

# A Fact-Finding Process Might Be the Solution for Resolving Your Employment Dispute

By Jeffrey T. Zaino

It is common for parties to an employment dispute to first attempt mediation to resolve a dispute. This is typically the first step in many employer-promulgated dispute resolution plans. Mediation is a non-binding process where a skilled mediator guides the parties to a negotiated settlement. If the dispute is resolved in mediation, both the employer and employee then avoid the time and potentially higher costs of either litigation or arbitration. Adversarial proceedings like litigation and arbitration should be the last step in achieving resolution of a dispute. Such proceedings can require extensive information exchange and discovery. If the parties, however, have extreme positions and lack any consensus on the facts of the case, mediation may also be impractical and a futile exercise, particularly in the early phase of a dispute.

What should parties do if faced with a dispute that is not suited for mediation and where they want or need to avoid resorting to litigation or arbitration? A fact-finding process might be the solution. This article will explore how a fact-finding process works and how disputes can be resolved long before a mediation and/or arbitration phase is triggered by an employer promulgated plan or individually negotiated employment contract.

## History

The fact-finding process has its roots in international disputes, being first established during the Hague Convention of 1907. The process is commonly used today by international bodies like the United Nations. Recent examples of fact-finding missions and reports by the United Nations are Saddam Hussein's weapons arsenal in 2002 and the Gaza Conflict in 2009. Besides international disputes, fact-finding is used domestically by the federal government, states, towns, unions, and companies when contentious issues arise that require fact-finding investigations and reports. The process also works to address and resolve employment disputes, both individual and collective disputes.

## Fact-Finding Process

Like other alternative dispute resolution (ADR) processes, fact-finding is created either by a pre-dispute contract between the parties calling for a fact-finding process or by joint submission after a dispute has arisen. Administrative agencies like the American Arbitration Association (AAA) offer fact-finding procedures and sample contract clauses to trigger a fact-finding process. The following is an example of a fact-finding clause that

could be added to an employment contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof, the parties agree to first submit their dispute to a neutral fact-finder pursuant to the American Arbitration Association's Fact-Finding Procedures administered by the American Arbitration Association before resorting to arbitration, litigation, or some other dispute resolution procedure.

Pursuant to the AAA's *Fact-Finding Procedures*, "any party may initiate a Fact-Finding process" and the fees are borne equally. It is recommended, however, if fact-finding is triggered by an employer-promulgated plan (a plan that all employees sign as a condition of employment), the employer should bear the majority of the administrative costs and fact-finder's per diem.

Once either party initiates the fact-finding process, the parties can either review a list of fact-finders for a mutually acceptable person or have a neutral administrator appoint the fact-finder. This should occur within days of the initiation and the fact-finder should be an expert versed in fact-finding, employment law, and have an understanding of the employer's industry. No person should serve as a fact-finder if he or she has any personal or financial connections to the parties, or interest in the outcome of the dispute. Like serving as an arbitrator or mediator, the fact-finder should make any and all disclosures upon selection.

The fact-finder, once selected, then works with the parties to establish a schedule for submission of documents and identifies all persons with information pertaining to the dispute. Also, the fact-finder and parties should establish set rules of procedure, including specifics such as length of interviews. The parties should also advise the fact-finder whether or not they want a settlement recommendation included in the fact-finder's report.

The fact-finder should have access to all relevant documents and information and all participants, the parties and those persons with information related to the dispute, are expected to fully cooperate during the interviews. Confidential information disclosed to the fact-finder during the investigation and interviews of the parties and witnesses must remain confidential. A fact-finder should never be compelled to divulge information disclosed or testify about the investigation in any ad-

versarial or judicial proceeding. The parties should also maintain the confidentiality of the process. This includes expressed suggestions of settlement or admissions by either party and proposals and views made by the fact-finder during the investigation. The complete investigative process should be completed within two weeks but can be shortened or lengthened based on mutual agreement by the parties.

### Fact-Finding Report

The fact-finder should prepare a concise report summarizing in detail all facts found during the investigation and include credibility determinations. Close questions of credibility should be identified and explained. Unless agreed to by the parties, the report should not include suggested remedies and/or settlement recommendations. The report will hopefully provide the parties with a far better understanding of disputed facts and make it easier to determine if it is time to settle or pursue other dispute resolution solutions. If mediation or arbitration is deemed necessary after the fact-finding, the fact-finder should not be the mediator or arbitrator.

### Employer-Initiated Fact-Finding

Beyond individual disputes between an employer and employee, an employer should also consider initiating fact-finding investigations when facing repeated employee complaints, or claims. A fact-finder can conduct an extensive investigation, evaluate ongoing disputed facts between the employer and employees, and provide the employer and its management team with a better understanding of what is creating a negative environment. The information uncovered during the investigation could go a long way toward eliminating or reducing future employee complaints and claims.

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