

Business

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EEOC using mediation

Alternative solution to employment disputes helps keep battles out of court; nearly 70% of cases resolved.

By Robert Rodriguez
The Fresno Bee

Companies facing charges of employment discrimination often panic when faced with the possibility of spending thousands of dollars in legal fees to defend themselves.

But that doesn't have to be the case. The U.S. Equal Employment Opportunity Commission — the agency responsible for enforcing federal anti-discrimination laws — is encouraging employers to consider mediation as an alternative to the traditional method of investigating charges of employment discrimination.

Private businesses are also turning to mediation as a way to settle disputes.

"We have a lot of clients who are using it as part of their employment and human resources practices," said Larry Parker, spokesman for the American Arbitration Association in New York. "It has become a real alternative."

In general, mediation involves the use of a trained expert — typically a lawyer or retired judge — to settle disputes between two parties.

Clovis attorney and mediator Doug Noll has seen the use of mediation grow from government agencies to private

businesses. Noll specializes in working with family enterprises and small corporations.

"And I think that is where the real growth will come in the next 10 years," Noll said.

At the EEOC, the agency uses staff mediators and outside mediators such as Fresno State Human Resources professor Mark Keppler to settle cases involving everything from sex to age discrimination.

EEOC officials say it can resolve complaints in half the time using mediation and at a lower cost to the employer and employee.

"A lot of companies don't want to spend the time and money to go through the mediation process because they would rather

See EEOC, Page C2

Mediation stats

The EEOC uses mediation as an alternative to court proceedings to resolve employment discrimination charges.

Mediations conducted by EEOC staff and outside mediators.

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EEOC: Mediators find solutions

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or pay an attorney the billable hours to defend them in a lawsuit," said Cherry-Marie D. Rojas, coordinator for the EEOC's alternative dispute resolution division in Los Angeles. "But the great thing about our program is that it is free, and it works."

Of the companies that have gone through mediation, 96% would agree to it again, Rojas said.

The agency's Los Angeles district office, which oversees Fresno, would like to see more companies sign an agreement obligating them to mediate employment discrimination complaints when they arise.

Nearly 50 companies, including McDonalds, Roadway Express and Con Agra Foods, have

signed the EEOC's National Universal Agreements to Mediate.

"I think there was a fear from companies that signing these agreements might lead to more charges," said Santos Albarán, an EEOC spokesman. "But that has really been unfounded."

The EEOC's most recent figures show that in 2003, about 70% of the mediation cases overall were resolved.

Keppler, an attorney and expert in labor relations, has worked as a mediator for eight years and settled more than 400 cases for the EEOC and other organizations.

"I have gone from Nebraska to Guam," said Keppler, who also is the executive director of the Ken Maddy Institute at California State University, Fresno.

Keppler has handled a variety of employment discrimination cases and believes mediation can resolve cases more efficiently than the court system.

"Sometimes, we are dealing with a situation where it is just a simple misunderstanding," Keppler said. "A lot of people think that the only option is to go to court, and that's not always true."

Over the years, Keppler has seen his share of mistakes by both employees and employers.

"I have had situations where I determined the employee was involved in an act of fraud," Keppler said. "And I have had employers who feel the law doesn't apply to them."

► The reporter can be reached at brodriguez@fresnobee.com or (559) 441-6327.



History of the EEOC Mediation Program

In 1991, the EEOC began pilot mediation programs in four field offices (Philadelphia, New Orleans, Houston, and the Washington Field Office), and subsequently, pilot programs were established in all District offices. Based on the success of the pilots and the recommendations of its own ADR Task Force, the Commission concluded that mediation was a viable alternative to the traditional investigatory methods used by EEOC to resolve charges of employment discrimination, and that an ADR program should be implemented. In 1995, EEOC adopted its [policy statement on ADR](#) setting forth certain core principles for an ADR program. Following development of the program's operational framework in 1998, and receipt of start-up funding in its FY 1999 appropriation, EEOC's ADR mediation program was fully implemented in April 1999.

Since its inception, EEOC's mediation program has been highly successful in resolving charges of employment discrimination. Several studies have been conducted by independent researchers to evaluate the program's effectiveness and to identify potential improvements. One survey found that parties who participated in mediation were very satisfied with the process, and that 96% of employers and 91% of charging parties would use the mediation program again if offered. (See [Studies of the EEOC Mediation Program](#)). From 1999 through 2017, over 212,500 mediations have been held and over 153,400 charges, or over 72 % have been successfully resolved. (See [EEOC Mediation Statistics FY 1999 through FY 2017](#)).

EEOC's program uses a combination of internal mediators employed by EEOC and external contract mediators. Field offices may also use pro bono, or volunteer, mediators. All mediators are trained in both mediation and the laws enforced by EEOC. As neutrals, the mediators apply their knowledge and experience as facilitators to explore the underlying dispute and to achieve resolutions which are mutually satisfactory to both parties. While more traditional remedies may be explored in mediation, many mediations involve creative approaches to resolving the dispute which are designed to meet the needs and interests of the parties. In many cases a non-monetary benefit is the only benefit that changes hands.

EEOC offers mediation soon after the charge has been filed and prior to further investigation. EEOC evaluates each charge to see if it is appropriate for mediation. Charges which EEOC has determined to be without merit are not eligible for mediation. In most instances, charges which require additional investigation on the merits are eligible. The parties may request mediation, however, at any stage of the administrative process. In 2002, EEOC expanded its use of mediation to attempt resolution at the conciliation stage, after a finding of discrimination had been issued, in appropriate cases. Since 1999, EEOC has conducted a variety of outreach and training activities to educate the public, employers and persons protected by laws enforced by EEOC, about the mediation program.

EEOC has also implemented an initiative to further expand and promote the use of mediation and ADR. EEOC encourages employers to enter into [Universal Agreements to Mediate](#) (UAMs) at the local, regional or national levels. These UAMs facilitate an employer's agreement to mediate and expedite the mediation process by providing identified points of contact for EEOC and the employer for scheduling the mediation. "As of September 2017, there were 2,385 UAMs with local employees and 414 Regional and National UAMs, for a total of 2,799."



EEOC MEDIATION

YOUR PARTNER IN WORKPLACE SOLUTIONS

- ✓ ***Free***
Mediation is available at no cost to the parties.
- ✓ ***Fair and Neutral***
Parties have an equal say in the process and decide settlement terms, not the mediator. There is no determination of guilt or innocence in the process.
- ✓ ***Saves Time and Money***
Mediation usually occurs early in the charge process, and many mediations are completed in one meeting. Legal or other representation is optional but not required.
- ✓ ***Confidential***
All parties sign a confidentiality agreement. Information disclosed during mediation will not be revealed to anyone, including other EEOC investigative or legal staff.
- ✓ ***Avoids Litigation***
Lengthy litigation CAN be avoided. Mediation costs less than a lawsuit and avoids the uncertainty of judicial outcome.
- ✓ ***Fosters Cooperation***
Mediation fosters a problem solving approach to complaints and workplace disruptions are reduced. With investigation, even if the charge is dismissed by EEOC, the underlying problems may remain, affecting others in the workforce and human resources staff.
- ✓ ***Improves Communication***
Mediation provides a neutral and confidential setting where both parties can openly discuss views on the underlying dispute.
- ✓ ***Discover the Real Issues in your Workplace***
Parties share information, which can lead to a better understanding of issues affecting the workplace.
- ✓ ***Design your own Solution***
A neutral third party assists the parties in reaching a voluntary, mutually beneficial resolution. Mediation can resolve all issues important to the parties, not just the underlying legal dispute.
- ✓ ***Everyone Wins***
An independent survey showed 96% of all respondents and 91% of all charging parties who used mediation would use it again if offered.

Find out more at: www.eeoc.gov
1 (800) 669-4000 (Voice) or 1 (800) 669-6820 (TTY)

“Once the employer gets past the myth of “If we didn’t do anything wrong, we shouldn’t go to mediation” and decides to participate, the real issues in the dispute become clear. Through mediation, we have had the opportunity to proactively resolve issues and avoid potential charges in the future. We have seen the number of charges filed with EEOC against us actually decline. We believe that our participating in mediation and listening to employees’ concerns has contributed to that decline.”

Donna M. Gwin
Director of Human Resources
Eastern Division
Safeway Inc.

“As an employer’s attorney, I routinely recommend mediation to my clients. In mediation, you can build a sense of what the issues are, learn the problems, explore possible options for resolution, and make informed decisions whether or not resolving at that time or moving on is the best outcome for that matter. It makes both business and economic sense from the employer’s perspective.”

Charles C. Warner, Esq.
Porter Wright Morris & Arthur LLP

“Regardless of the issue or whether it has merit under Title VII, if it is draining resources, weighing on the mind of the employee, or having a negative impact on productivity, then getting the issue out on the table, mediating it and resolving it is often the smartest and most expeditious way to ensure workforce effectiveness.”

Linda I. Workman
Vice President
Workforce Effectiveness
ConAgra Foods, Inc.

“Hopkins is striving to be an employer of choice. We think that participating in EEOC’s mediation program moves us that much closer to meeting that goal. . . .We learned that settlement is not always about money. Sometimes there are non- economic ways to settle a case that may be important to the charging party and the respondent.”

Laurice Royal, Esq.
Johns Hopkins Health System Corporation

For more information contact:

Cherry-Marie B. Destura, Esq., ADR Coordinator
Equal Employment Opportunity Commission
Los Angeles District Office
Tel: (213) 894-1030
E-Mail: cherry.destura@eeoc.gov



Questions And Answers About Mediation

What is mediation?

Mediation is a form of Alternative Dispute Resolution (ADR) that is offered by the U.S. Equal Employment Opportunity Commission (EEOC) as an alternative to the traditional investigative and litigation processes. Mediation is an informal process in which a trained mediator assists the parties to reach a negotiated resolution of a charge of discrimination. The mediator does not decide who is right or wrong and has no authority to impose a settlement on the parties. Instead, the mediator helps the parties to jointly explore and reconcile their differences.

Does the EEOC require the parties to participate in mediation?

No. Participation in EEOC's mediation program is strictly voluntary. If either party declines to participate in mediation, the charge will be processed just like any other charge.

Who mediates EEOC charges?

Only mediators who are experienced and trained in mediation and equal employment opportunity law are assigned to mediate EEOC charges. EEOC has a staff of trained mediators. We also contract with professional external mediators to mediate charges filed with EEOC. All EEOC mediators, whether internal staff or external mediators, are neutral unbiased professionals with no stake in the outcome of the mediation process.

At what point in the administrative process will mediation take place?

Mediation will usually take place early in the process prior to an investigation of the charge. Offering mediation to the parties prior to an investigation saves Commission resources by avoiding the investigation of a charge that might be appropriately resolved through mediation. In addition, mediation prior to an investigation prevents the hardening of positions that can occur during a lengthy investigation.

Is mediation available during an investigation or during the conciliation process?

Yes. In order to increase opportunities for mediation, the EEOC expanded the charges eligible for mediation and now mediation is available at the conciliation stage, after a finding of discrimination has been issued, in appropriate cases.

What are the differences if any in mediation that takes place at the conciliation stage?

A. If mediation occurs at the conciliation stage, EEOC sits as a participant-- along with charging party and respondent-- with an independent mediator serving as a neutral.

Can a party request mediation if EEOC does not offer it?

Yes. Either party can request mediation without an offer from EEOC. As long as both parties agree to participate, EEOC will consider the charge for mediation.

Is the Mediation process confidential?

Yes. The EEOC maintains strict confidentiality in its mediation program. The mediator and the parties must sign agreements that they will keep everything that is revealed during the mediation confidential. The mediation sessions are not tape-recorded or transcribed. Notes taken during the mediation by the mediator are destroyed. Furthermore, in order to ensure confidentiality, the mediation program is insulated from the EEOC's investigative and litigation functions. EEOC mediators only mediate charges. They are precluded from performing any other functions related to the investigation or litigation of charges.

Who should attend a mediation session?

The charging party and a representative of the employer should attend the mediation session. The person representing the employer should be familiar with the facts of the charge and have the authority to settle the

charge on behalf of the employer.

Can the parties bring an attorney or other representative to the mediation session?

Yes. While it is not necessary to have an attorney or other representative in order to participate in EEOC's mediation program, either party may choose to do so. The mediator will decide what role the attorney or representative will play during the mediation. The mediator may ask that they provide advice and counsel, but not speak for a party. If a party plans to bring an attorney or other representative to the mediation session, he or she can discuss this with the mediator prior to the mediation session.

How long does the mediation process take?

Mediation is a very efficient process that saves time and money. According to a study conducted by the EEOC, mediations usually last for approximately 3-4 hours. However, this may vary depending on the facts of each case. Successful mediations avoid a time consuming investigation and achieve a prompt resolution of the charge.

Are all charges eligible for mediation?

No. The EEOC evaluates each charge to determine whether it is appropriate for mediation considering such factors as the nature of the case, the relationship of the parties, the size and complexity of the case, and the relief sought by the charging party. Charges that the EEOC has determined to be without merit are not eligible for mediation.

What happens to a charge if it is not resolved in mediation?

If a charge is not resolved during the mediation process, the charge is returned to an investigative unit, and is processed just like any other charge.

Are the parties required to pay for the mediation?

No. There is no fee for the mediation.

What happens if a party does not comply with an agreement reached in mediation?

An agreement reached during mediation is enforceable in court just like any other settlement agreement resolving a charge of discrimination filed with the EEOC. If either party believes that the other party has failed to comply with a mediated settlement agreement, he or she should contact the ADR Coordinator.

Does mediation work?

Yes. Participants in the EEOC's mediation program indicate a high degree of satisfaction with the program. It is a fair and efficient process that can avoid a lengthy investigation and the possibility of unnecessary litigation.

Are most charges resolved in mediation?

In fiscal year 2008, the mediation program achieved a 72.1% settlement rate.

Can information revealed during a mediation session be used during an investigation if the charge is not resolved during mediation session?

No. Since the entire mediation process is strictly confidential, information revealed during the mediation session cannot be disclosed to anyone including other EEOC personnel. Therefore, it cannot be used during any subsequent investigation.

Do charges ever settle for nonmonetary benefits?

Yes, in almost half of the cases that are mediated, the settlement involves a non-monetary benefit. Since the program's inception, in approximately 13.5% of cases, the only benefit involved in settlement is non-monetary.

What are the benefits of mediation?

One of the biggest benefits of mediation is that it allows the parties to resolve the matters in dispute in a way that is mutually satisfactory to them and meets their needs. In addition, mediation is faster than the traditional investigative process. For instance, in fiscal year 2008, mediated cases were resolved in an average of 97 days in comparison to the over 200 days it took for a cases to go through the traditional investigative process. The process may also allow the parties to preserve or repair the employment relationship. The parties have nothing to lose by participating in mediation. If a resolution is not reached, the charge will be investigated like any other

charge.

As an employer, if I believe the charge has no merit, why should I participate in mediation?

Mediation provides a neutral and confidential setting where both parties can openly discuss information about the underlying dispute. Through enhanced communication, mediation can foster improved working relationships and a better understanding of factors which may be affecting the overall workplace.

How can I learn more about EEOC's mediation program?

For additional information about the mediation program at EEOC, you may contact EEOC's ADR coordinators or by calling our toll free numbers 1-800-669-4000 (Voice) or 1-800-669-6820 (TTY).