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SECTION OF LABOR AND EMPLOYMENT LAW

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PREPARING FOR AND PRESENTING YOUR FIRST – OR YOUR HUNDREDTH – LABOR ARBITRATION

CHECKLIST FOR LABOR ARBITRATION

PRE-ARBITRATION CONSIDERATIONS AND PREPARATION

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I. Initial Stage: Considerations in Preparing for an Arbitration

A. Review legal issues and facts to support claims/defenses.

B. Review Collective Bargaining Agreement: Terms, applicable sections to support claims/defenses.

C. Review personnel file to assess documents which support relative positions and determine whether there is evidence that contradicts claims/defenses.

D. Review Company’s Policy and Procedures Manuals, Rules, customs and past practices to support claims/defenses.

E. Review Employee’s disciplinary history, documentation, e-mails, assess whether Company followed progressive discipline and that there is a paper trail. Was the Employee given proper notice/warning of the likely action.

F. Review Grievance Procedure to determine whether a party has complied with the procedural requirements set forth.

G. Carefully read the written grievance positions of the parties and wording of the Arbitration Demand.

II. Selection of an Arbitrator(s)

A. The single most important factor to arbitration is your ability to participate in the selection of the Arbitrator(s) who will preside over the hearing, rule on evidentiary issues, control the conduct of the parties and ultimately render the award. A thorough review of the Arbitrator(s) background and
review of past written opinions is essential using extensive research and alternative sources.

Factors for consideration:

a. Education (type of undergraduate/law school)
b. Employment history (firm history/titles/practice)
c. Type of past issues handled
d. Memberships and professional associations
e. Publications and speaking engagements (topics and opinions)
f. Fees and costs
g. Internet research on Arbitrator(s)
h. Review RC Simpson or Bureau of National Affairs, Inc. (ADR Service) which provides a summary of past arbitration awards, comments and summary of management reactions and experience.
i. Review professional licenses and professional qualifications.
j. Reputation of the Arbitrator
k. Seek comments from other associates, partners, colleagues or business acquaintances regarding past experiences with the arbitrator.
l. Review previous written opinions and carefully determine the Arbitrator’s bias and reasoning process.
m. Carefully numerically select and strike from the list of panel arbitrators.

III. **Investigation of the Case**

A. At the early stage after a notice for arbitration has been made, meet with all individuals who have information, participated or responsible for the enforcement of the collective bargaining agreement in order to obtain all relevant and useful information and documents.

B. Use this opportunity to identify potential witnesses that will be selected to appear and testify at arbitration. You will need to selectively identify individuals that will effectively fit specific roles and limitation as a witness.

i.e. Management: (upper management, human resources representative, front line supervisor, eye witnesses or co-worker).

i.e. Union: (union representative, shop steward, grievant and co-worker).

*As an advocate you must understand that circumstances pick the witnesses.*
C. Test the witness’s credibility, competence and capability of reporting what they saw, heard, experienced or know with respect to the facts of the case. Determine which witnesses will most effectively and persuasively present the information necessary to prove your case.

D. Collect all documents to support your position and to understand the opposing parties anticipated presentation. Request additional documents that may have come to light after interviewing and meeting with potential witnesses.

*Broad pretrial discovery rules permitted in civil litigation do not apply to the arbitration process, and therefore may cause difficulty for an advocate to obtain all relevant and useful documents prior to the arbitration hearing.

E. Narrow the issues for arbitration and begin to formulate your game plan.

IV. Actively Participate in the Pre-Arbitration Administrative Procedure Process

A. Once the Arbitrator(s) have been selected, participate in a telephonic prehearing conference to set forth the following:

   a. Assess whether the collective bargaining agreement sets forth a procedure for the exchange of information.

B. Discuss the following as part of the prehearing conference:

   a. Location of hearing (neutral site, arbitrator’s offices or at the ADR providers offices)
   b. Whether there will be an exchange of information.
   c. Set date for exchange of witnesses list and exhibits.
   d. Whether there will be a need for subpoenas for relevant information.
   e. Set date(s) and start time for arbitration hearing.
   f. Whether there will be a pre-arbitration brief, date of submission, length of pages and the method of the submissions.
   g. Be prepared to inform the Arbitrator of the probable number of potential witnesses that may appear at hearing.
V. Pre-Hearing Preparation

A. Treat an arbitration like a mini-trial. All the elements of a trial will come in to play in an arbitration. Therefore, the following items will need to be given attention.

a. Create a “theme” for the arbitration.
b. Conduct necessary legal research to support your position.
c. Prepare witness notebooks for each of your witnesses to include an outline of issues for the arbitration and the individuals who will testify to those issues, draft direct examination questions and identify potential anticipated cross examination questions and issues, include copy of collective bargaining agreement, grievance, arbitration demand, all exhibits and copy of pre-arbitration brief.

*Forward the witness notebooks to the witnesses approximately one week prior to the arbitration hearing to allow the witness sufficient time to review and prepare.

d. Prepare you own attorney trial notebook to include an outline of issues for arbitration, direct examination questions of all witnesses, cross examination questions for anticipated witnesses of opposing party, collective bargaining agreement, grievance, arbitration demand, all exhibits and copy of pre-arbitration brief.

VI. Witness Preparation

A. It is critical to the success of any type of case that time and much effort be given to the proper preparation of your witnesses. You will need to discuss the following to provide the witness sufficient information so that the witness is able to fully understand the process and their respective role in order for the witness to feel as comfortable with the process as possible.

Meet with the witnesses preferably the day before the arbitration hearing.

a. Discuss the “theme” of the arbitration
b. Explain the role of each witness in a way that they will best comprehend the purpose they serve and how they will impact the arbitration.
c. Have the witness understand that they are “fact witnesses”, explaining who, what, where, when, and how they are part of the storyline.
d. Describe the process. Explain information about the Arbitrator and his/her role, the role of the opposing attorney, swearing in of the witnesses, the use of direct and cross examination, the presentation of evidence, the use
of objection and stipulation and other procedures that may occur during
the witness’s testimony.
e. Review how important it is for the witness to conduct themselves, be
polite and courteous to both the Arbitrator and opposing counsel. It is
important that the witness speak clearly and slowly.
f. Have the witness direct his/her attention towards the arbitrator while
testifying and make eye contact.
g. Advise the witnesses to be prompt, report on time and be well groomed.
h. Explain the need for the witness to listen closely to each question, not
guess at an answer and respond directly to the question presented.
i. Review all documents, statements, interview notes or testimony that the
witnesses previously made. Discuss any inconsistencies and how to best
handle these issues at hearing.
j. Reaffirm that the witness is to tell the truth. The witness is not expected to
know everything and should state that they have no knowledge or
information as to that which they did not participate in or have no first
hand knowledge.
k. The witness needs to tell his/her story in their own words and vocabulary.
The witness is to tell the story based on his/her knowledge and experience
relative to the issues for arbitration.
l. Explain the introduction of exhibits through the witness. The witness
needs to be familiar with the entire document prior to testifying. The
witness is to be aware that they may be asked to review and testify to other
portions of the document during cross examination.
m. Explain that the witness is in control while testifying and can request to
take a break if necessary.
n. Explain to the witnesses the process of sequestration that may occur at the
beginning of the hearing.
o. Explain the use of objections and stipulations that may occur during the
hearing. The witnesses need to understand that they are to cease
answering a question until the Arbitrator has ruled on the objection. It will
benefit the witness if they listen closely to the objection.
p. Review anticipated cross examination questions. The witness should not
give an appearance of being defensive or hostile during cross examination.
q. Remind the witness never to speculate or embellish an answer when they
do not know or remember an answer.
r. Explain that the witness will have the ability to answer their cross
examination more fully or clarify their answer during re-direct
examination.
VII. **Pre-Arbitration Briefs**

A. Raise the issue during the preliminary telephone conference to obtain the Arbitrator’s consent.

B. Are the issues complex and require briefing or have the parties stipulated not to submit post hearing briefs?

C. Include a concise version of the issues and identify specific sections of the collective bargaining agreement that are in dispute and those that will be raised at the hearing.

D. Carefully set forth the facts and present the arguments with regards to those which will be proven at the arbitration hearing.

E. Identify and attach copies of relevant documents that will be entered into evidence at the arbitration hearing.

F. Incorporate key case law/arbitration cases and theories to support your position.

G. The pre-arbitration brief should serve as a blueprint of your case for the Arbitrator to follow.

H. The pre-arbitration hearing brief allows the advocate to generate a guideline for crafting the testimony and exhibits relative to the theory of the case.

VIII. **Additional Considerations**

A. Whether that dispute is arbitrable?

B. Whether the Arbitrator has jurisdiction over the subject matter of the dispute “Substantive Arbitrability”?

C. Whether there may be a claim that the dispute is arbitrable due to some procedural defect. As an affirmative defense the issue of “Procedural Arbitrability” must be asserted before the case is allowed to proceed to arbitration?

D. Impact of a prior settlement reached by the parties.

E. Impact of a prior Award on the issue at stake.

F. Should you obtain a Stay of the Arbitration from the Court?

G. Whether the issues of liability and damages should be bifurcated?
H. Should certain grievances be litigated before the same Arbitrator?
I. Whether the use of a stenographic record/court reporter is advisable?

“Arbitration is an art rather than a body of knowledge. It cannot be learned in college, nor from books and speeches. It is not something that every lawyer can do nor even learn.”

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