



## The Time is Ripe for Employment Dispute Resolution Programs

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Two recent happenings in employment discrimination arena make it imperative and beneficial for employers to create internal employment dispute resolution programs to prevent, identify and resolve employment issues.

First, in a recent U.S. Supreme Court decision, the Court made it easier for employees to win discrimination lawsuits against their employers by holding that *circumstantial evidence* can be used to prove mixed-motive cases. (*Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 6/9/03). Previously, several lower courts had ruled that in mixed-motive cases, where both legitimate and illegitimate reasons motivated the firing of an employee, proof in the form of *direct evidence* of discrimination was required.

Second, the U.S. Equal Employment Opportunity Commission (EEOC) recently announced the implementation of a voluntary mediation pilot program in which private sector discrimination charges filed with the EEOC will be referred back to a participating employer's internal dispute resolution program, as appropriate. Under this new program, only employers that have internal dispute resolution programs that meet the following specific criteria may participate: a) participation by its employees is voluntary; b) the employer has an established program; c) the program has clearly written procedures; d) the program is free to the employee; e) the program addresses all claims and relief under EEOC-enforced statutes; and f) settlements obtained must be in writing and enforceable in court. If the dispute is resolved through the employer-provided program, the charge will be closed pursuant to the Commission's procedures governing withdrawal and settlement of charges.

Given these developments, employers can benefit by addressing and resolving employment claims at an early stage through the use of internal dispute resolution programs. A comprehensive internal dispute resolution program provides employers with more options to obtain effective resolution of disputes while at the same time avoiding the potential risks associated with pursuing such matters in court or through the EEOC. The resulting benefits of such programs may vary, but often include: reducing legal and other associated costs; reducing the cycle time of disputes; thoroughly evaluating a dispute or complaint at an early stage; privacy/confidentiality; preserving working and business relationships; improving company decision making; controlling the process to minimize uncertainty and maximize uniformity; and enhancing a company's public and business image.

Typically, in an organization with an employment dispute resolution program, the employee in conflict follows a previously agreed upon series of steps involving various dispute resolution processes (e.g. facilitation, fact-finding, ombuds, peer review, dispute review boards, mediation, mini-trials, arbitration and private judging), some of which may be optional or required, some of which may be internal or external to the organization, and some of which may be non-binding or binding (the binding process, if a part of the program, is usually the final step, but is sometimes offered as an earlier optional step). For example, a typical employment dispute resolution program might require an organization's non-union employees to utilize internal processes such as open door, facilitation, and ombuds, and then external mediation, and then allow for optional internal peer review and external binding arbitration. Extremely successful results can be obtained by developing a comprehensive, multi-mechanism dispute resolution program particularly within the context of a legal system that is opening wider doors to employment-related lawsuits and an EEOC that is receptive to allowing organizations to resolve their disputes internally.

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