Resolve Disputes Without Litigation

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NEUTRAL NEWS YOU CAN USE

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►MEDIATION – President Obama, viewed by many as the "Mediator-in-Chief," told the troops at Camp LeJeune: "We will not let the pursuit of the perfect stand in the way of achievable goals." (2/27/09). Obama's remark reflects an insight that is useful when negotiating settlements directly or in mediation. Many negotiators wait to pursue settlement discussions until the other side "gets reasonable," maintaining "we don't want to negotiate against ourselves." However, conditions for negotiations are not always perfect, and many times, it is better to get the ball rolling with realistic, principled offers than waiting for extreme and unreasonable positions to change. See K. Bryan, *ADR: The 'New Lawyer' and the Triumph of the Soft Skills*, National Law Journal (Nov. 24, 2008).

►ARBITRATION – Mandatory arbitration is subject of hot debate. The United States has always been in the forefront of promoting the use of alternative dispute resolution and is generally considered a "pro-arbitration" venue. Nevertheless, there are new legislative signs that seem to mark a decided turn against the arbitration process. For example, the American Recovery and Reinvestment Act of 2009 contains provisions protecting whistleblowers but specifically prohibits pre-dispute arbitration of these claims except under collective bargaining agreements. Further, Congressman Hank Johnson has recently re-introduced the Arbitration Fairness Act (HR 1020) that would amend the FAA to prohibit pre-dispute arbitration agreements in consumer, employment and healthcare disputes.

► INVESTIGATIONS – EEOC reports that every category of discrimination claims has spiked since the last survey conducted in September 2007, however, the largest increase has been in the area of age discrimination. Prompt, careful handling of internal complaints continues to be an important safeguard in preventing and responding to discrimination claims. A recent 4th Department decision reinstated a claim of discrimination where the employer's complaint procedure did not provide the employee with an avenue around an offending supervisor, holding the employer could not raise the "reasonable care" affirmative defense. *In Re Winkler v. NYSDHR & The Pilates Studio*, No 08-01313 (Feb. 6, 2009).

►TRAINING – With all eyes focused on terminations and layoffs, it is easy to forget the employees still at work. New regulations and statutes affecting the workplace call for updating decision-makers. In addition, employers that have invested in diversity initiatives should not let those investments go the way of the stock market; occasional programs to reinforce equal employment opportunity and diversity messages will contribute to employee engagement in difficult economic times and will help position the entire workforce for better days ahead.

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