

JAMS Guide to Dispute Resolution for Employment Programs and Sample Clause Language

Effective October 2014



JAMS GUIDE TO DISPUTE RESOLUTION FOR EMPLOYMENT PROGRAMS AND SAMPLE CLAUSE LANGUAGE

JAMS provides arbitration and mediation services worldwide. We resolve some of the world's largest, most complex and contentious disputes, utilizing JAMS Rules & Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS arbitrators and mediators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained, experienced ADR professionals are dedicated to the highest ethical standards of conduct.



Introduction

Employment law is one of the fastest developing areas of law in the United States today. Claims involving allegations of harassment and discrimination have changed the practices of most companies and their policies regarding employee relations. The cost, publicity, delay and disruption that result from litigation have sharply increased the use of alternative methods for identifying and resolving potentially harmful disputes.

Many disputes in the workplace can be resolved in their early stages by companies designing and implementing employee dispute resolution programs. Such programs typically establish sequential processes progressing from non-binding to binding steps.

JAMS, the Resolution Experts, has been a leader in alternative dispute resolution (ADR) for 35 years. JAMS is dedicated to ensuring that both our administrative and professional practices are sensitive to all parties' needs, and meet fairness standards established under applicable law. To that end, any employment matter referred to JAMS as a result of a mandatory pre-dispute clause must first be reviewed by our employment experts before administration begins to ensure compliance with JAMS Minimum Standards of Procedural Fairness. If an arbitration clause or procedure does not comply, JAMS will notify the employer that the arbitration demand will not be accepted unless there is full compliance with JAMS' Minimum Standards.

For more information, the following materials are posted on the JAMS website at www.jamsadr.com: JAMS Employment Arbitration Rules & Procedures; JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness.

What to Consider When Drafting an Employment Dispute Resolution Program

The outline below is provided as a basic guide for companies considering an employment dispute resolution program. At the end of the outline are two sample clauses. This information is not comprehensive and should not be construed as legal advice or a legal opinion regarding the use of alternative dispute resolution in a particular employment dispute or program. We recommend that you consult

experienced counsel for advice. States may have specific requirements related to employment arbitration and you should make certain to remain apprised of applicable case law in your jurisdiction.

Step One: Internal Mechanisms

Consider the internal mechanisms for resolving conflict in the workplace that are consistent with your company's culture, resources and needs. Such mechanisms may include:

- **Corporate Ombudsperson**
- **Peer Review Board** made up of fellow employees, facilitated by neutral management, HR person or other professional
- **Employee Hotline**
- **Open Door Policy**
- **Progressive Management Review** at successive levels within the organization until the problem is resolved
- **Progressive Joint Management/Employee Review** at successive levels within the organization until the problem is resolved

Properly communicated and administered, internal mechanisms can be very effective in resolving disputes at an early stage.

Step Two: External Mechanisms

Consider the external mechanisms for resolving conflict in the workplace that are consistent with your company. Those may include:

- **External Ombudsperson:** A process in which a trained mediator who is neither a retired judge nor a lawyer facilitates communication between employee and management or HR representative.
- **Neutral Fact Finding:** An independent investigation conducted by a neutral, outside resource who can provide a written report of findings which may include recommendations regarding the situation under investigation.
- **Mediation:** A confidential process in which the parties are assisted by a neutral mediator who helps them to negotiate resolution of their dispute. Mediation is a non-binding procedure. However, once an agreement has been reached and documented, it is binding on the parties and can be enforced.

- **Early Neutral Evaluation (ENE):** A process in which both parties present the facts of their case to a neutral for a non-binding written evaluation and recommendation.
- **Arbitration*:** A process in which a neutral third party arbitrator hears parties' arguments and issues a written award which can be entered as an enforceable judgment.

**State and Federal laws may affect the use of arbitration in pre-dispute employment programs/contracts. It is recommended that you consult experienced counsel for advice.*

JAMS encourages the use of mediation and of voluntary arbitration that is not a condition of initial or continued employment. JAMS does not take a position on the enforceability of condition-of-employment arbitration clauses. If courts rule definitively that such clauses are unenforceable, or if laws or regulations proscribe their use, JAMS will comply with the rulings or laws in the applicable cases or jurisdiction. Absent such proscriptions, JAMS accepts arbitration assignments based on condition-of-employment clauses provided the Minimum Standards are met, but does not encourage the use of such clauses.

Step Three: Design

- Consider who should be involved in the design, implementation and communication of the program to ensure success and appropriate use of the program: Employees, Management, Human Resource Professionals, General Counsel, outside counsel, outside neutral consultants, etc.
- Consider who will finalize and approve the program (e.g., Senior Management, CEO, COO, CFO, General Counsel, Committee of all including employees, etc.)
- Consider which employees should be covered by the program and whether the program should be mandatory or voluntary.
- Consider which disputes should be included or excluded at any internal or external step of the program. Define the timeline between all internal and external steps of the program.
- Consider whether a Pilot Program should be used to test the program. If so, determine:
 - Duration of Pilot
 - Location of Pilot
 - How results will be evaluated

Step Four: Implementation

- Decide on an institutional dispute resolution services provider (e.g., JAMS) for the external steps to the dispute resolution program. Many companies name more than one provider and allow the employee to choose the institution at the time the external step is necessary. If arbitration is to be included in the program, it is recommended that the company specify which arbitration rules and procedures will apply. Naming the institutional service provider ensures that the external steps are self-executing.
- Notify the institutional provider so they may streamline program administration.
- Once the program is finalized, determine the date the program will go into effect and how the program will be tracked and administered for both the internal and external steps. Consider how the fees for the external steps should be allocated between employee and employer and explain this in the program description. (See JAMS Minimum Standards of Procedural Fairness.)
- Consider the procedures by which the program will be communicated to the employees (memorandum, employee handbook, initial job application, etc.) and the ways in which employees shall convey their consent. The program should be fully described and the procedures for accessing the program should be clearly articulated in a step-by-step guide to both employees and management including forms, phone numbers and who to contact with questions, etc. Consider including Evaluation Forms at each internal and external step so that the effectiveness of the program and the individual steps can be monitored and modified, if necessary. In addition, some jurisdictions may require the employer to provide the employee with a copy of the applicable arbitration rules. If applicable, consider how to comply with such requirements.
- Conflict management training and an overview of all ADR processes should be considered for all levels of management.

Sample Clauses for Use in Employment Dispute Resolution Programs and Contracts

The following are basic sample clauses providing for mediation or arbitration in an employment contract. A variety of issues may affect the enforceability or effectiveness of these sample clauses, therefore it is recommended that you review applicable law in your jurisdiction and consult experienced counsel for advice. The information contained herein should not be considered legal advice or legal opinion. For information about naming JAMS in your program or setting a case, call your local JAMS office at 1.800.352.5267.

Sample clause for mediation only:

Any controversy, dispute or claim arising out of or relating to this [contract] or breach thereof shall first be settled through good faith negotiation [OR company employment program] [other]. If the dispute cannot be settled through negotiation [OR company employment program] [other], the parties agree to attempt in good faith to settle the dispute by mediation administered by JAMS.

Sample clause for mediation and arbitration:

Any controversy, dispute or claim arising out of or relating to this [contract] or breach thereof shall first be settled through good faith negotiation [OR company employment program] [other]. If the dispute cannot be settled through negotiation [OR company employment program] [other], the parties agree to attempt in good faith to settle the dispute by mediation administered by JAMS. If the parties are unsuccessful at resolving the dispute through mediation, the parties agree to arbitration administered by JAMS pursuant to its Employment Arbitration Rules & Procedures and subject to JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness. Judgment on the Award may be entered in any court having jurisdiction.

Optional Additional Provisions for Employment Clauses

Mediation

- Define Process for Mediator Selection
- Mediator Qualifications
- Define Timeline by which parties must agree to a Mediator
- Define default mechanism and timeline by which Mediator will be appointed if parties cannot agree
- Confidentiality
- Location of Mediation
- Written Submission of Briefs or Position Statements

Arbitration

- Define Process for Arbitrator Selection
- Number of Arbitrators
- Party-Appointed Arbitrators
- Arbitrator Qualifications
- Binding/Non-binding or Split (Binding on the company, non-binding on the employee)
- Location of Arbitration Proceeding
- Timelines
- Confidentiality
- Fee Allocation

© Copyright 2014 JAMS. All rights reserved. For more information, please visit our website at www.jamsadr.com, or call your local JAMS office at 1.800.352.5267.

800.352.5267 | www.jamsadr.com