Consider Mediation

By Lee Cotugno, Esq.[1]

Executive Summary

- But religious entities, by their very nature, have a special obligation, mandated by their faith, to treat their employees with fairness and dignity, especially when disputes arise.
- Religious entities should consider adopting a policy that requires both sides to submit disputes at the outset to mediation.
- Effective mediation policies address certain key elements, including costs, document exchange, confidentiality, and the appointment of a neutral mediator.
- Even if not initially successful, early mediation offers both sides the opportunity to get an evaluation of their positions from a disinterested third party – which by itself can lead to an eventual resolution of the dispute.

Introduction

Employment disputes are common and can quickly result in litigation. Whether tried before a jury, before an arbitrator, or before an administrative agency, employment litigation is expensive, time-consuming, and risky, and can result in unwanted front-page news.

Faced with these concerns, many companies have adopted arbitration policies. But this approach has not gone unchallenged. For example, courts in California courts have often found arbitration agreements to be procedurally or substantively "unconscionable," or both, and hence unenforceable. And last year the California legislature passed a law that would have banned arbitration as a condition for employment. While that legislation has been enjoined (as to arbitration agreements

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governed by the Federal Arbitration Act), if history is any guide, there will more challenges to come.

But even with arbitration, employment litigation poses a particular problem for nonprofit religious entities, which often have limited resources and find it difficult to obtain – or pay for – insurance. Besides the cost, there is the inherent disruption that employment disputes can cause to religious employers. And the allegations of improper conduct, which can take years to resolve, can threaten the good reputation, if not the very existence, of a religious entity.

These are all legitimate issues. But religious entities, by their very nature, have a special obligation, mandated by their faith, to treat their employees with fairness and dignity, especially when disputes arise. This should include giving their employees a real opportunity to explain why they believe that they have been mistreated, and to do so without fear of retaliation. The adversarial nature of litigation, whether in court or in arbitration, inevitably encourages both sides to take stark and often hardened positions early on and can actively discourage an open discussion.

A Faith-Based Approach

For all of these reasons, religious entities should consider adopting a policy that requires both sides to submit disputes at the outset to mediation. Doing so can send a strong message, especially important for religious entities, that they are willing to listen to employees and give them a fair hearing, one which is focused on seeking a just resolution that affirms the inherent human dignity of the (former) employee. The power of sending such a message should not be underestimated. When an employer demonstrates such openness, employees often respond in kind. Indeed, one complaint often heard from employees is that no one would take their concerns seriously, and a formal mediation policy tells them they will be given a real opportunity to express their grievance before a neutral party. And the religious employer likewise will be able to explain the reasons for its actions through the neutral party in a non-adversarial manner.

Why Mediation?

You may ask, why is mediation needed? After all, the employer and the employee are free to have these discussions at any time. But this ignores the dynamics of the workplace and basic human nature. It is common in any employment relationship for misunderstandings and distrust to develop. This can occur vertically – between management and workers – and horizontally between employees themselves. Internal complaint procedures end up not getting used because of the suspicion that bringing a complaint (to a supervisor or HR) either will have no result or will get the employee fired. While these suspicions may be unfounded, the fear remains, often

because of perception of bias or favoritism, or simply because of the way that supervisors or managers relate to the employees.

It also may be argued that early mediation is a waste of time because the parties won't be ready, that they need to subpoena documents or take crucial depositions. There also may be a concern that early mediation gives the opponent a quick peek at the other side's strategy. But the first argument will almost always guarantee an expensive and protracted process that can reduce the likelihood of settlement (especially given the factor of attorneys' fees). And the second argument assumes that the issues are more complex than they really are. In most cases, laying your cards on the table will not weaken your case if you end up having to go to trial.

Elements of Effective Mediation Policies

To be effective, mediation must be fair and any mediation policy:

- Should be a written agreement signed by both parties;
- Should require that mediation be pursued as a pre-condition to arbitration (or to filing a lawsuit if the employer does not have an arbitration policy);
- Should provide for a truly neutral mediator experienced in resolving employment disputes (using a neutral from one of the alternative dispute resolution companies such as JAMS or ADR);
- Should ensure confidentiality;
- Should provide that the employer will pay for the unique mediation costs (this follows California law which requires the employer to pay for the unique arbitration costs – primarily being the arbitrator's (here, the mediator's) fees);
- Should provide for an exchange of documents (which would include the employee's personnel file and payroll records, where applicable); and
- Should encourage or require the exchange of short mediation briefs at least a week before the mediation

An experienced mediator can open doors that the parties themselves cannot. Often the mediator can get at what are the real issues dividing the parties – and whether those issues can be bridged. At times, the dispute comes down to personalities. At other times there may be serious issues with a policy or procedure the employer has used. And sometimes the parties are like two ships passing in the night. Simply put, an experienced mediator can bring the parties together, and offer solutions that would not have been acceptable if proposed by the parties themselves.

Final Advice

Of course, not all disputes can be resolved early. But even if not initially successful, early mediation offers both sides the opportunity to get an evaluation of their positions from a disinterested third party – which by itself can lead to an eventual resolution of the dispute.

An example of a mediation/arbitration agreement based on mediation occurring in California is included here as an appendix. Like arbitration, mediation will be governed by the laws of the state where you reside, and this example should not be used without consulting with legal counsel experienced in this area of the law.

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SAMPLE – MEDIATION AND ARBITRATION AGREEMENT

Legal Disclaimer: This resource is a sample for general educational purposes. This sample document does not constitute legal advice. Prior to using this agreement, consult with a licensed attorney regarding the matters discussed herein. Although licensed attorneys work with NLI, NLI is not a law firm and does not undertake legal representation on behalf of any clients. Further, no licensed attorney working with or on behalf of NLI agrees to undertake legal representation on behalf of any client unless the terms of such representation are set forth in a separate, written representation agreement.

The undersigned employee ("Employee") and _____ ("Employer") hereby agree as follows:

1. Any claim, dispute or controversy by and/or between Employee and Employer (or its owners, directors, officers, employees, and parties affiliated with the Employer's employee benefit and health plans) arising out of or related to or having any connection with Employee's seeking employment with, employment by, or other association with Employer (including, but not limited to, claims of discrimination, harassment, unfair competition, and breach of contract, and wage and hour disputes) that otherwise could be filed in and heard by a state or federal court or other governmental dispute resolution forum, ***must first be mediated. No legal action can be brought by one party against another party hereto unless one of the parties refuses to submit to mediation, in which instance a legal action can be brought to specifically enforce this mandatory mediation provision.***

   Mediation shall be conducted before the JAMS Mediation Arbitration and ADR Service (JAMS) located in Los Angeles California. Either party may commence mediation by providing to JAMS and the other party a written request for mediation, setting forth the subject of the dispute and relief requested. The parties will cooperate with JAMS and with one another in selecting a mediator from the JAMS panel of neutrals and in scheduling the mediation proceedings. Parties may be represented by counsel. The Employer shall pay for the cost of mediation, including the mediator's fee. Such costs do not include attorneys' fees and other attorney costs (including expert witness fees) incurred by Employee. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator or any JAMS employees, are confidential, privileged and inadmissible for any purpose, including impeachment, in any arbitration or other proceeding involving the parties, provided that evidence that is

otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.

At least ten (10) days prior to the mediation, the parties shall serve on each other documents which they believe are relevant to the dispute, together with a mediation brief not to exceed five (5) pages summarizing the issues and their respective positions.

2. ***If the matter is not resolved through mediation, it shall be submitted to and enforced exclusively by binding arbitration in conformity with the procedures of the Federal Arbitration Act (9 U.S.C. section 1, et seq.).*** In addition to requirements imposed by the Federal Arbitration Act: (1) the parties hereto shall have all rights to discovery as provided under the California Arbitration Act (California Code of Civil Procedure section 1280 et seq.); (2) the arbitrator shall be a retired state or federal judge subject to disqualification on the same grounds as would apply to a judge of such court(s); and (3) to the extent applicable in civil actions in California state courts, all rules of pleading (including the right of demurrer), all rules of evidence, and all rights to resolve the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under California Code of Civil Procedure Section 631.8 shall be followed.

3. Any claim for arbitration shall be filed with the JAMS office located in Los Angeles County, California. The arbitration shall be administered by JAMS pursuant to its then current Employment Arbitration Rules & Procedures and subject to the JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness (collectively, "JAMS Rules"), subject to the provisions of paragraphs 1 and 2, above. The JAMS Rules can be found at www.jamsadr.com/rules-employment.

4. Resolution of the arbitration shall be based solely upon the substantive law governing the claims and defenses pleaded. The arbitrator shall not invoke any basis other than such governing law, including, but not limited to, notions of "just cause." As reasonably required to allow full use and benefit of this agreement, the arbitrator shall reasonably extend the times set by the arbitration acts for the giving of notices and the setting of hearings. Awards shall include the arbitrator's written reasoned opinion.

5. Employee has the right to be represented by counsel at the arbitration. Employer shall pay for the cost of arbitration, including the arbitrator's fee. Such costs do not include attorneys' fees and other attorney costs (including expert witness fees) incurred by the Employee.

6. ***Employee and Employer understand that by agreeing to this binding arbitration provision, both give up their rights to trial by jury.***

7. Claims for state employment insurance (*e.g.,* unemployment compensation, workers' compensation and worker disability compensation) are ***not*** subject to arbitration. In addition, Employee may still file claims with administrative agencies such as the National Labor Relations Board, the Equal Employment Opportunity Commission, or similar state agency. However, Employee may not bring a lawsuit or participate as a party in any lawsuit arising out of such a claim but must instead pursue any and all personal claims against Employer through arbitration.

8. Employee and Employer also are entitled to file applications in California Superior Court for provisional remedies to the extent they are permitted under California Code of Civil Procedure section 1281.8.

9. Each arbitration proceeding shall cover the claims of only one Employee. Unless all parties consent in writing, the Arbitrator has no authority to adjudicate a class and/or collective action and shall not consolidate claims of different employees into one proceeding.

The signatures of Employee and Employer below attest to the fact that they have read, understand, and agree to be legally bound to all of the above terms.

Dated: _____ _____
Employee's name (printed)/Signature

Dated: _____ _____
[Employer's name (printed)/Signature]