Alternative Dispute Resolution (ADR)
Designing a Program

As the number of employment lawsuits skylrockets, employers, employees, courts and administrative agencies are searching for better ways to handle disputes. Increasingly, they are turning to alternative dispute resolution (ADR) programs. The benefits of these programs are well-known: ADR is faster and cheaper than litigation, settles disputes in a more confidential manner, and often results in more creative, tailor-made solutions.

It's not too surprising, then, that employers are rushing to implement in-house ADR programs. But in their haste, they may fail to properly design a program that meets their specific needs. It may be tempting to save time by adopting an “off-the-shelf” model or replicating a program from another company, but those approaches are unlikely to succeed in the long run.

To make sure their ADR programs are successful, employers must tailor them to their organizational culture. They also should include employees and frontline managers in the design process to increase acceptance and use of the program. If needed, consultants can provide information on design theory, program models, and options and can facilitate the choices to be made.

Arbitration vs. Mediation

One of the first choices employers must make is whether to use arbitration, mediation or some combination of the two.

The critical distinction between mediation and arbitration is the decision-making authority of the third-party neutral. Mediators clarify each party's understanding of the other's interests, concerns and constraints; help improve communication; and generate options for a mutually acceptable resolution.

Arbitrators, on the other hand, decide disputes much the same way a judge would.

How common is each approach? Out of 600 major U.S. corporations, 88 percent used mediation in the past three years, 79 percent used arbitration, and 41 percent used “mediator/arbitration,” according to a survey by Cornell University, Price Waterhouse and the Foundation for Prevention & Early Resolution of Conflict.

When employers use a combination of arbitration and mediation, their ADR programs frequently employ multiple steps of review. For example, a program may use mediation in the first stages, then require arbitration in later stages for disputes that remain unresolved.

Such an arrangement can get complicated, however, if employers insert clauses in their employment contract that require workers to submit to binding arbitration as the final step in the ADR program. Courts have generally ruled that contracts that require binding arbitration are legal—but only if they are voluntarily and knowingly signed by employees and if the required arbitration procedures are considered fair. Unfortunately, proving that employees have freely signed an agreement can be problematic. And issues of fairness are not completely resolved.

Critics contend, however, that all agreements that deny employees access to court are inherently
coercive and unfair, given the inequality.

Some employers, concerned about such criticisms, design arbitration programs that are voluntary or nonbinding. Others attempt to build procedures into their programs that meet potential due-process concerns.

But binding arbitration clauses in employment contracts remain fairly uncommon, according to the 1997 Employment Litigation Survey conducted by the Society for Human Resource Management and the Jackson Lewis law firm. Only 14 percent of responding HR professionals whose firms require signed employment contracts said the contracts impose mandatory ADR clauses.

Although mandatory arbitration programs are subject to some legal uncertainties and risks, consensual approaches such as mediation are noncontroversial and highly successful. Such programs encourage prompt response to informal complaints and focus on communication and problem solving; the programs don't assess blame.

Mediation also gives employees the opportunity to be part of the resolution process, so it tends to produce high levels of satisfaction, which translate into more durable solutions. Mediation also serves as a preventive measure, enhancing managerial and conflict management skills throughout the workplace. One pleasant by-product of mediation—especially given today's tight labor market—is lower turnover. The engineering firm Brown & Root estimates that its internal dispute resolution program has helped retain 300 valued employees.

Program Features

In-house ADR programs can range from relatively simple open-door procedures to more complex, multi-step models that progress from in-house facilitators and mediators to outside dispute resolution professionals. Internal mechanisms often include the following:

- Ombudsmen whose role is to gather information, to advise and assist employees in finding the best way to address their concerns and, sometimes, to find a satisfactory solution.
- Hotlines that employees can call with questions about their employers' ADR program.
- Open-door policies that range from encouraging employees to discuss their concerns directly with senior levels of management, to more formal review procedures.
- Peer review panels of employees empowered to render final and binding decisions that affirm, reverse or modify management decisions. (Disputes involving compensation, performance reviews, benefits and company policies usually are excluded from peer review.)

Designing ADR Programs

The most important step in designing an ADR program is assessing the history of employment conflicts. What kinds of disputes have arisen, between what classifications of employees, and how often? Why did those disputes occur? How are disputes currently handled, how long does the process take, and what does it cost? How satisfied have disputants been with the procedures and results? What changes have been recommended and why?
Employee surveys, interviews and focus groups can be useful ways to acquire that information, which will help define the goals of a new or retooled internal ADR program.

Designers should also assess the organizational culture. Although very formal procedures may inspire greater confidence that “justice” will be meted out, employees may feel more comfortable using an informal complaint mechanism. Procedures that suit a more rights-oriented, centralized or formal, workplace will differ from those best suited to a more casual workplace characterized by open communication. Because it is important to encourage use of the program, an understanding of the culture will help determine who is likely to support or resist a new program, and what incentives and disincentives will influence its use.

After goals and priorities have been identified for a dispute resolution program, a number of design issues must be considered and choices made:

- What kinds of disputes will be subject to the program? Which employees will be covered? How will they be educated about the program?

- What kinds of dispute resolution procedures will be offered? Which program components will be voluntary? Which will be mandatory?

- Will the program be pilot-tested? Who will "champion" the program? Who will oversee and manage it? How will it be evaluated?

- Who will serve as the neutrals? How will they be selected for each dispute?

- Who will pay for mediation and/or arbitration? Who will attend mediation sessions? What rules or procedures will be adopted? What time frames will be established for each step of the program?

**Keys to Success**

Successful ADR programs are simple to use and easy to access. They successfully resolve disputes quickly and at the lowest possible cost. To create programs that have these characteristics, employers should take the following steps:

**Gain a commitment from top management.** Support from top management will bolster the credibility and overall integrity of the program. Such support also fosters a sense of responsibility among middle managers and human resource managers, who may be asked to help administer the program and answer employees' questions. Workshops that solicit managers' concerns and ideas about an organization's new dispute resolution program can build needed support.

**Consult employees during program design to enhance their buy-in.** A program developed by management alone will probably be viewed with suspicion. Employees are more likely to trust and use programs they have had a hand in creating. A good way to involve employees is with design task forces.

**Give employees enough information and resources to use the program effectively.** For an in-house program to succeed, employees must know about the program and how it works. Employers should think carefully about the best way to communicate the program's availability and procedures. Some employers designate and train an administrator to help employees access and use the ADR
Ensure protection against reprisals. Protection against reprisals should be a promise and a reality. The company should clearly communicate to employees that top management endorses the program and that any form of retaliation for using the program will be met with appropriate discipline. Some employers publicize enforcement of anti-retaliation measures.

Monitor and evaluate the program continuously. Simply putting a program in place is no guarantee of success. Not even the most thoughtfully designed ADR program can anticipate every potential issue or problem that may arise in a workplace. Monitoring and evaluating the program will help to ensure that it remains vital and effective.

Communicate results of the program. Disseminating information about the program's results will enhance its credibility.