Resolve Disputes Without Litigation

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NEUTRAL NEWS YOU CAN USE

Fall 2006

►MEDIATION

-- Labor & employment disputes continue to "dominate the types of litigation causing the greatest concern" to major multi-national and international corporations, according to the Fulbright & Jaworski's *Third Annual Litigation Trends Survey* (October 2006), www.fulbright.com. According to the survey, the percent of in-house counsel reporting concern about employment litigation grew from 26% to 48% between 2005 and 2006. This trend, together with corporate counsel's interest in controlling litigation costs, underscores the importance of considering mediation as a dispute resolution device.

►ARBITRATION

-- After the first comprehensive review of the American Arbitration Association's ("AAA") National Rules for the Resolution of Employment Disputes since 1966, the AAA released new rules governing arbitration and mediations, effective July 1, 2006. A summary of the rule changes and the new rules appear at www.adr.org/rules. Among the significant changes include new Rule 6 which states that the arbitrator may rule on his or her own jurisdiction as well as the existence, scope and validity of a contract containing an arbitration provision, and new Rule 27 which sets forth the circumstances under which an arbitrator may permit the filing of dispositive motions.

► INVESTIGATIONS

-- "Foley-gate" and recent court decisions demonstrate the importance of prompt and effective investigation of potential claims of discrimination and harassment. One of the spotlights directed at the scandal involving Congressman Foley's inappropriate e-mailing of Congressional pages is whether Congressional leadership adequately investigated the situation months earlier when House Leader Hastert first learned of a potential problem. Hastert's "hear no evil, see no evil" response was embarrassing and potentially devastating to his career as

well as to the continuation of the Congressional page program. Similarly, employers should use a "worst case scenario" perspective when responding to internal employee complaints of sexual harassment. For example, in *Howard v. Winter*, 446 F.3d 559 (4th Cir. 2006), the Fourth Circuit decided that summary judgment was improperly granted and that a jury should have determined whether an employer reasonably discharged its duty to investigate an employee who complained that a co-employee "put his hands on me and I don't like it." The Court rejected the employer's defense that the employee's complaint was "too vague" to put it on notice of potential harassment. Once an employee complains of activity that could amount to harassment, it is up to the employer "to get to the bottom of her allegations" by conducting an inquiry reasonably commensurate with the information available.

► TRAINING

-- Business journals report that "command and control" management style is ineffective and outmoded. The 'Generation X & Y' employees entering the workforce in huge numbers do not respond to 'my way or the highway' supervision. Managers should be coached and counseled to use, what one successful business-owner, restaurateur-Danny Meyer, calls "constant, gentle pressure." According to Meyer, "Understanding *who* needs to know what, *when* people need to know it, and *why* – and then presenting that information in an entirely comprehensible way – is the sine qua non of great leadership. Clear, appropriate, timely communication is the key to applying constant, gentle pressure." *Inc. Magazine*, Oct. 2006, at 69-70. The strategy of clear communication, often repeated, should be used in designing all employee training programs. So the question is not simply, *"have you trained your employees?"* but also *"how often have you repeated the message?"* With the holiday season soon upon us, it is certainly a good time for "constant, gentle pressure" as a reminder of EEO, diversity and conduct policies.

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