How Labor and Management Are Using Mediation

By Deborah Masucci

Since the United States Supreme Court decided the Concepcion case, businesses are including class action waivers in agreements with their customers, vendors, franchisees, and employees. Businesses view the waiver provision as a way to manage costly litigation. At the same time, consumer advocates, including the Consumer Financial Protection Bureau, argue that the class action process provides more effective relief for consumers than individual arbitration. Employers who include class action waiver provisions in agreements with their employees fashion their programs to address these criticisms by including certain incentives such as opt out provisions, paying for filing fees, or paying for limited attorneys fees to name a few.

*Are there more creative ways to frame a program, especially programs developed to address workplace disputes?*

Unionized Labor and Management historically have been huge supporters of alternative dispute resolution (ADR). Collectively bargained agreements traditionally include arbitration as a method to resolve disputes between labor and management and some agreements expand ADR methods by adding mediation to resolve workplace disputes. The New York State Real Estate Industry’s collectively bargained agreement includes a class action waiver clause and the industry has gone one step further to transform mediation into a valuable tool to resolve statutory discrimination disputes between employees and employers. They adopted a no discrimination Protocol (Protocol) to preserve employees’ access to statutory substantive rights. Will the solution adopted in the New York State Real Estate Industry’s unionized context provide a blueprint to push back on the criticism of class action waivers in non-union corporate employment dispute resolution programs?

Our unionized workforce has substantial experience using arbitration to resolve disputes between labor and employment. Who hasn’t heard of baseball or other sports arbitration programs to resolve disputes between players and management? Tom Brady’s recent “Deflategate” appeal of his sanction by Roger Goodell educated the public at large about how arbitration works in the sports world. Fans chose sides and passionately advocated for or against sanctions, but it was the arbitrator who decided whether to impose sanctions and how much.

ADR has been used to resolve workers’ compensation claims in the construction industry since the early 1990’s. These programs that are part of the collectively bargained agreements integrate several ADR processes - ombuds, mediation, and arbitration. The programs are very popular in California and Nevada and are included into project/labor agreements for specific infrastructure projects. These programs permit labor and management to opt out of the state workers compensation system and resolve workers compensation disputes in a private system. These systems save time and money and get the worker back to work faster.
But let’s focus on the workplace disputes in the Real Estate industry. Last month I attended a seminar sponsored by the American Arbitration Association (AAA) where there was a discussion about how an open question left by the U.S. Supreme Court led to the implementation of an innovative mediation program in the New York City Real Estate Industry.

The New York Real Estate Industry’s collectively bargained agreement includes a no discrimination and arbitration clause requiring employees to submit their statutory discrimination claim to an arbitration forum. In 2009, under the “Pyett” decision, the U.S. Supreme Court required employees to arbitrate their statutory claims even when the Union decides not to represent the employee. The U.S. Supreme Court did not decide an issue raised by the individual plaintiff in that case that the waiver denied employees their substantive rights contained in the statute especially when the union refused to take their statutory claims to arbitration. The Court referred the issue back to the lower court. The Union and Employers, represented by the Real Estate Board, decided to leave the question open, try another route, and instead adopt a Protocol to govern all statutory discrimination claims regardless of whether the Union declined to pursue those claims on behalf of the employee. A pilot for the Protocol was developed, establishing a mandatory mediation program.

The Protocol allows employees access to the substantive rights available under federal statutes.

How does the Protocol work? The Real Estate Board and the Union agreed to a mediation panel from which the parties may choose. The Real Estate Board and the Union bear the costs of the mediation equally. The mediators are very proactive and are empowered to take steps uncommon to traditional mediation. The mediators can require production of evidence and position statements; a pre-mediation conference must be scheduled within 30 days of the appointment of the mediator; the mediator may make a settlement proposal to the parties at the conclusion of the mediation; and if the mediator believes that the parties did not comply with directives in good faith then the parties can be sanctioned by the mediator.

If the parties are not able to resolve their dispute in mediation, the claims may be pursued through arbitration. The Real Estate Board and the Union established a list of qualified and trained AAA arbitrators whom the parties may select to decide the case. Unlike in mediation, the parties share all costs of the arbitration.

What has been the experience with this program? During the last six years, the majority of the claims were resolved through mediation. More telling is that a number of courts and governmental agencies have deferred to the program, and governmental agencies deferred hearings until the parties proceed under the Protocol and resolution is reached.

Similar programs can be developed that could ensure employees have access to the statutory remedies available while providing a fair and cost effective process to resolve discrimination disputes.
Deborah Masucci has been appointed as an arbitrator in over 125 matters including employment, debt recovery, breach of contract and professional fee disputes. Masucci is a global expert in alternative dispute resolution and dispute management, with emphasis on strategic and effective use of mediation and arbitration. She is a past Chair of the Dispute Resolution Section of the American Bar Association and current Chair of the International Mediation Institute. She can be reached through her web site, www.debmasucciadr.com.

1 See AT&T Mobility v. Concepcion, 563 U.S.333 (2011); accord American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (where the Court further solidified its pro-arbitration stance by determining that the FAA expresses a clear federal policy in favor of enforcing class action waivers contained in arbitration agreements).
2 For information about savings related to Collectively Bargained ADR programs visit: http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1043&context=reports.
4 The Union and Employers in the Real Estate Industry could arbitrate the issue anytime upon thirty days written notice.
5 The pilot was a success and the parties agreed to incorporate the Protocol into its master agreement at the end of 2011.