



Practical Tips for Handling MPPAA Withdrawal Liability Arbitrations

By: AAA Pension/ERISA Arbitrators

John E. Sands
Mark L. Irvings
Ira F. Jaffe

Three experienced AAA Pension/ERISA Arbitrators shared their strategies, best practices, and case management tips. The combined experience of these three arbitrators exceeds 150 years and over 15,000 arbitrations/mediations.

What strategies do you employ to manage complex Pension/ERISA cases?

- Active case management is key to effective arbitration.
- Narrow the legal and factual issues, leading to a more efficient hearing.
- Emphasis was placed on the management of the preliminary conference.
 - Encourage cooperation between the parties
 - Control the proceedings effectively
 - Confirm the basics of the case: location, expectations of the proceedings, exchange of exhibits/stipulation of facts, discovery
 - If not already provided by the AAA, prior to conference, secure and review copies of assessment, request for review, fund response (if any), demand for arbitration and prior judicial rulings (if any)
 - Have a requirement that, in discovery, a detailed privilege log be submitted for any items withheld on the basis of claimed privilege
 - Expert witnesses to be in attendance for other expert testimony
 - Federal rules don't typically apply, but it is essential to explain the way the process will be handled for discovery
 - Motions to compel are unproductive – always suggest other alternatives to resolve issues, *i.e.*, conference call, written explanation via email or letter
 - Schedule conference calls to discuss and resolve disagreements between the parties or when they are not cooperating with each other's requests
 - Provide an estimate of your time on the case following the preliminary conference call so that the parties are aware of the potential costs
 - Prepare a case management order following the conference call



- o Direct the parties when submitting briefs to include copies of the cited cases, especially arbitrations and those from WESTLAW, LEXIS, and Employee Benefit Cases

What are your recommendations for pre-hearing activity?

- The parties should exchange lists of proposed exhibits.
 - o Ask parties to indicate if there are objections to relevance, authenticity, or no objections.
- The parties should provide their lists of proposed stipulations of fact.
 - o Ask parties to indicate if it is accepted or rejected.
- Docketing of witness lists (with brief summary of the areas that will be subject to testimony)
- Docketing of exhibits/witness lists/stipulations prior to hearing, leaving enough time for slippage of the dates without triggering a postponement of the hearing.
 - o Identifying the format desired for docketed items (electronic, paper, both)
 - o Clarify that stipulations and docketed exhibits do not waive objections based on relevance, materiality, or weight
 - o Add a date sufficiently in advance of the start of hearings for any pre-hearing motions and clarify whether they can be filed as a matter of right or only upon approval
- Discuss whether the parties will exchange and submit pre-hearing memoranda with a description of the evidence to be adduced on disputes, questions of fact, and legal arguments supporting conclusions of law.
- Do the parties want to submit a reply memorandum?

How do you handle discovery disputes between the parties?

- The parties are encouraged to resolve the issues in a collegial manner. If that fails, the parties can raise the issues and their positions with the arbitrator in an email. A conference call will be scheduled to address the parties' concerns if necessary.
- Motions are discouraged.

What are some of the best practices you can share?

Understand the Issues – Thorough Preparation

- Familiarize yourself with the specifics of the pension dispute, including the relevant laws, regulations, and precedents.
- Identify key issues and the positions of the parties.
 - o Discuss the possibility of submission of the case, or of one or more preliminary/bifurcated issues, on the basis of a documentary record and retain the right to clarify or request additional information or argument.



Review the Case Documents

- Carefully read all submitted documents so that you understand the issues involved.

Effective Communication – Clear Instructions

- Provide clear guidelines to the parties on the arbitration process, timelines, and expectations.
- Facilitate and encourage open dialogue.
 - Emphasize that there are to be no *ex parte* communications, everything sent to the arbitrator must be copied to the opposing counsel and the AAA

Drafting Rulings and Awards

- Write a clear, well-reasoned ruling and/or award addressing all issues raised.
- Provide a solid legal basis for your decisions, referencing applicable laws.
- Do not worry about the possibility of being reversed by a federal court – it is a frequent part of the process

Ensure Fairness

- Give both parties an equal opportunity to present their case.