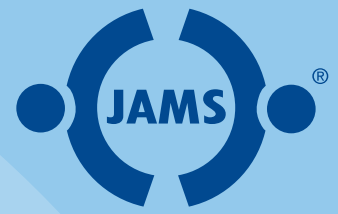


Employment Mediation Settlement Guide



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Employment law litigation continues to be one of the most active fields of the law. These cases can be difficult to resolve, yet it cannot be denied that, ultimately, more than 90 percent of these cases are settled prior to trial. The question thus becomes will you, as counsel for either the employer or the employee, take steps to facilitate an effective and mutually agreeable resolution?

The following checklist provides the practitioner with some actions and considerations that will positively impact attempts to successfully mediate an employment case. This list is certainly not all-inclusive, and each case will have its unique challenges to overcome. Hopefully, however, the following will provide “food for thought” as you navigate toward an employment mediation.

- 1. Begin at the beginning:** Your first contact with opposing counsel should be professional and cordial. Remember, at some point in time, it's likely you'll ask him or her to agree to your settlement position.
- 2. Review the complaint:** If the complaint truly has problems that require amendment, discuss them with opposing counsel and attempt to stipulate to an amended complaint that clearly sets out the issues in contention.
- 3. Binding Arbitration Clause:** If the employer alleges that there is a binding arbitration clause, and the employee does not dispute this, commence the arbitration process immediately. While it is pending, mediation is still a good option and an experienced arbitrator will move dates to accommodate mediation.
- 4. Review the administrative rules of binding arbitration:** If your case does move to arbitration, be aware of the discovery limitations imposed by the rules of the entity such as JAMS, which will act as the administrator of the process. Work cooperatively with opposing counsel in order to reach any necessary agreements to modify the rules.
- 5. Unlock discoverable information:** Whether or not there is a binding arbitration clause, discuss conducting informal discovery at the very inception of the case. Whether it is a single employee claim, or a proposed class action, there is likely discoverable data that can and should be exchanged without the necessity of formal discovery. This would include items such as the number of work weeks in question, average hourly rates of pay, company written policies and procedures applicable to the claims being raised, etc.
- 6. Look for “windows of opportunity” to mediate:** Every case is different. Some may be ripe for early mediation as there is little dispute as to the facts. Others may require more litigation. In any event, be open to opportunities to mediate.
- 7. Be bold:** Do not hesitate to be the first side to propose mediation. Contrary to the common belief, proposing mediation is not a sign of weakness. If you believe that both sides have enough information to move toward a resolution, then propose mediation.

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8. **Research potential mediators:** Each side will likely propose mediators to the other. Speak with colleagues in your firm, as well as attorneys you know on both sides of similar cases, list servers, etc.
9. **Propose a truly neutral mediator:** Selecting a mediator is a crucial step that should be taken with significant thought and investigation. A mediator who you believe is “on your side” will likely not obtain approval from the other side. Remember, you want a true “neutral.” That is an experienced mediator who has a track record of bringing parties to successful resolutions of their cases.
10. **Prepare your client for mediation:** It is crucial that you communicate with your client prior to the mediation. Emphasize that you can’t “win” a mediation. The client should anticipate a compromise. It is rarely beneficial to promise a client a particular outcome before the mediation.
11. **Your mediation brief:** There is no reason to provide an experienced mediator with the history of the law from the Palsgraf case to the present. Maintain a well-focused and narrow discussion of the applicable case history, law and facts relevant to the claim being made. Complex discussions of pre-mediation motion practice offer little to ultimate resolutions. And don’t forget the benefit of getting your brief to your mediator on time so s/he has time, at least, to initially review it before a pre-mediation phone call.
12. **Schedule a pre-mediation telephone call with your mediator:** Each side should separately have a brief pre-mediation telephone conference with your mediator once mediation briefs have been filed (if at all possible). The discussion should concentrate on any personality issues between the parties or counsel that might come into play. Also, if one side believes they still require undisclosed data, the mediator can try to facilitate this prior to the mediation.
13. **Mediation procedures:** During the pre-mediation telephone call, you should confirm with your mediator how s/he conducts mediations. There are various styles, but, they essentially fall into what I call “messenger mediators” (those who primarily move back and forth with demands and offers), and “evaluative mediators” (who engage in some level of discussing the strengths and weaknesses of each side’s position). And, there are very skilled mediators who cannot be fit into either of these categories but who have substantial resolution rates.
14. **Post mediation follow-up:** If you are unable to settle at mediation, but you believe the parties are not worlds apart, permit your mediator to follow up with both sides at a mutually agreeable time (i.e., after a summary judgment hearing) to see if further progress can be made. Simply put, don’t quit.