# WEB EXCLUSIVE – NLRB Expands Mediation Options With Announcement Of ADR Pilot Program

Insights
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The National Labor Relations Board recently announced an expansion of its alternative dispute resolution (ADR) program: the free program for employers, unions, and individual participants puts a case on hold for 30 days while parties try their hands at mediation. As the NLRB's website described in announcing the July 10 release, the Board aims to "help to facilitate mutually satisfactory settlements" by providing the parties with either a mediator with the Federal Mediation and Conciliation Service or the ADR Program Director in an effort to get parties talking.

The ADR program, which has been in place since 2005, has historically been very successful in resolving disputes. According to the NLRB's information, the agency has approved the vast majority of proposals that were put forth by way of mutual agreement through this program. The expansion of the program is welcome news to employers, as the use of mediation could lead to an increase in quicker, cost-effective settlements.

**Some Background About ADR In Labor Matters**

Alternative dispute resolution has always been an integral part of labor law; most labor contracts feature arbitration clauses, and mediation is a common tool used during particularly contentious contract negotiations. And while ADR has always played an important role in labor law, its popularity has progressively grown throughout the legal world. Many courtrooms across the country employ mediators and mandate settlement conferences, as parties see the benefits of avoiding a protracted court case through cheaper, faster options. As stated by the Board's Associate General Counsel in her October 2015 Memorandum OM 16-02, "The Board established the ADR program in response to the success experienced by other federal agencies and the federal courts in settling contested cases through ADR, as well as the success of the NLRB's own settlement judge program at the trial level."

Onlookers might be wondering why this pilot program is happening now, when the Board's ADR program has been in place for over a decade. The answer could very well come down to budget cuts. While the Board's budget has remained stagnant since the 2014 fiscal year, the White House has proposed a decrease in the Board's funding in 2019. Settling more cases through the ADR process means a lighter workload for a shrinking national NLRB workforce.

**What's New About The ADR Pilot Program?**

Prior to this development, ADR was only formerly offered by the Board through mail after an administrative law judge's original decision. The pilot program aims to engage more parties in the

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ADR process by having the Office of the Executive Secretary contact parties with unfair labor practice cases to let them know about their options. Moreover, either side is still entitled to proactively request to enter the ADR program.

Employers should note that entering the program does not bind a party to settle or even remain engaged in the process for a full 30 days, and mediators have no authority to impose a settlement. Any information divulged during the Board-run mediation process is confidential and cannot be used in further proceedings. However, certain arguments or strategies produced in this setting may tip off the opposing side to the future strategy of the case.

**Which Cases Are A Good Fit For The ADR Program?**
Although unfair labor practice charges make for solid candidates to participate in the ADR program, the program is not suitable in every case. Representation cases—those in which an individual or union files a petition for the NLRB to hold an election over whether the employees want to be represented in collective bargaining with their employer—do not qualify. Relatedly, cases to determine whether a union election was conducted fairly or to resolve disputes over bargaining unit construction are also not fit to participate in the ADR program.

Mediation is a great opportunity to get a third party involved in the settlement process if a charging party overvalues its case. Allowing an experienced mediator to shed light about the value of its case lets the charging party hear from an independent source, which might provide more influence. Additionally, mediation allows parties to come to a compromise leaving both sides happy with the outcome, while taking a case to a hearing before an administrative law judge may end up with only one or neither side happy with the decision.

Even though there are many benefits to engaging in the ADR process, it could be of little value to proceed with mediation early in the process in some cases, especially if facts are unknown, investigations remain ongoing, or the case is complex. In addition, cases initiated by a union may not be as appropriate for the process as charges filed by an individual; unions may have a vested interest in seeing a case go all the way to the Board in an effort to change precedent or prove a point to its membership.

**Why Does This Matter To Employers?**
After finding your organization in a dispute before the NLRB, you should speak with your labor attorney about the possibility of engaging in the ADR process to determine if your case is right for mediation. You may determine that more creative, flexible, and customized resolutions are available than you otherwise considered.

*For more information, contact the authors at SBernstein@fisherphillips.com (813.769.7513) or JCohen@fisherphillips.com (503.242.4262).*

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**Steven M. Bernstein**
Regional Managing Partner and Labor Relations Group Co-Chair
813.769.7513
Email

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