2 Steps to Improve Arbitrator Diversity in Labor and Employment Cases

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Today, over 60 million workers are subject to arbitration — a 55% increase since the early 2000s — yet the arbitration field remains dominated by white men. While workplaces across the country have increased their commitment to diversity, equity, and inclusion in the workplace, it is no surprise that there are prevalent obstacles in efforts to close the race and gender gap in the realm of arbitrator selection, specifically regarding employment-related disputes. The interest in increasing diversity among arbitrators has been heightened over a number of years, resulting in the ongoing commitment by scholars and advocates, arbitral entities, employers, employees, and unions alike. This article will focus on existing efforts to achieve diversity and inclusion in arbitrator selection, as well as two possible solutions to consider in reaching that goal.

ABA Identifies Diversity Problem During Arbitrator Selection Process

Arbitrators are often mutually selected by employers and unions or employees after a neutral arbitration service supplies the parties with a list of potential arbitrators.

In 2018, the Section of Dispute Resolution of the American Bar Association introduced Resolution 105, aimed at increasing diversity in the hiring of neutrals from such a list. "Diverse neutrals," as per the ABA, refers to "minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities."

Resolution 105 broke down the diversity problem into two areas: the roster issue and the selection issue.

- The roster issue refers to the low representation of diverse neutrals in panels of major dispute resolution providers.
- The selection issue is the overwhelming selection of nondiverse neutrals over their diverse neutral colleagues.

The underlying problem of these two areas lies in the network-based and confidential nature of the profession, where parties often seek feedback on potential arbitrators from colleagues and peers and thus perpetuate selection from the same pool of nondiverse options. The limited number of diverse neutrals fuels a negative loop where diverse attorneys are discouraged from applying to become neutrals themselves.

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Resolution 105 provided legal practitioners with an outline of helpful steps or actions that one can take in order to solve the diversity problem.

Some suggestions include encouraging clients and attorneys alike to initiate discussions regarding the value of diversity, aiming to select diverse neutrals whenever possible, taking diversity pledges, and/or including diversity inclusion into contracts.

What is Being Done About the Problem?

Examining the steps being taken by interested parties reveals two key initiatives that you should monitor.

The Ray Corollary Initiative

Diversity advocate and arbitrator Homer C. La Rue promotes the Ray Corollary Initiative™, or RCI™, to increase diversity. La Rue suggested the creation of a national taskforce that would involve the collaboration of the ABA, arbitration service providers, lawyers selecting arbitrators, and entities that hire such lawyers to develop and implement a plan to address the problem.

Such a plan would require parties to consider candidates from underrepresented populations before making any final arbitrator selection in labor and employment cases.

La Rue modeled the RCI™ after the Rooney Rule in professional football and the Mansfield Rule in Big Law. The empirical evidence supports using bias in favor of the status quo to change the status quo. Specifically, he advocates for the RCI™ to seek "a demonstrable commitment from all areas of the dispute resolution community that every final group of candidates for an arbitration or a mediation will include 30% people of color, both female and male," according to a 2021 article he wrote for the ABA's Dispute Resolution Magazine.

Arbitral Entities

Meanwhile, arbitration service providers are working to increase diversity within their rosters given that the field is dominated by white men. Nonetheless, alternative dispute resolution providers have seen improvements in racial, ethnic, and gender diversity in recent years.

For example, the American Arbitration Association reported that its roster included members that are 30% women and 41% racially or ethnically diverse in 2022. While these metrics show progress, there is still room to grow.

2 Action Items to Consider

In tackling the issue of improving diversity among arbitrator ranks, there are two action items for legal practitioners to consider: **boosting continuing legal education** that addresses the underlying

problem of discrimination and unconscious bias, and **revising practices taken by advocates** when negotiating the selection of diverse arbitrators.

1. Boost Legal Education

In line with Resolution 105 and the RCI™, advocates should seek to address discrimination and unconscious bias through continuing legal education. Continuous studies in the legal profession will aid in the establishment and widespread practice of selecting diverse arbitrators because education aids in the elimination of both actual discrimination and unconscious bias.

For example, organizations such as the Labor and Employment Relations Association have managed to host and schedule programs aimed at addressing diversity in the selection of neutrals for labor and employment advocates to address diversity, inclusion and bias for labor, management, and neutrals.

Other organizations, including state bar associations, have similarly made efforts to offer continuing legal education aimed at eliminating unconscious bias.

By boosting continuous legal education, advocates, clients, neutrals, and arbitral entities will receive valuable information and influence conscious decisions in ensuring equal access, voice, and administrative justice.

2. Revise Arbitrator Selection Language

To take matters into one's own hands, advocates should implement the practice of drafting and negotiating language that implements the RCI™ to achieve arbitrator diversity.

For example, firms and other organizations can use agreements that require the parties to ask the arbitration service for a list that contains at least 30% diverse arbitrators at the outset of the selection process. If it does not, each party must add at least one diverse arbitrator from which to then select.

Making the Change Now

Legal institutions, practitioners, neutrals, and arbitral entities alike continue to express their intentions in boosting diversity in the dispute resolution community.

While this is a constantly evolving and improving area for the labor and employment practice, it is one many labor and employment advocates believe in moving forward to strengthen the service to their clients and their respective workforces.

As La Rue has stated: "The time to act to make diversity and inclusion real is now." Therefore, the action items of continuing legal education and/or arbitrator selection language serve as useful tools

that could help achieve the RCI™ minimum of 30% diversity, both in a short- and long-term basis. These two solutions are a good start at making the change now.

Conclusion

If you have questions, contact your Fisher Phillips attorney or the authors of this Insight. We will continue to monitor developments in this area, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

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