

# Employment Law for Mediators and Arbitrators

By Laura B. Hoguet

An employment litigation is a contested divorce. It carries with it all of the emotional baggage, the rationalization, the intensity and the anger that we associate with divorce court. The lawyers are partisan, too. Employment lawyers often specialize in representing either employers or employees; they identify fiercely with their clients, and they have a hard time looking at the case from the other end of their particular tunnel. Successful mediation of employment claims requires, first of all, letting the clients vent—not at each other, and not through their lawyers, but in their own words, to the mediator. Many people, once they have spoken their piece, will be ready to listen.

An arbitration, on the other hand, is a trial. Like judges in bench trials, arbitrators are reluctant to involve themselves in settlement discussions. Sometimes, however, a nudge towards settlement—or mediation—from an arbitrator can benefit the parties and their counsel.

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## The Parties' Choice of Forum

You are mediating or arbitrating this dispute because the parties agreed to mediation and/or arbitration. Employers frequently require employees to sign agreements to mediate and arbitrate workplace disputes (both contract and statutory claims, see below). Employees in the financial services industry are required in their application for registration with FINRA (formerly NASD) to agree to arbitrate any future dispute with a member firm.

Be sure to read the mediation/arbitration provision and watch out for clauses that may affect the proceeding. For example, agreements often require parties to share mediator and arbitrator fees, which can be a large investment for an employee. Some agreements have fee-shifting provisions, or a prohibition against punitive damages, that limit your options as well.

Disputes about whether a dispute is arbitrable are beyond the scope of this article. Speaking generally, courts tend to resolve these disputes in favor of arbitration.

## Contract Claims

Employment in the U.S. is virtually always at will, which means that either side is free to end it, for any reason or no reason (provided, that is, the employer's decision is not tainted by unlawful discrimination). Claims for wrongful discharge (being fired unfairly) do not state a cause of action in New York or in most states (but state law varies, so if the law of another state applies, ask the parties to brief the law of that state for you). Very occasionally an employee may invoke a statute that bars termination of employment in retaliation for whistleblowing; again, if a party invokes such a statute, ask for briefing.

**No “just cause” protection:** Labor arbitrators who are accustomed to determining “just cause” under collective bargaining agreements need to keep in mind that employers in a non-union context are not subject to any such restriction on their freedom to end the employment relationship. Occasionally employees do not understand or accept that their employer had the right to fire them for reasons the employee thinks are wrongheaded or dishonest. Usually, however, the employer's wrong-headedness, unfairness and even dishonesty does not entitle an employee to damages.

Except as an agreement between the parties (oral or in writing) otherwise requires, the employer owes the employee nothing when the relationship ends. Pay in lieu of notice and severances are not required by law but are matters of convention, practice and agreement. Usually an employer requires employees to release claims in exchange for severance, and employee releases are usually enforced in court.

**Oral v. written agreements:** Historically, most people in this country went to work under oral contracts—after the interview an offer was extended, a salary was quoted and hands were shaken. Today employees typically receive an “offer letter” which recites the terms of the offer and the employee is asked to countersign the letter to indicate acceptance. Problems arise when oral assurances are given outside the letter or in subsequent years. The employer will argue it is bound only by what is in the letter; the employee will argue that other promises were made which should be enforced. These issues need briefs on the law and testimony on the facts.

Sometimes the parties' dispute will arise from a contract of employment for a fixed term (e.g., three years). Classically the employee was entitled to be paid for the unexpired term if the employer terminated the relationship without cause. Today most contracts provide for

a payout or severance period if the employer lets the employee go without cause, that is, for reasons other than misconduct. Even where the contract has a fixed term, however, the employee is entitled to quit at any time, and he is also free to go to work elsewhere unless the contract contains a non-competition clause.

**Bonus claims:** The employer position is usually that the bonus or its amount was discretionary and the employee was not entitled to it unless he or she was in the company's employ on the date when bonuses were paid to employees generally. (To support this position the employer should produce a handbook or other policy statement provided to the employee and/or an employment letter or contract to the same effect.) The employee's position typically is that bonus is a large part of what he worked for and getting fired, especially at the end of the year, with no bonus is unfair. Most cases support the employer but a few have found in favor of employees on particular facts—and the particular facts are everything in these cases.

**Terminations for cause:** These are, and should be, uncommon. Usually, if employment is terminated without cause, the employee will be eligible for severance and, under his employment letter, contract or company policy, will receive at least some of his bonus, deferred compensation, stock options, etc. Most agreements provide that, if an employee is terminated for cause, he is paid his base salary and benefits through his last day worked and nothing more (and may, indeed, be subject to claims for recapture of compensation received after his misbehavior took place). "Cause" is usually a defined term in the parties' agreement and, consistent with case law, means, in essence, willful misconduct. Cause does *not* mean ordinary poor job performance as assessed by the employer. You may be asked to mediate or arbitrate the claim of an employee that he should not have been fired for cause because, if cause does not exist, the employee will be entitled to money and benefits that are forfeited in the event of termination for cause. Occasionally employers fire an employee for cause as the first step in a "negotiation" intended to persuade the employee to accept a lower bonus or lesser severance than he would otherwise receive. This tactic is abusive and you should not tolerate it.

**Severance:** Some employers offer employees who are let go for economic or other employer-based reasons a severance package but do not offer severance to employees terminated for poor performance (even though there was no "cause," *i.e.*, willful misconduct). Employees sometimes feel that their termination for poor performance was unwarranted and bring a proceeding in the hope of getting a "package." The employer probably has the right to decide whether performance was poor, so the employee has an uphill battle here, but you will want to focus on the facts of the particular case.

**Securities industry issues:** The termination of a registered employee triggers a U-5 filing with FINRA which requires the employer to disclose the reasons for its action. The courts have held the employer judicially immune for misstatements in these filings, which have huge consequences for employees. Many a FINRA arbitration or mediation leading to it has as its object getting a determination that the employee was not guilty of misconduct, which can be the predicate for a supplemental FINRA filing.

## Restrictions on Competition and Solicitation

An arbitrator may be asked to enforce a non-competition agreement, or an agreement not to solicit or work for a former employer's clients, or not to solicit or hire a former employer's employees. Even in the absence of a written agreement, the parties may dispute whether the employee's actions in starting a new business or going to work for a competitor breached his common law duty of loyalty to his former employer.

What law applies? State law generally recognizes the employee's duty of loyalty but varies widely on the enforceability of non-competition agreements. In California, non-competition agreements are illegal by statute (but California does, vigorously, protect trade secrets and employer information generally). Many states, however, enforce such agreements as written. New York judges tend to pare them down to avoid restrictions that interfere with employee mobility except as necessary to protect employer confidential information and client relationships. Most judges take a dim view of employees who misappropriate employer property by, for example, downloading customer lists and price or cost data.

Case law used to say that restrictions were valid if they were appropriately limited in time and geographically. Geographic limitations have now largely gone by the wayside except for doctors, hair salons and other businesses where good will is associated with location. Time limitations range from 3 or 6 months to one year—occasionally an agreement will impose a two year restriction, though this may be hard for the employer to justify. In New York City's Commercial Division, judges have seemed willing to enforce agreements for up to six months, especially if the employee was being paid a salary to stay "on the beach," but these cases are very fact-specific: What is the real injury to the employer if the restriction is not complied with? What is the employee trying to accomplish by moving? Has (genuinely confidential) information been taken? Is this a group raid/move that will cost the former employer a whole line of business? Etc. Covenants associated with the sale of a business are broadly valid for a long period of time, and you may need to figure out in a particular case what the business basis for the covenant was.

Often the employer will go to court to get injunctive relief before starting an arbitration. One or the other of the parties will then move to compel arbitration. The parties may be sent to mediation early in the process, in the hope that their business issues can be ironed out—the employee and his new employer can be made to promise not to do certain things, or to pay some royalty, etc.

### Statutory Claims

Employer agreements and policies may require employees to mediate and/or arbitrate claims that an employer has discriminated against the employee based on race, sex, age, disability or other protected characteristic, or has retaliated against the employee for complaining

about such discrimination. A mediator or arbitrator may perceive these claims as an attempt to dress up a legally insufficient wrongful discharge claim in wolf's clothing. This may be the case—and it may also be the case that discrimination has occurred and the employee has no choice, because of the agreement the employer required him to sign, but to arbitrate the claim. Many statutory claims are mediated as a step on the road to arbitration, and the parties can benefit hugely from the mediation process.

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