

# Financial Challenges Package

## FREQUENTLY ASKED QUESTIONS

One of the biggest potential obstacles to resolving employment lawsuits through mediation is financial difficulties faced by a defendant. M Resolution has developed a method to help the parties and their counsel spot financial challenges early, evaluate them before mediation, and address financial challenges before and during mediation to ensure the best outcomes at mediation. Below is an FAQ designed to help you better understand this method and how it impacts your mediation.

### THE PROBLEM

#### **Why are the defendant's financial difficulties an obstacle to mediation?**

All too often, financial challenges go undetected or are underappreciated before mediation, which can lead to distrust between the parties and their counsel, sabotage the mediation, prevent settlement, or necessitate a costly second mediation. Indeed, a defendant's financial challenges can significantly impact the negotiations, the ultimate settlement value, and the timing and nature of settlement payments.

#### **Why do financial difficulties often go undetected before mediation?**

A defendant's financial difficulties can be tricky for plaintiff's counsel, defense counsel, and the mediator to spot and manage, and thus often go undetected until the day of mediation. Meanwhile, a defendant that is experiencing financial challenges and facing a lawsuit often doesn't fully understand the extent of its financial challenges or how those challenges impact mediation. For this reason, many organizations with financial challenges can be confused, avoidant, or in denial about the lawsuit and their financial difficulties headed into mediation. In fact, the lawsuit and the mediation can feel like the least of defendant's concerns in the midst of financial turmoil.

#### **Why doesn't a standard demand to share financials work?**

Many organizations under financial stress may conceal their financial challenges in the lead-up to mediation given fear over the threat of the pending lawsuit and its impact on their bottom line. Feeling like their organization is under attack from the lawsuit, the defendant often distrusts everyone involved in the mediation process, including the plaintiff and their lawyers, the mediator, and even the organization's own outside counsel. This is why a plaintiff's standard demand for defendant to share financials (even when encouraged by defense counsel) is often met with skepticism and distrust.

### THE SOLUTION

#### **What is the solution for uncovering financial challenges before mediation?**

Given the high level of emotions and the financial complexity associated with a business under financial distress, it is important for the mediator to provide a process by which the parties can safely explore the financial challenges at issue. This means both exploring whether there is legitimate financial distress that will impact the mediation/settlement and understanding the extent to which the financials play a role in the amount of the settlement and/or timing of payments. Because such issues can rarely be unpacked and effectively explored on the day of mediation, it is important that the exploration process start early and be completed well before mediation. This is why we developed a Financial Difficulties Survey to help spot these issues early in the process.

### THE SURVEY

#### **What is the Financial Difficulties Survey?**

Because the number one challenge with cases involving financial difficulties is spotting the issue long before the mediation, we now have counsel for each party to mediation (including plaintiffs and defendants) fill out a short survey after reserving the mediation. The survey is a short 10-question survey that will help uncover whether financial challenges are a potential obstacle to mediation.

#### **Why does everyone have to fill out the Financials Difficulties Survey?**

The survey is important because it will help counsel spot potential financial difficulties that often go undetected before mediation. This helps all mediation participants to prepare for the mediation and keeps expectations aligned.

#### **When does the survey get completed and how long does it take?**

The survey must be filled out within two weeks after the mediation is booked, and it takes from just a few minutes to complete (if there are no financial challenges) to less than 10 minutes to complete (if there are potential financial challenges)

#### **What happens next after the survey is filled out?**

If there are no financial challenges identified, then the mediation will proceed as it normally would. If, however, the survey reveals financial challenges, then the parties will proceed on the Financial Difficulties Track as described below.

### THE FINANCIAL DIFFICULTIES TRACK

#### **What is the Financial Difficulties Track?**

The Financial Difficulties Track has two key no-cost stops before mediation that will help the parties and the mediator better understand the financial challenges before mediation. The first stop is a Pre-Mediation Financial Difficulties Interview, which is conducted

via Zoom with the mediator, the defendant, and defense counsel to better understand and unpack the financial difficulties. The second step is a Financial Difficulties Evaluation with an outsourced CFO/CPA to help the defendant and their counsel understand the severity of the financial challenges and payment options at mediation.

### **Are there additional costs associated with the Financial Difficulties Track?**

There is no additional cost above the current flat mediation rates.<sup>1</sup> The additional services on the Financial Difficulties Track, including the Interview and the Evaluation, are provided at no additional cost to the parties (despite requiring more time and personnel) because we are passionate about helping parties navigate financial distress scenarios, understand the need to keep the cost down in these situations, and we believe that these services ultimately help the mediation succeed.

### **If there are no additional costs for the Financial Difficulties Track, is there any reason not to do it?**

We can't think of any reason. If the case involves potential financial challenges that could impact mediation, then the case should be on the Financial Difficulties Track, which will give it the best chance to resolve.

### **What are the benefits of a case being on the Financial Difficulties Track and are there benefits for everyone involved?**

Regardless of the ultimate determination on financial difficulties, there are many positive outcomes that may result from this process for everyone involved, including the following:

- **Ruling Out Financial Distress:** The process may quickly rule out any serious or severe financial distress, and the parties can proceed through the traditional mediation process confident they won't be surprised by financial issues the day of mediation.
- **Spotting Financial Challenges:** The process may reveal some financial issues that are worthy of further exploration and discussion, but that may not ultimately play a significant role in mediation, leaving the parties better prepared for a traditional mediation without significant financial discounts at play.
- **Understanding Financial Distress:** The process may help defendant better understand that, although they are experiencing some financial challenges, the nature and extent of those challenges are not severe enough to justify a discount or a payment plan. This might help defendant and their counsel prepare for mediation without hoping for something (a discount) that isn't a realistic possibility based on the financial challenges at issue.
- **Sorting Out Financial Distress:** The process may reveal that the defendant does not have a good handle on the extent of financial distress, and the defendant and their attorney might realize that the organization needs to further evaluate financials to determine whether they will impact the organization's ability to pay and the timing of payment. In this case, a Financial Difficulties Evaluation may help the defendant unpack its financials in a way that assists the organization and its

counsel to understand the role the financials will play at mediation.

- **Addressing Significant Financial Distress:** The process may reveal that the defendant is under extreme financial distress that will likely support a discount at mediation and/or a payment plan. Going through the Interview and Evaluation may help the organization understand why sharing and disclosing financials can help the organization navigate through the lawsuit and help it feel more comfortable sharing financial information.
- **Preparing for Successful Mediation:** The process may help the parties and mediator proactively unpack any potential financial difficulties and prepare everyone for productive mediation. This process also eliminates any surprises and prevents the mediation from being rescheduled, derailed, or doomed due to financial difficulties.

### Is there any downside for a case to be on the Financial Difficulties Track?

We have not yet found any. Defendants only stand to gain more information and be better prepared for mediation. Meanwhile, the plaintiffs and their counsel may gain more information as well and they can be confident that they won't be surprised with financial distress arguments the day the mediation. In addition, this process will allow the mediation to stay on track and on schedule to avoid rescheduling or having to pay for a second session.

Just because a case ends up on the Financial Difficulties Track does not determine the outcome at mediation or presume that a defendant's financial challenges will automatically lead to a discount or payment plan. Instead, the process helps the parties and the mediator confirm, rule out, narrow, and better understand the financial issues to facilitate the mediation.

## THE INTERVIEW

### What is the Pre-Mediation Financial Difficulties Interview?

If the survey indicates financial challenges that could be potential obstacles to mediation, then we will schedule a one-hour Zoom session with an M Resolution mediator, the defendant's owner(s) (and/or CFO, and CPA), and defense counsel. In this Zoom session, we will facilitate a discussion with the organization and defense counsel to better understand and rate the level of potential financial difficulties, explain the impact these have on mediation, and discuss solutions for handling financial challenges in the mediation setting, including possible disclosure of some or all financials, and/or a Financial Difficulties Evaluation by an independent CFO/CPA consultant.

### Why is the Financial Difficulties Interview important?

This interview is a key step in the process as it helps the defendant understand how financial challenges may impact the mediation well in advance of the mediation date. This gives the defendant and its legal team (A) time to prepare to demonstrate financial chal-

allenges at mediation or (B) the knowledge that the financial challenges may play a minor role, thereby putting a focus on identifying the proper authority for mediation.

### **When does the Financial Difficulties Interview occur?**

The Zoom interview should occur within two weeks of a survey revealing potential financial challenges and at least six weeks prior to the mediation date. There is no additional cost for participating in this interview and this is offered as a courtesy to help the defendant better understand and process financial challenges before mediation to facilitate a better outcome the day of mediation. Because there is no cost, the interview is mandatory (for any case identified as having financial challenges through the survey) as we have found that failure to have this type of conversation early on leads to poor outcomes at mediation.

## **THE EVALUATION**

### **What is the Pre-Mediation Financial Difficulties Evaluation?**

If the Zoom interview reveals financial challenges that are beyond moderate financial challenges (e.g., significant to severe financial distress), the defendant(s) will have the option of undergoing a free financial difficulties evaluation by an M Resolution financial consultant who is an independent CPA and outsourced CFO. The financial consultant will confidentially review the financials of the defendant(s), interview the relevant stakeholders, and provide an easy-to-understand report for the defendant(s), their counsel, and the mediator that describes the nature and severity of the financial challenges and evaluates the organization's ability to pay a settlement in a lump sum or on a payment plan. After reviewing the report, the defendant and its counsel can decide whether and to what extent this report should be shared with the plaintiff's counsel (under a strict confidentiality agreement or orally by the mediator) and whether to further share other financial information and documents with the plaintiff's counsel based on this report.

### **Why is the Financial Difficulties Evaluation important?**

Having a clear understanding of how the organization's financial condition can potentially impact the negotiations at mediation is critical for a defendant to be properly prepared for mediation. The question of whether and what financial information to share at mediation is often a complex business question that takes weeks (if not longer) to decide. Some organizations do not have a CFO or qualified accountant who can unpack these issues. And even for organizations with a CFO or accountant it can be valuable to have an outside second opinion.

### **If the defendant goes through the Interview and Evaluation, does it mean they have to share their financials?**

The answer is not necessarily. After completing the Interview and/or Evaluation, the defendant ultimately can decide whether to share the financial consultant's report and/or other financial information with the plaintiff's counsel. Sharing a financial consul-

tant's report and/or further financial information will allow the defendant to argue for a financial distress discount or payment plan. Meanwhile, opting not to share financial information makes a financial distress discount or payment plan less likely. The key to a successful mediation is to make these decisions early in the process so that the table is properly set the day of mediation.

### **When does the evaluation occur and what does it cost?**

The evaluation and report will be completed within three weeks of the Zoom interview and should be completed at least one month before the mediation date. While the value of this evaluation and report is approximately \$5,000, this evaluation is offered at no additional cost above the flat mediation rates. In some cases, a full or more exhaustive evaluation may require more time and attention beyond the basic evaluation parameters (e.g., situations with complex or messy financials) in which case the defendant will be given the option to pay for additional evaluation services. Nevertheless, almost all evaluations will fit within the no-cost structure.

### **Will a case on the Financial Difficulties Track always end with a discounted settlement or payment plan?**

No. Just because a case ends up on the Financial Difficulties Track and completes one or both steps described above does not determine the outcome at mediation or presume that a defendant's financial challenges will automatically lead to a discount or payment plan. Rather, the process helps the parties better understand the financial issues to facilitate the mediation.