having to litigate the claim in court as well. Even if the ADR agreement is enforceable against an individual, it does not preclude administrative agencies such as EEOC from conducting an investigation on its own and pursuing remedies in the public interest.

ADR Resources -

A Limited Directory:

American Association
of Arbitration (AAA)

Website address: <http://www.adr.org/>

The National Association for Dispute Resolution (NADR)
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