CHAPTER 12

NEW ROLES, NEW RULES: UPDATE ON ADR DEVELOPMENTS

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ADR in the U.S. Department of Labor

The Administrative Dispute Resolution Act of 1990[1] authorized and encouraged federal agencies to use alternative dispute resolution (ADR) techniques to reduce the growth of litigation. The Act required each agency to develop an ADR policy after conducting an examination of possible uses of ADR in formal and informal adjudication, rulemakings, enforcement processes, contract administration, litigation, and other actions brought against the agency. To implement the Act, the U.S. Department of Labor (DOL) conducted a survey of its component agencies in 1992 and, after receiving comments from the public, issued an interim ADR policy.

The DOL survey was intended to gather information about the types of disputes that arise, the methods used to resolve them, and any statutory, regulatory, or procedural barriers that impeded the use of ADR. The survey revealed a wide and complex array of disputes arising in DOL agencies and a diverse range of formal and informal methods employed by the agencies to resolve such disputes. For example, in the Wage and Hour Division of the Employment Standards Administration (ESA), the majority of cases are resolved by informal conferences or meetings between the Wage Hour investigator and the outside party. If necessary, an agency supervisor may hold a meeting called a "second level conference" with the employer to provide an opportunity to air any concerns or present additional information on the case. Overall, these infor-

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[1]5 U.S.C. § 571 (1990).

mal dispute resolution methods, which resolve approximately 95 percent of all cases without requiring litigation, are considered to be an efficient use of resources because most cases are handled by telephone.

In further planning to implement ADR, national office managers and attorneys prepared an overview of ADR and its potential applications in the federal sector. In the labor standards policy arena, the department conducted a pilot test of ADR using DOL program managers to mediate cases in the Philadelphia region.

In the Philadelphia pilot, key operational decisions including the selection of cases for ADR and the selection of DOL personnel to serve as dispute resolution mediators were left to the discretion of the regional enforcement officials.[2] During the pilot, DOL agencies continued to fully investigate employee complaints of policy violations. In some cases, however, when an impasse was reached, and the case would normally be referred to the Solicitor of Labor for litigation, the employees and employers were offered the option to mediate the dispute rather than proceed either through litigation in federal court or a hearing before a DOL administrative law judge. Mediation—rather than arbitration, or minitrials—was selected as the sole ADR modality to be tested in the pilot.

The results of the Philadelphia pilot were encouraging. Of the 27 cases mediated in the pilot, 21 (81 percent) were settled, and most were resolved in a single mediation session. DOL participants independently concluded that the settlements were at least comparable to the likely outcome of litigation.

In addition to these efforts, the DOL published regulations that provide for alternative settlement proceedings for cases before our administrative law judges; the Employment Training Administration initiated a pilot test of mediation in grant and contract disputes; and, in fiscal year 1996, the Department's Directorate of Civil Rights (DCR) conducted in the Philadelphia and Atlanta regions a pilot test of mediation of equal employment opportunity complaints filed by employees of the department.

The DCR pilot used national office staff who had a minimum of 20 hours of classroom training, experience with observing other mediators in resolving disputes, and some participating experi-

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[2]The DOL entered into a contract with the Federal Mediation and Conciliation Service for the development and provision of a structured training program for the DOL mediators.

ence in co-mediation sessions. The results of the DCR pilot were very positive. Of those cases where the complainant elected to use mediation, 49 percent reached a settlement. Of the remainder, only 20 percent elected to go forward and file a formal equal employment opportunity complaint. Mediation was considered successful in the remaining 31 percent because no complaint was ever filed. A focus group was held at the close of the pilot to elicit feedback from the mediators and settlement officials. In general, participants expressed a positive feeling about the use of mediation. In addition, respondents agreed that mediation provides an opportunity for problem-solving and enables managers and supervisors to adopt a pro-active stance that is useful in preventing other similar situations from surfacing as problems. At the start of fiscal year 1997, DCR expanded the pilot to the remaining DOL regions. The Department plans to institutionalize this ADR technique during fiscal year 1997.

Rationale for ADR

Most employers and employees accept the need for workplace regulations and support the broad social goals embodied in the laws governing the workplace. But the surge in employment law disputes over the last 25 years has raised questions about the burden and distribution of legal costs associated with resolving such disputes. The complexity, length, and expense of legal proceedings make it difficult for many employees to pursue a claim through administrative and court proceedings. Handling and resolving disputes through current methods is a financial burden for all parties involved—employers, employees, and the public. This is especially the case for low-wage workers and those lacking the support of a union or other advocacy group. Moreover, it is generally felt that administrative and court proceedings not only impose unnecessary costs on employers, they also do not meet the needs of the workers who are ostensibly being protected. The 1994 Report and Recommendations of the Commission on the Future of Worker-Management Relations (the Dunlop Commission) pinpointed this problem and suggested ADR methods as a way to provide the positive benefits promised by workplace laws and regulations, while making them more accessible to and effective for ordinary workers. The commission urged the department to expand the Philadelphia pilot to the remaining regions and to enlarge the mix of cases submitted to mediation. In addition, in

1993, a National Performance Review report strongly endorsed ADR as a way to reduce government costs and improve operating efficiency. In short, federal agencies should develop a more customer service–oriented approach. ADR is such an approach, and has the potential to enhance the "public capital" of federal agencies by reducing the amount of litigation associated with conflict resolution.

Present Efforts

A number of recent developments—including enactment of the Administrative Dispute Resolution Act of 1996[3] (signed by the President on October 19) and the President's February 1996 executive order on civil justice reform—have encouraged the Labor Department to consider expanding its use of ADR. Several enforcement agencies, working with the Solicitor's Office, have been examining their programs to see where ADR might be used successfully. As an example, within ESA, the Office of Federal Contract Compliance Programs (OFCCP) administers Executive Order 11246, which requires nondiscrimination and affirmative action by employers with federal contracts. Under current enforcement procedures, OFCCP conducts compliance reviews of federal contractors and, where violations are found, attempts to resolve issues through conciliation with contractor representatives. Where these efforts are unsuccessful, OFCCP refers the case to the Solicitor's Office, which is authorized to institute administrative enforcement proceedings. After a full evidentiary hearing, a DOL administrative law judge issues findings of fact, conclusions of law, and a recommended decision. Subsequently, the Administrative Review Board issues a final administrative order that reflects the Secretary of Labor's views, which may then be appealed to federal district court. If ADR methods were employed rather than the existing process, the contractor might be offered the opportunity to have a third-party neutral hear the case before administrative enforcement proceedings are initiated. This would considerably truncate what otherwise would be a time- and resource-consuming process for both parties.

When the Department completes the proposal for expanding the use of ADR, it will be published in the Federal Register for

[3] 5 U.S.C. § 571 (1996).

public comment. We want to learn as much as possible from all parties with an interest in the use of ADR in employment-related disputes before launching any new ADR initiative. There is no fixed timetable for completion of the proposal, but the department is moving forward energetically and hopes to publish a proposal soon.

One possibility under consideration is the use of outside neutrals—private mediators and arbitrators. This possibility raises a number of issues for the department to consider. For example, the department would need to ensure that those selected to mediate or arbitrate its cases would be impartial, experienced, qualified, and knowledgeable in the laws administered by DOL. Quite possibly, DOL classroom training in the relevant statutes and ADR procedures might be required for private neutrals. Secondly, compensation of the third-party neutrals must be addressed. The compensation system should be designed to assure impartiality. It is generally recognized that if the employer pays for the neutral, conflict of interest concerns arise, but in many cases, employees may be either unable or unwilling to pay any share of the neutral's fee. The compensation issue is perhaps of even greater concern in cases involving low-income employees where DOL is not a party.

Perceived Benefits to DOL Agencies of Adopting ADR

When the ADR law was enacted, Congress expressed concern that the resolution of disputes between federal agencies and members of the public had become a formal, lengthy, and costly process that, if anything, diminished the protection of employee rights and opportunities. ADR was proposed as a way to resolve disputes faster, in a less contentious and more cost-effective manner. ADR methods can lead to more creative, efficient, and sensible outcomes than many administrative proceedings, and may enhance government operations by fostering a more efficient use of resources. ADR methods employed in DOL agencies thus far have proven to avoid the expense, uncertainty, and delay associated with traditional litigation.

Perceived Disadvantages From Substituting ADR for Current Dispute Settlement Processes

Because DOL's authority is limited to the laws it administers and enforces, the ADR proceeding will address only claims under DOL-

administered laws. Thus, employers may be reluctant to participate in a process that leaves some employee claims outstanding.

There is also a view that arbitration is not a useful option because it is accompanied by many of the same trappings of litigation that are common to the current system. Some critics think mediation is preferable to arbitration because it offers a less formal alternative to litigation. Mediation does not require deposing witnesses and meeting the rigorous evidentiary standards required in arbitration. While the original Administrative Dispute Resolution Act (in effect from 1990 to 1995) authorized federal agencies to use binding arbitration, no cases were actually arbitrated. Perhaps arbitration was not used because agencies were allowed unilaterally to vacate an arbitration award. Under the newly enacted statute, federal agencies will no longer have the power to vacate arbitration awards. This might encourage more employers to pursue arbitration in resolving enforcement cases.

Also, in the past, some members of the career staff expressed concerns that ADR should not be used in DOL enforcement actions because negotiations for settlements might undermine existing laws and their prescribed penalties. It is precisely this concern that has caused the department to go forward slowly and carefully with ADR to ensure the appropriate implementation of ADR techniques.

The key point is that given the current and likely future fiscal realities facing the federal government, a concerted effort must be made to develop more cost-efficient ways of settling disputes that arise when federal laws have been violated. There is a broad consensus among enforcement officials, employers, and workers that the current system for resolving disputes—a system burdened by expensive, lengthy administrative or court proceedings—is broken and must be fixed. Now is the time for agencies not only to seriously consider but also to implement ADR methods that will produce more timely and less costly outcomes.