

DISPUTE RESOLUTION PROGRAMS: DESIGN CONSIDERATIONS AND ALTERNATIVES

Diane M. Pfadenhauer, SPHR, Esq.

INTRODUCTION

Alternative dispute resolution programs became recognized in the workplace decades ago as unionized employers adopted formalized grievance systems, culminating in arbitration. Moving forward nearly a century later, employers have adopted a myriad of programs and practices that can be categorized as alternative dispute resolution programs. The reality, however, is that these initiatives are far from “alternative.” Proactive organizations have recognized the benefits of such programs, and they typically exist in some form in almost every organization.

DIANE M. PFADENHAUER, SPHR, ESQ. is President of Employment Practices Advisors, Inc., based in New York. She has over twenty years of experience as VP/SVP of HR and in-house labor and employment counsel, and she speaks and writes regularly on the subject of employment law. She is also a member of the graduate faculty in the E.M.B.A. program at St. Joseph's College in New York and the NYS Bar Association, Labor & Employment Section's EEO Committee.

The general purpose of dispute resolution (DR) programs is to provide employees with a fair and private forum to resolve internal workplace disputes. At first glance, it is believed that organizations typically adopt such programs to avoid the costs of litigation. It is not at all uncommon for defense costs for a typical discrimination claim to exceed \$150,000. A DR program relieves the employer of the potential for large defense costs. In order for such a program to be truly effective, however, employers must focus not only on the traditional endgame—privacy and costs savings—but also on the establishment of a fair and equitable system that is perceived as such by employees.

The purpose of this article is to discuss the use of DR programs by non-union, private-sector employers and to provide practical guidance to ensure that the programs implemented both achieve organizational objectives and meet the needs of employees. It is presumed that the reader is well acquainted with the various options ranging from negotiation to vari-

ous forms of mediation and arbitration and has decided that the implementation of such a program is in the best interests of the organization. The goal is to provide the reader with guidance on ensuring that the persons responsible for spearheading the program consider important elements so that it can be implemented without the organization falling into the invariable traps that will tempt it along the way.

DISPUTE RESOLUTION METHODS

Many organizations lack formal processes for DR. That notwithstanding, many have adopted informal, ad hoc methods that serve an adequate purpose of preventing disputes from escalating into costly and disruptive challenges for both the organization and employees. Typically, however, DR methods can be classified in three general areas. The first, ad hoc methods, relates to informal processes adopted by organizations. These tend to evolve over time and are significantly influenced by the culture of the organization or

some key individuals. For example, a human resources professional with strong conflict resolution skills may be known as the “go to” person to resolve intra-company disputes. While the role of this individual may not be formalized into policy, he or she may possess the unique skills to have a significant impact on the prevention of litigation, employee satisfaction, and the reduction of workplace disruptions. Many organizations have such persons on board by chance. The proactive organization will recognize this and utilize that individual.

The second area relates to formal policies and procedures that require compliance on the part of employees and the organization. These include following a chain of command in the case of specific disputes, assigning roles that various internal parties may play in terms of dispute resolution, and taking subsequent remedial actions. Notwithstanding the introduction of a level of formality, much of the success of these programs is contingent upon the players involved, their individual skills, and the environment in which they operate.

The third area relates to the development and implementation of systems which are designed to be voluntary in nature, are generally a condition of employment, and may often use outside parties, such as investigators, mediators, arbitrators, or ombuds professionals to assist in either fact finding or rendering decisions. Typically the most formalized of programs, these are embodied in sophisticated policies, often involve the use of an alternative forum for resolving legal disputes, and have results that are usually intended to be legally binding on the parties.

BENEFITS OF EFFECTIVE DISPUTE RESOLUTION PROGRAMS

The most effective dispute resolution program is one that preempts the spiraling nature of disputes gone wild. But, such a program requires that appropriate steps be in place in place long before the threat of litigation surfaces. Merely implementing a mandatory arbitration policy is not a dispute resolution program. While there are many benefits to such programs, the real savings is in the programs that provide for early intervention and prevent conflict from occurring or, in effect, nip it in the bud.

Maintaining Good Will Between the Parties

The DR program which focuses beyond legal compliance will ultimately promote and maintain good will between the parties by promoting and fostering communication and preventing or reducing conflict early on. In addition, others in the workplace will judge the adequacy of the program on their own perception of its fairness. One that is viewed as objective and fair will more likely be embraced by not only employees, but management as well. In addition, the presence of an outsider in the dispute resolution process who assumes an adversarial posture may, at times, may not be acting in the interest of promoting an ongoing, productive relationship between the parties. This may result not only in the predicted costs of litigation, but the loss of valuable skills in employees that the employer has invested heavily in. Thus, to promote a system that discourages employees from seeking outside intervention will help to maintain good will.

Reduction in Litigation and Related Costs

DR programs have been proven to reduce ultimately the overall cost of litigation faced by an organization. Some organizations have seen an 80% drop in employment-related lawsuits as a result of the implementation of ADR programs.¹ In addition, the resolution of a dispute through arbitration is typically final, once and for all, due to the limited instances where an arbitration decision can be overturned. A reduction in litigation does not, however, necessarily correlate with increased employee satisfaction, nor does it mean that organizational conflicts are in fact resolved at all. While reduction in litigation is clearly one benefit, there are others that focus on the softer elements of interpersonal conflict as well as other measurable outcomes.

Minimization of Workplace Disruption and Speed in the Resolution of Disputes

Generally, it takes parties twice as long to litigate a case than to arbitrate one. According to one recent study, the average employment discrimination case in litigation was resolved in about 680 days, while the average arbitration case took about 260 days.² While any conflict is proceeding through the steps of a DR program, there continues to be a cloud of disruption over the workplace. Employees are discussing the case, management is periodically asked to work on preparing the employer's defense, and the workplace continues to feel the tension of the ongoing dispute. Thus, the sooner it is resolved, the better.

Privacy

DR programs can be appropriate for employers who are sensitive to public scrutiny. In fact, this is one

of the most often cited criticisms of such programs. Those who believe that justice is better served when the public is aware of the employer's misdeeds take the position that the lack of publicity serves to perpetuate discrimination or mistreatment of employees. Notwithstanding this seemingly pro-employee view, there are many employees who do not pursue matters against their employers out of a concern for negative publicity or fear of developing a reputation in the industry as a problem employee. For these individuals, the element of privacy is desirable.

Flexibility—Process and Remedies

For every organization, there can be a variation in design and management of a DR program. While there are hard and fast rules which have emerged through case law and EEOC guidance, each organization's culture is as unique as its people. As a result, organizations have a tremendous amount of flexibility in implementing proactive systems that are designed to minimize disputes, speed their resolution, and minimize expenses, long before the litigators become involved.

Enforceability

The enforceability of workplace DR programs typically hinges on several factors. One often cited is the lack of equal bargaining power between employers and employees. The employer typically drafts the policy, and the employees are asked to take it or leave it. Therefore, it is likely that employees will want to challenge a program that seemingly takes away their rights, and such challenges will focus on the fairness of the system. It is well known, however, that as a result of the *Gilmer*³ decision, the arbitra-

tion of a workplace dispute is not a process that takes away an employee's rights, but rather serves as an alternative, yet equivalent, forum for resolving the matter. Therefore, when the program is viewed as being designed and administered in a manner that leans in favor of management, courts may refuse to compel arbitration.

Generally, the enforceability of a mandatory arbitration provision hinges on a variety of issues. These include voluntary consent by the employee, the employee's right to representation, the availability of neutral decision makers, the availability of statutorily protected remedies such as attorney's fees, the costs to be borne by the employee, access to relevant information and evidence, and limited review of a final and binding arbitration award.

Focus on Resolution of the Dispute, Not Winning at Litigation

DR programs are most effective when they are used to resolve conflicts long before the threat of litigation. Thus, the design of the program is critical to its success. A variety of studies have demonstrated time and again that the most effective programs are those that focus not only on legal compliance and litigation avoidance, but also focus on fairness.⁴ In addition, organizational support and the availability of professional resources to assist employees will promote this goal. Some of the systems characteristics that are important include:⁵

- Availability of expert resources to aid employees in the processing of their grievances
- Level of input employees have into the process

- Impartiality or degree of independence from management of the person making the actual decision
- Timeliness and speed of the process
- Consistency with which complaints are resolved
- Degree of top management and line management support of the program
- Extent to which the process fits the organizational culture

POLICY CONSIDERATIONS

Having asserted that the most effective DR programs begin long before lawyers become involved, the following are the steps that an organization should consider when designing a program. Ideally, the organization will work closely with its employment lawyer in the development of a policy. However, it is incumbent on management to make policy decisions for the organization that can ultimately increase the overall effectiveness of the program.

At the outset, it is recommended that a task force be created to explore the viability of a DR program for the organization. On the task force should be representative stakeholders throughout the organization, legal representation, human resources, and operations management.

1. The Business and Human Resources Strategy

Every policy in an organization must embody the organization's overall mission and strategy. These influence the availability of internal resources to devote to DR programs. Organizations typically manage their employees like they manage their business. Thus, organizations in cut-throat, highly

competitive industries typically manage their employees the same way, unless conscious effort is made to define how employees are to be treated. Any organization considering conflict resolution and DR programs must first ensure that they will dovetail with the business environment in which they operate.

Consistent with the business and human resources strategy is the need to have preliminary discussions regarding the ultimate goal(s) of the program. What are the end results the organization wishes to achieve by endeavoring to implement such a program and how will it measure its success?

2. Understand How Disputes Are Resolved in the Organization

Every organization has a current “system” for resolving disputes. These are seen in every handbook which mentions an “open door” policy. Notwithstanding this language in the handbook, each organization has a way of resolving disputes. These range from autocratic decision-making by a high-level executive to democratic systems which seek input, either formally or informally, from key stakeholders. Any DR program must be designed in a way that will work in concert with existing systems or replace, in a planned and concerted way, the existing system. In addition, the task force should review the following policies to begin the process of determining how a DR program will work with existing policies:

- Grievance procedures
- Open-door policies
- EEO / harassment policies
- Code of conduct / ethics
- Discipline / discharge

- Privacy
- Workplace violence
- Technology
- Workplace searches
- Performance appraisal / management

For each of these policies the task force should also have a clear understanding of the roles and responsibilities of management and employees under each policy. In addition, review the guidelines articulated under each of these policies with respect to the specific steps that management will take in the event of an alleged violation or complaint under the policy.

3. What Types of Disputes Will be Covered?

The task force should carefully evaluate the types of disputes that will be addressed through the program. Are there certain disputes that will be handled outside of the DR system? In order to effectively make this determination, the task force should evaluate conflict, claim, and any other dispute history. What types of employee complaints have been lodged? What kinds of complaints became legal complaints? What costs have been incurred? What is the nature of these complaints? Frequency? Include any other metrics that the task force feels are relevant and helpful to making their recommendations.

4. Organization Culture, Hierarchy, Decision-Making and Politics

How does the “open-door” policy really work? Is it merely a statement in the handbook or is it a policy truly embedded in the corporate culture? Is the organization’s culture formal or informal? Are its processes structured or un-

structured? Are management and decision-making decentralized or centralized? Does local management operate independently on certain issues? Are there important stakeholders who can influence the treatment of employees who are not in the normal corporate hierarchy? An organization that is unwilling to fully adhere to the process or is willing to circumvent its own process should not consider such a program.

Organizational culture also influences communication patterns. How much information at the close of and during the DR process is the organization willing to share and with whom? Communication itself can often be the cornerstone of success and needs to be ongoing and continuous.

5. Due Process

Organizational research clearly demonstrates that the most effective DR programs are those that promote fairness and objectivity. Often, employees are less concerned about the outcome than they are about the process itself. Thus, if employees view the process as one that is fair and equitable, they are less likely to doubt it or ultimately challenge its findings. The following are some suggested concepts to discuss when designing a DR program:

- Are the individuals who are charged with administering the program properly trained?
- Are the individuals charged with administering the program trustworthy?
- Is the outcome of the process clearly explained to the complainant?
- Is there an appeal mechanism that is administered consis-

tently and fairly and more than merely a “rubber stamp” for management?

- Are delineated timelines realistic and followed consistently?
- Are employees involved in the administration of the system?
- How impartial or independent of management is the fact finder in any investigation or review of a complaint?
- How impartial or independent of management is any decision-maker?
- Does the process itself fit within the organization’s culture?
- Does top management support the program, or does it exercise discretion to resolve matters outside of the program in a seemingly arbitrary manner?

Legal standards of compliance for DR programs do not necessarily effectively address all of these due process issues. The gap between passing legal muster and one that addresses these due process issues is often the hallmark of a successful program versus a merely adequate program.

6. The Earlier the Intervention, the Better

DR programs that provide for a forum to resolve differences early on are more likely to reduce the instances where employees seek outside help to resolve their issues. Often, communication, failure to provide feedback, and personality conflicts can escalate into dangerous, embarrassing and costly conflicts for the organization. They often do not start out as lawsuit

material but quickly develop into one. Quite frankly, the success of any DR program is sometimes best measured not by what happens in ensuing litigation or arbitration, but by what happens to resolve disputes before they ever get there.

7. Training of Management, Employees, and Administrators

Both employees and management will need to be trained in a variety of areas for any DR program to be successful. Specifically, managers must be skilled at: a) communicating and providing constructive feedback; b) evaluating performance; and c) resolving workplace conflicts. In addition, they must be trained on all of the company’s policies that deal with performance and behavior so that they understand their roles and obligations, the obligations of employees, and their level of authority.

Employees need to be trained regarding the DR process so that they understand the types of issues which it covers. In addition, those responsible for administering the program need advanced training.

8. Structure of the Agreement, Consideration

When introducing a DR program for the first time, employers must consider the legal requirements regarding the possibility of the need for additional consideration to be provided to the employee in exchange for the employee agreeing to resolve his or her dispute through an alternative forum to litigation. Courts have found agreements to resolve disputes through mandatory arbitration viable when found in handbooks, employment applications, offer letters, and other such documents.⁶ Obviously an employer will want to ensure that its process includes a signed employee acknowledgment, training or other communi-

cation to ensure the policy is understood, and ample time is provided for employees to review the materials.

9. Fear of Reprisal

No DR program can be effective if the style and culture of the organization dissuades employees from utilizing it out of fear of reprisal. Just as an open-door policy that is really a sham does nothing other than to take space in the handbook, so too does the DR policy that employees are afraid to use.

10. Use of Neutrals: Fact Finding and Decision Making

The American Arbitration Association has established clear guidelines regarding the qualification of arbitrators used to render a decision in the employment context. Specifically, the arbitrator must be knowledgeable of employment law, have no personal or financial interest in the results of the proceedings, and have no relation to the underlying dispute or to the parties or their counsel that would create the appearance of bias.⁷ While this rule is applicable to an arbitrator selected to resolve a dispute, it also sheds light on the need for neutral and objective parties to be involved in fact finding and investigating the nature of the employee’s complaint. In any conflict where the investigator or fact finder is also the one who recommends discipline and then serves as judge and jury, objectivity is almost always questioned.

11. Cost Sharing

Related to the issue of fairness and objectivity is the concept of fee or cost sharing. An employee required to utilize arbitration to resolve his dispute with his employer often questions the neutrality of any outside expert (fact finder or arbitrator) who is paid by the em-

ployer. Viewed as a hired gun, the employee tends to question his or her objectivity. Notwithstanding this concern, an alternative view asserts that should an employer consider cost sharing with the employee, it must do so in a way so as to avoid making the process cost prohibitive for the employee. From the perspective of fairness, it is likely that the employer will need to explain the policy on cost sharing to employees. This decision will ultimately be a balance of what is legally required and what is perceived by employees as still promoting a fair resolution of the conflict.

12. How Will Program Results Be Measured?

All programs adopted by an organization must be evaluated for their effectiveness: did they produce the results that were desired? In addition, they must be evaluated on a cost-benefit basis as well. Did the outcome more than offset the costs (real and opportunity costs) of implementing the program? At the outset, it is important for the organization to consider how it will define the program's success and how it will measure it. In determining the program's success, the organization must look beyond the legal issues and evaluate the strategic implications such as the effect on organizational per-

formance, workforce effectiveness, workplace satisfaction, etc.

Since each organization is unique, it is imperative for each to develop their own metrics to evaluate the program's effectiveness. Following the measurement of the effectiveness of the program, it is important to then make the appropriate changes necessary to improve upon the foundations already in place.

CONCLUSION

Dispute resolution programs have evolved over the decades into practices within organizations that are far from "alternative": they are now mainstream. Their organizational benefits have been proven time and again, and their existence has long since passed legal muster. Every organization that truly wishes to achieve the maximum benefits of a DR program must evaluate the myriad of issues unique to itself in order to design a program that will serve it well over the long haul. While DR programs are often considered novel or popular, they cannot be implemented effectively with a boilerplate approach. By considering the issues discussed here, an employer will have the opportunity to implement a program that is trusted, perceived as fair, and reduces disruption and conflict in the organi-

zation. Ultimately, this will enable the organization to increase the effectiveness of its workforce in the long term.

NOTES

1. Alex Maurice, *HR Execs Try to Curb Worker Lawsuits*, 102(49) National Underwriter, 9, 12, (1988), available at, ABI/INFORM Global Database. (Document ID: 36633657), quoting a survey of small and mid-sized companies across the United States sponsored by Assurex International and the American Mediation Institute.
2. David Sherwyn, *Mandatory Arbitration: Why Alternative Dispute Resolution May be the Most Equitable Way to Resolve Discrimination Claims*, CHR Reports, the Center for Hospitality Research, Cornell University, (July 2006).
3. *Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26, 59 U.S.L.W. 4407, 55 Fair Empl. Prac. Cas. (BNA) 1116, 56 Empl. Prac. Dec. (CCH) P 40704, 1991 WL 73843 (1991).
4. Donna Blancero and Lee Dyer, *Due Process for Non-Union Employees: The Influence of System Characteristics on Fairness Perceptions*, 35, 3 Human Resource Management, 343-359. (Fall 1996).
5. Donna Blancero and Lee Dyer, *Due Process for Non-Union Employees: The Influence of System Characteristics on Fairness Perceptions*, 35, 3 Human Resource Management, 343-359. (Fall 1996).
6. Peter Paul Nicolai, *Rethinking Employment Law Strategies: Part 2*, 56(4) Dispute Resolution Journal 53-63, (2001), available at ABI/INFORM Global Database (Document ID: 96928487).
7. American Arbitration Association Rules and Procedures: Employment Arbitration Rules and Mediation Procedures. July 1, 2006. Rule 12(b). available at <http://www.adr.org/sp.asp?id=28481#the> (last visited October 2, 2006).