EMPLOYMENT MEDIATION: WHAT WORKS & WHAT DOES NOT

Tips For Employers On What Works:

1. Bring settlement template and two checks to the mediation so the entire deal can be consummated on the spot.

    a. Disclose this preparation either in the opening statement or in the final closing stages of negotiation.

    b. OWBPA: bring an escrow letter and date the checks for eight days after the mediation concludes (you can always stop payment).

2. Go through the employee's e-mail records for information that may be useful for the defense even if the case is not yet in suit. Determine whether there is a counterclaim for breach of fiduciary duty, violation of Computer Fraud & Abuse Act, etc.

3. Apologize in the opening statement.

4. Prepare a chronology for the mediator highlighting key events of the dispute and important dates for your defense.

5. Prepare a detailed and complete analysis of damage issues and the impact on damages of your damage defenses.

6. Start bargaining at a "low-reasonable" figure, based on discounted likely recovery level and tied to employee's annual income.

7. Consider offering off the bat to pay counsel's fees based on hours sight unseen (or at a typical 10-15% federal judge discount), plus a small recovery for plaintiff.

    a. This can ensure that plaintiff's counsel is lobbying for settlement from the outset.

    b. Alternative: agree at the start to include the full mediation fee in the settlement if an agreement can be reached.

8. Put your defenses on the table, identifying supporting documents and witness testimony in a mediation statement provided before the mediation. Cover this ground in the opening statement, starting with everything that is agreed on both sides and then working into the disputed points.

9. Raise the issue of whether the employee's spouse or significant other should come to the mediation because "Settlement or continuing will be a big decision for this family to make that affects both of them."

10. Find out whose budget the settlement comes from, and make sure that person is available to attend or be on the phone for the mediation. Recognize that the mediation process may impact not only the thinking of the employee, but also yours.

Tips For Employees On What Works:

1. Prepare a detailed spreadsheet with backup showing analysis of all "hard damages."

2. Do not forget prejudgment interest in federal court. Also do not forget fringe benefits, but recognize that for medical insurance, only unreimbursed expenses or out-of-pocket insurance premium costs (including COBRA) are recoverable.

3. Find out in advance what your client's priorities and motivations are in the event that the defense is not willing to come in where you expect.

    a. Counsel the client that this is likely to occur and that especially at the start, the defense proposals will be unreasonable.

    b. Counsel the client that "nickel and dime" negotiating is part of the usual bargaining process for these kinds of cases.

    c. Counsel the client that the process may lead to re-evaluation of the merits and the reasonable settlement value of the case.

4. Document mitigation of damages in detail and provide documentation and narrative to defense counsel well before the mediation. Include legal citations of comparable mitigation efforts. It does not take a lot to satisfy the legal standard, but especially when documentation is lacking, defendants consider this defense to be worth substantial discounting.

5. Prepare and submit to opposing counsel your detailed time and billing rate before the mediation

6. Prepare a chronology for the mediator highlighting key events on your case

7. Bring witnesses or witness statements to the mediation and incorporate them into your presentation. Start with what is agreed on both sides and focus on both the low standard for defeating summary judgment and how your evidence will do so. Then discuss the impact of the evidence on a jury at trial.

8. Start bargaining at a "high reasonable" figure—actual damages and attorneys' fees to date and near-maximum recoverable soft damages for your case (*not* automatically the caps). Focus on the range of what is reasonable—expected defense costs if case is lost plus your recoverable damage. Discount the figure for your calculated risk of loss (which should never be over 80%).

9. If there is an insurance carrier, provide your strongest mediation statement three to four weeks before the mediation so that the claims committee has read and considered your points before they put a number of your case.

10. Insist that defendant identify who is coming to the mediation before it begins and probe for anyone who will need to be "available by telephone" to authorize a change in authority for the defense. Insist that the person on the phone be conferenced into the opening statements and available for the mediator to speak with, not just defense counsel.

Some Things That Do Not Work:

1. "Shock and awe" presentation at the mediation session taking employee and employee's counsel by surprise with compelling, previously undisclosed defenses. This induces "fight or flight" response. Either total denial or refusal to continue bargaining because counsel needs time and investigation to assess the new defense.

2. Aggressive, in-your-face presentation attacking the adversary, particularly on matters that will wound the ego.

3. Even worse, skipping opening statement or pulling your punches in the opening statement "because we all know the facts."

    a. How do you *know* that the client on the other side "knows all the facts?"

    b. How do you *know* that opposing counsel appreciates the strength of your claim or defense without forcing him or her to actually sit through a full explanation of it, all at once?

    c. You are missing your best opportunity to influence the other side with information either not heard or provided, but not fully absorbed, before. This is like sending the jury out for your opening statement at trial.

    d. You are setting yourself up for angry responses to your initial offers because the other side will not grasp why your offer is so high or low and will quickly attribute it to bad faith bargaining.