Dispute resolution in the post COVID-19 environment: How are International Dispute Resolution Agencies navigating the new normal?

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PRESENTATION OUTLINE

1. Pre-Covid
2. Early Covid
3. Late Covid
Dispute Resolution in the post COVID-19 Environment: How is the U.S. Federal Mediation & Conciliation Service Navigating the New Normal?

Presented by David Thaler, FMCS Chief International Affairs Officer, to the CCMA Annual Labour Conference

September 23, 2022
“25 years in pursuit of social justice and equity”
Creation of FMCS and Status in the U.S. Federal Government

- Established in 1947 to “preserve and promote labor-management peace and cooperation.”
- Independent, stand-alone federal agency.

Why is “independent agency status” beneficial to FMCS?

- Independent agency status allows mediators to focus solely on helping the parties resolve disputes, without worrying about legal or rights-based questions.
Collective Bargaining in the U.S.

- In the U.S., collective bargaining is decentralized and generally takes place at the enterprise level.

- If the parties fail to reach an agreement, the solution is a strike or a lockout.

- Unlike in many other countries, there is no body that decides the terms of a CBA (and no one decides the outcome for the parties in a strike situation).
**FMCS vs. National Labor Relations Board**

**FMCS**
- Does not adjudicate or enforce the law.
- Relies heavily on ADR-related processes, like mediation.
- Does not need to be concerned with unfair labor practices or who would prevail in court.

**NLRB**
- Adjudicates and enforces collective bargaining law.
- Generally, does not use ADR in their practice.
- Is concerned with CBA violations and legal outcomes.
Grievance Mediation

- In the lingo of U.S. labor relations, a grievance is the name for the formal process under a collective labor agreement for complaining and seeking to remedy alleged violations of that agreement.

- Under virtually all collective agreements, if the parties are unable to reach a settlement of the grievance, it goes to an arbitrator for a final and binding decision.

- Many parties use FMCS to mediate their grievances. This saves time, money, and stress, and improves their working relationship in the process.
Employment Discrimination Claims

• Mediation of employment discrimination claims for federal government (not private sector) employees, which fall completely outside of the National Labor Relations Act, and stem from the Civil Rights Act of 1964 and its successor laws.
Mediation of Other Statutory Rights Claims (e.g., wages & hours, health & safety, pension accountability, etc.)

• Most federal claims impacting rights at work are brought by the U.S. Department of Labor and are not mediated by FMCS.
Evolution of FMCS Services

Over time, we have shifted our services from just resolving disputes to preventing them... with available training services including:

- Launch and maintenance Labor-management committees (LMC)
- Union and management representative training.
- Grievance handling
- Problem-solving (IBB and its progeny)
- Communication skills
- ...and more!
Early Covid
March 2020: FMCS Was Ready!

- Since 2013 FMCS had gradually been introducing video teleconferencing via RingCentral to our mediator corps.
  - Conflict Resolution Week (2013)
  - Creation of FMCS Virtual Academy (2014)
  - Integration of virtual programming into FMCS Institute (2015)
  - First international technical assistance program (2016)

- Thus, we already had a cadre of about 20% of the workforce not only capable of delivering services virtually, but ready willing and able to train the other 80% in how to conduct virtual meetings and trainings.
Creation of Office of Strategy Development (2020)

Moved 7 Mediator Positions to this New Office

- Trained mediators in the various platforms (i.e. RingCentral, Zoom, Microsoft Teams, etc.) through small-group “sandbox sessions.”

- The 7 mediators made themselves available to attend client-facing meetings and mediations in real-time to support the use of online platforms and ensure a seamless experience for clients;

- Stayed in touch with the mediator workforce to listen to their concerns and suggestions regarding issues that arise, and in turn, working with IT to take corrective action;
• Remained alert to new platforms and tools (i.e. Miro, Facilitate Pro, Microsoft Forms, Poll Everywhere, X-Mind, etc.) that become available, and worked with mediators to gradually adopt those that have the most promise to be useful in their practice; and

• Provided their input and expertise to Agency leadership on FMCS policies regarding meeting security and the use of technology, more generally.
Creation of FMCS Internal “Meeting Tech” Team (2020)

• **Meeting Tech Team**: Overseen by the Office of Strategy Development, this was a group of about 35 collateral duty mediators who provided support for technology integration and troubleshooting during online meetings.

  • These mediators could be requested by their colleagues on a voluntary, as-needed basis.

  • The Meeting Tech Team was essential to the effective scale-up of FMCS field operations by allowing their peer mediators to focus on the mediation itself.
The Results

• 100% of our workforce became proficient in virtual service delivery.

• FMCS performed record numbers of not only collective bargaining, but also relationship development trainings, grievance mediation and employment mediation.

• Through all this cross-regional cooperation among our mediator corps, we became more unified as an agency and not only learned from one another, we also developed strong relationships, in many instances, friendships that continue to this day.
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How has FMCS responded?

- **Part 1:** Programming in Response to Social, Economic, Political Chasms in the US.
- **Part 2:** Human Capital Changes in Response to Continued decline in Unionization Rates in the U.S.
- **Part 3:** Structural Changes in Response to Covid and the Rapid Growth of Remote Work.
How Has FMCS Responded?

Part 1: Programming in Response to Social, Economic, Political Chasms in the US.
Diversity and Inclusion Initiative: **External Component**

From 2021-22, led by our two Regional Directors and an advisory body, FMCS mediators designed a series of training programs in:

- Diversity & Inclusion
- Micro-Aggressions
- Cultural Awareness
- Allies
- Creating Safe Spaces
- Equal Employment Opportunity Training Basics
- Understanding Bias
- Conducting Facilitated Dialogues
Diversity and Inclusion initiative: **Internal Component**

Employees from across the agency volunteered to participate in examining the current culture and identified areas to focus improvement:

- Accepting Responsibility
- Hiring Practices
- Welcoming New Employees
- Shared Values/Core Principles
FMCS Implementation of President Biden’s Executive Orders Promoting Diversity, Equity, Inclusion & Accessibility

- **Diversity**: Recruit and promote the nation’s best talent, reflective of the make-up of the nation utilizing merit-based principles.

- **Equity**: Ensure all FMCS employees have equal opportunities to advance in their careers and grow as leaders by mitigating any potential biases or barriers to professional development and promotion.
FMCS Implementation of President Biden’s Executive Orders Promoting Diversity, Equity, Inclusion & Accessibility

• **Inclusion**: Enhance and sustain an inclusive workforce by strengthening feedback loops for employee input, including through listening sessions and climate surveys. Enhance employee engagement.

• **Accessibility**: Design, develop, maintain facilities, technology, programs, and services so that all people, including people with disabilities, can fully and independently use them.
In the Community

• FMCS has forged a relationship with U.S. Department of Justice Community Relations Service

• Cool schools: program to teach grade school children conflict resolution skills.
Political Polarization

- Compounded by the constant din of acrimony in the media and on social media, people are continuously being primed for conflict.
- FMCS has only dipped its toe into the issue of political polarization.
  - Columbia University Professor Peter Coleman delivered a Keynote address to the 2022 National Labor-Management Conference.
  - However, we recognize that, by putting people in a self-righteous, reflexive in-group-out group mindset, political polarization both reflects and feeds into many of the conflicts we face.
How has FMCS responded?

Part 2: Structural Changes in Response to Declining Unionization Rate
FMCS structural Changes in Response to Declining Unionization Rate

• 2022 Agency Reorganization
  • Allows for greater use of mediators across geographic lines
  • Requires mediators to attain the Conflict Management Professional credential as a prerequisite to promotion to the highest grade.
  • Reduces administrative burdens on mediators so they can better focus on client services.
• Increase resources for training mediator corps
  • 100% increase in size of our Center for Conflict Management Education
FMCS Structural Changes in Response to Declining Unionization Rate

• Conflict Management Professionals Program
  • Allows for provision of services, beyond mediation of disputes, to support existing labor-management initiatives at a broader and deeper level – e.g., collaboration, problem-solving, leadership, change management.

• Creation of National Projects Unit
  • Highly talented, technological savvy unit of elite mediators who can deliver services in major cases and to major clients across the geographic boundaries of our nation.
How has FMCS responded?

Part 3: Structural Changes in Response to Covid and the Rapid Growth of Remote Work
FMCS Structural Changes in Response to Covid and the Rapid Growth of Remote Work

• Continued investment in technology platforms for remote dispute resolution, training and other services.
  • And in training our workforce to use them

• Continued reduction in our real estate imprint as we allow for more and more remote work.

• Increase in trainings offered to the public via the FMCS Institute.

• Response to increase in requests for international services.
THANK YOU

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