**To: CEO  
XYZ Company**

**From: Senior V.P. Human Resources  
XYZ Company**

**Re: Why XYZ Company should utilize alternative dispute resolution (ADR) methods to resolve employment-based disputes**

XYZ Company is a non-union employer that has experienced an increasing number of employment lawsuits and employment-related charges in the past ten years. Many of these actions have required the company to spend hundreds of thousands of dollars in legal fees in its defense and additional monies to resolve the actions. You have asked Human Resources to assess ways to minimize the number of lawsuits and charges filed against the company and thereby minimize the costs associated with such actions.

Various civil rights laws, including the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991, along with greater press coverage and employees' awareness of their employee rights, led to an explosion of employment law claims over the last decade. The U.S. Equal Employment Opportunity Commission (EEOC) received over 75,000 discrimination charges in 1999. More significantly, the cost of settling an EEOC charge has increased by almost 79 percent since the early 1990s. Of course, EEOC charges are only a small fraction of the types of employment actions that may be brought against employers. Many employees file a charge with the EEOC and then also file a lawsuit. The increase in XYZ Company's litigation docket is consistent with the increase in the number of discrimination lawsuits filed nationwide--it has more than tripled during the 1990s. As discussed above, approximately 90 percent of those lawsuits are ultimately settled--but only after significant legal expenses have been incurred, internal resources have been expended and, sometimes, negative publicity has hurt XYZ. Of the lawsuits that do not end up settling but rather proceed to jury trials, plaintiffs were successful approximately 60 percent of the time. In those cases, the plaintiffs usually recovered back pay, front pay, compensation for emotional pain and suffering, punitive damages and their attorneys' fees.

In light of the rapid growth in employment discrimination claims, negative publicity from litigation and the high costs associated with such claims, companies are increasingly establishing alternative methods to resolve such claims short of litigation. The following memorandum summarizes how XYZ could avoid these costs.

**1. Internal Appeals Procedures**

Many companies institute internal appeals procedures as a means of resolving employee complaints before they end up as a charge with an agency such as the EEOC or in litigation. Such procedures typically involve a tiered structure in which the employee first discusses his or her problem with his or her supervisor. Then, if the problem is not resolved, the employee appeals to a higher level of management or a committee composed of management, employees or a combination thereof. The benefits of an internal appeals procedure are numerous. Such a procedure may improve employee morale and loyalty by creating greater due process in the workplace, providing insight into employee "hot buttons" based on an evaluation of the frequency and nature of an employee's grievances, allowing for reversal of poor management decisions and often resulting in a successful resolution of disputes.

There are, however, drawbacks to such a procedure. First, if the procedure is not properly drafted, it may modify an employee's at-will status and create a "just cause" standard for discipline and discharge. In addition, if an employer does not follow its procedure, it can be accused of disparate treatment and its legitimate business reasons for disciplining or discharging an employee can be discredited. These concerns can be eliminated by including appropriate disclaimer language in the procedure and by following the procedure. Another drawback of instituting such a procedure is that it may encourage employees to file grievances they otherwise would not file due to easy access to the program. (Of course, XYZ Company's existing anti-harassment and non-discrimination policies already encourage employees to come forward with their complaints. An internal appeals procedure would just be one more step in the complaint process.) Finally, there are some costs associated with having employees take time from their work to engage in the process.

On balance, the benefits of adopting an internal appeals procedure outweigh the drawbacks, given the success of such a procedure in identifying and resolving grievances before they become litigation. Therefore, HR recommends that we do this at XYZ.

**2. Mediation**

Mediation is typically an informal, confidential and voluntary process designed to facilitate settlement of disputes with the assistance of a neutral mediator. Many courts and administrative agencies (including the EEOC) provide mediation services as a means of assisting parties to resolve their claims. The EEOC's mediation program, which was implemented relatively recently, has been extremely successful: 65 percent of the charges that go to mediation are settled. Mediation is much less formal than arbitration, although most mediation programs provide a method for selecting a mutually acceptable neutral mediator, impose limited or no costs on the employee and require the parties to submit to the mediator confidential written statements presenting the merits of their respective cases and their settlement ranges before the actual day of mediation.

The major benefit of mediation is that it provides a confidential forum in which employees can air their grievances to a neutral third party and receive the mediators opinion as to the merits of their case. This process is often just what an employee needs to feel that he or she has been afforded due process and to agree to a reasonable settlement of his or her claim. There are very few drawbacks for an employer to mediation other than the minimal cost and time required to select a mediator, prepare a mediation statement and attend the mediation. Many companies that have internal appeals procedures also have a procedure whereby employees can agree to mediate their claims before a neutral third party. The relatively high success rate of mediation in resolving claims far outweighs the drawbacks, and HR recommends that we try mediation at XYZ Company.

**3. Arbitration**

Many companies also adopt arbitration programs to resolve employment law claims. A voluntary arbitration program gives employees the option--after they have asserted a claim--to elect binding arbitration to resolve their claims rather than proceed in court. Although the EEOC is in favor of voluntary arbitration programs, these programs generally are not effective in minimizing the number of charges and lawsuits filed against a company. The reason voluntary arbitration programs are not effective in significantly reducing the number of charges and lawsuits filed is that plaintiffs' attorneys and employees generally believe that they will have greater success before a jury than an arbitrator. In addition, plaintiffs' attorneys often seek to use the leverage of negative publicity and the prospect of a jury trial in extracting larger settlements from companies-- leverage they would not have in a confidential arbitration proceeding.

Many employers have instituted arbitration programs that require employees to enter into an agreement to arbitrate employment discrimination suits as a condition of employment. The majority of courts enforce such provisions. However, such programs have come under increasing scrutiny by the courts and are strenuously opposed by the EEOC and plaintiffs' attorneys principally because they require employees to forego a jury trial. In addition, legislation has been introduced in Congress and in some states to prohibit employers from requiring arbitration as a condition of employment.

To be enforceable under current law, an arbitration program should: (1) require each employee to sign a free-standing, individual arbitration agreement that expressly states that employment claims, including claims of discrimination and harassment, will be subject to arbitration; (2) provide employees with the same length of time to file an arbitration claim as provided under applicable employment statutes; (3) permit fair and reasonable discovery, including depositions of company employees and managers;

(4) provide employees with the same statutory remedies as provided under applicable employment statutes (e.g., back wages, reinstatement, compensatory and punitive damages and recovery of attorneys' fees); (5) provide for a neutral arbitrator or arbitration panel that is familiar with employment law; (6) allow the employee to be represented by an attorney; and (7) significantly limit the arbitration expenses to be shouldered by the employee or provide that the company will cover the costs of the arbitration.

There are significant advantages to adopting an arbitration program. Arbitration offers far greater confidentiality concerning the claim than does public litigation; it eliminates a jury from the resolution process and all the attendant risks to defendant employers associated therewith; it offers greater potential for a speedier resolution than a court proceeding; it offers the possibility of lower legal costs in defense of employment actions; it typically has a limited appeal process, which contributes to a speedier resolution and lower defense costs; and there typically is less acrimony between the parties in an arbitration than in litigation. An arbitration program that provides for a mandatory internal appeals and/or mediation process preceding the arbitration combines the benefits of non-binding dispute resolution procedures discussed above with the benefits of arbitration. Nonetheless, there are drawbacks to adopting an arbitration program. Specifically, the easy accessibility of such a program might lead to an increase in the number of employee grievances; the risk that an outside arbitrator will "split the baby" or not strictly follow the law in resolving the claim; if not carefully drafted, such a program may be construed to limit the employer's ability to terminate employees at will; and if implemented and not carefully drafted, there is the possibility that the employee will be permitted a second bite at the apple in court or that the program will be deemed to be unenforceable by future legislation and/or court rulings.

Most of these downside risks can be minimized, however, through careful drafting of the arbitration program and selection of experienced arbitrators.

**Conclusion**

Although there are some disadvantages associated with each of these ADR methods, they are outweighed by the advantages of a comprehensive program that includes a pre-arbitration appeals and mediation process. Accordingly, HR recommends that XYZ Company establish this type of internal dispute resolution program to minimize the number of charges and lawsuits filed against it.

**This article was prepared by SHRM's ELRC Committee and drafted by Paul Salvatore, Esq., Proskauer Rose LLP. On the SHRM website, the ELRC has placed several sample ADR policies, for the review of SHRM members.**