



January 2010



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Upcoming Seminar

What's New In Employment Law for 2010? - Changes In Workplace Law You Need To Know

When: Tuesday, February 9, 2010, 8:30 a.m.

Where: Westin Buckhead-Atlanta

Our next seminar will be on Tuesday, February 9, 2010, at the Westin Buckhead-Atlanta beginning at 8:30 a.m. and lasting until 10:00 a.m. Registration and coffee begin at 8:00 a.m.

Please let us know if you plan to attend by calling our RSVP line at 770.818.1423 or email us at fmgseminar@fmglaw.com. You can also visit our website at www.fmglaw.com. [Click here to register.](#)

The Westin Buckhead-Atlanta is located at 3391 Peachtree Road, NE, Atlanta, Georgia 30326 across from Lenox Mall. As always, our seminar is free of charge. We hope to see you there.

About Freeman Mathis & Gary, LLP

Freeman Mathis & Gary, LLP is a leading specialty litigation firm, serving clients through its practice groups in Business Liability and Insurance Law, Labor and Employment Law, Construction Law, Commercial and Complex Litigation, and Government Law. FMG attorneys serve as trusted counsel to corporations and governments throughout the country, providing practical, efficient, and cost-effective solutions for legal issues. For more information about FMG, visit www.fmglaw.com.

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EEOC Charges Reach Second Highest Level In 20 Years



By [Brad Adler](#) and [Marty Heller](#)

The Equal Employment Opportunity Commission (EEOC) released its 2009 fiscal year performance and accountability report, and the numbers continue to reflect that employment issues are a major liability concern for employers. During the EEOC's 2009 fiscal year, more than 93,000 charges of discrimination were filed against private employers. This is the second highest number of federal employment discrimination charges filed against private employers in the last 20 years, trailing last year's record of 95,000 charges. In addition to the continued high level of administrative charges, the EEOC received its largest budget increase in 10 years, increasing its enforcement budget to more than \$340 million dollars. In just the past few months, the EEOC has added more than 155 additional investigators, trial attorneys, support staff and paralegals. The EEOC's Chairman, Stuart Ishimaru, stated that he expects the EEOC to continue its increased hiring in 2010.

Although the preliminary report did not include statistics for each category of charge, the Chairman stated that the EEOC has seen a nearly 11 percent increase in disability discrimination charges under the Americans with Disabilities Act (ADA). According to the Chairman, this increase likely is a side-effect of the broader coverage of the ADA since the passage of the statutes' new amendments last year.

The EEOC also collected more than \$290 million dollars for all claims of discrimination - a record high. In the report, Chairman Ishimaru stated that the EEOC's mediation alternative continued to be successful in 2009. Notably, during 2009, the EEOC filed 281 lawsuits, including 170 individual lawsuits and 111 class action lawsuits.

It should be emphasized that Aletha Brown, EEOC's Inspector General, warned that the number of charges likely will increase significantly in 2010, as the EEOC begins enforcing the Genetic Information Nondiscrimination Act as well as the expanded ADA. She also stated that the new hires made by the EEOC, resulting in its expanded enforcement capability, will increase its ability to process and investigate charges. In that regard, Ms. Brown was critical of the EEOC's alleged past "failures" in its investigative process "to effectively eliminate employment discrimination." Her comments clearly reflect the EEOC's intent to continue to increase its enforcement activities against employers.

For more information regarding this article, please contact Brad Adler at 770.818.1413 or by email at badler@fmglaw.com, and Marty Heller at 770.818.1284 or by email at mheller@fmglaw.com.



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Arbitration or Litigation, Now That is the Question!



By [Neil Wilcove](#) and [Will Tate](#)

During contract negotiations, members of the construction industry must decide whether to send their disputes (if any) to private arbitration or to litigation through the court system. Unfortunately, more times than not, these dispute resolution procedures are overlooked until it is too late. This article looks at the two procedures by which construction disputes are typically resolved and the pros and cons of each.^[1]

Cost

A chief consideration in the decision to pursue either arbitration or litigation is cost. Arbitration is widely believed to be a cheaper form of dispute resolution. A survey asked attorneys to estimate both litigation and arbitration costs for a fictitious case.^[2] The resulting estimates placed arbitration at approximately 27 percent less expensive than litigation. The lawyers estimated that more time would be required to prepare and respond to motions leading up to trial than preparing for arbitration. Also, the group of attorneys felt that discovery expenses, a large cost factor in any dispute, could be better controlled in arbitration. Nonetheless, the costs of arbitration have been increasing quite dramatically over recent years.

Speed

The general consensus in the legal community is that arbitration is a faster way to resolve a dispute. A survey of construction cases in federal court determined that the average time until a ruling was 22 months, about twice as long as the typical construction arbitration case.^[3] However, the speed in either route depends on the complexity of the issues, the judge or arbitrator's schedule, and the working relationship of the parties.

The Decision Makers

A possible benefit of arbitration is the ability to select knowledgeable parties to be the decision makers. Arbitrators in construction law cases are often individuals with knowledge of the industry or other construction attorneys. This can drastically reduce the amount of time and effort the parties spend trying to bring 12 jurors or a judge up to speed about complex issues.

On the other hand, a jury trial may be preferable if the case involves relatively simple issues and a sympathetic party or bad facts on the part of the other party.

Confidentiality

Another possible benefit of arbitration is the availability of confidential proceedings. Litigation is inherently a public procedure. The documents submitted to the court and its findings will all likely be available to the public. Parties in an arbitration can agree to keep the proceedings confidential. This would protect both parties from potentially embarrassing or harmful testimony and evidence revealed during arbitration proceedings.

Finality

Arbitration is a one-way street. The decision of the arbitrator, barring extreme



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misdeeds, is final. This is good if the decision is acceptable because it keeps costs down by preventing the other party from appealing. Of course, the downside is that party could be stuck with an adverse ruling that cannot be appealed. Litigation offers several layers of potential appellate review that arbitration does not typically allow for.

Conclusion

Whether to arbitrate or litigate your construction dispute needs to be carefully decided when negotiating your contracts. Hopefully the above list of items allows one to understand the ramifications of choosing one over the other.

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^[1]The other popular form of dispute resolution is mediation where a third party acts as an "in between" among the parties to help generate a dialog and seek a mutually acceptable resolution. Unlike arbitration or litigation, mediation is only binding if the parties reach an agreement.

^[2]Susan Zuckerman, Comparing Costs in Construction Arbitration & Litigation, *Dispute Resolution Journal*, May-July (2007).

^[3]Construction Industry, Arbitration v. Litigation: The Lines Aren't Drawn Where You May Think, available online at www.adr.org.





2010 Economic Forecast Predicts Continued Difficulties



By Ben Mathis

Dr. Albert Niemi, currently the Dean of the Cox Business College at Southern Methodist University, recently gave his annual economic forecast at a meeting in Atlanta at the invitation of the Bank of North Georgia - a forecast he has given to Atlanta leaders for more than 10 years. His comments are always interesting and provide many valuable insights. We hope you'll read the synopsis of his comments below and use them as a thought-starter as you plan for 2010.

Following is a synopsis of Dr. Niemi's remarks courtesy of Bill Cooper, the CEO of the Cobb Chamber of Commerce:

- From 1982 to 2007, the United States experienced an unprecedented period of economic growth, which we will not experience again in the foreseeable future. There were three major factors driving this growth:
 1. Invention of the microchip - altogether, technology industries (computers, cell phones, etc.) contribute one trillion dollars to our economy.
 2. Globalization of the economy. China, India, Russia = 4.5 billion people become part of our economy.
 3. Economic policies: Marginal tax rate dropped from 70 percent to 35 percent. Inflation dropped from 14 percent to 2 percent, and international free trade has been adopted.
- Current federal economic policies are the wrong policies to grow economy.
- California is a perfect example of the way our nation is headed with current policies:
 - Expansion of the role of government - more since the 1930's.
 - Anti-business sentiment - businesses are leaving the state, resulting in less tax income.
 - More expensive government benefit programs; unsustainable environmental restrictions. California has huge negative growth for foreseeable future.
- The nation lost 6 percent of its GDP from 2007 to 2009, compared to the 1980 - 1982 recession, which lost 2 percent and the Great Depression, which lost 26 percent of GDP.
- Unemployment was 25 percent in the 1930's. Currently, Georgia is at 10.2 percent and predicting 10.5 percent. There is a chance unemployment could go up to 11 percent by the spring of 2010.
- There is the possibility of a "double dip" recession caused primarily by three factors:
 1. "Stimulus" dollars gone in 2011
 2. Bush tax cuts expire
 3. Possible increase in interest rates driving up inflation due to federal government spending.
- When recovery comes it will be sluggish at best. It will be a "jobless" recovery, keeping unemployment high, resulting in a lack of consumer spending to spur economy.
- Public policy is making problems worse:
 - Stimulus dollars did not address the jobs issue; the dollars went primarily to pork barrel politics. Only \$120 billion of \$700 billion went to jobs. The rest went to states to address their issues.
 - The current healthcare proposal is a huge problem resulting in no hiring by businesses because of fears of increased costs of providing insurance.



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- Housing is 20 percent of the United States economy:
 - From 2000 to 2007, two million homes were built each year.
 - In 2008, 800,000 homes were built. Approximately 550,000 were built in 2009, and 700,000 will be built in 2010.
 - This downsizing of the housing industry is felt throughout all sectors of the economy.
- Consumer spending is 70 percent of the economy:
 - Households lost 22 percent of their net worth in the past two years. People are replenishing their savings - not spending. The savings rate is up 4 percent from virtually zero the past few years. Auto/truck purchases are down 30 percent from 2000 to 2007 levels.
- Tax policies:
 - Bush tax cuts will expire in one year. The marginal tax rate will increase 5 percent.
 - This impacts spending and hiring.
 - When the Bush tax cuts expire, 50 percent of taxpayers will be paying 99.6 percent of all federal income taxes. This is an untenable situation.
 - The federal government is set to increase taxes next year. Raising taxes on people in higher brackets will hurt people at the bottom. Workers suffer as people don't purchase second homes. The hospitality industry suffers with less eating out, less travel, etc. Workers and job creation suffer.
 - Taxes will be raised on interest and dividends. Medicare taxes will increase.
- Forecast for 2010:
 - Growth from 2.5 percent to 2.7 percent. Real estate will be at bargain prices in north Georgia.
 - Unemployment will still be at 10.5 percent by the end of 2010.
 - Inflation will be less than 2 percent. Interest rates will have no large changes.
 - Georgia will have an underperforming GDP compared to the national average. Georgia GDP will be down 3.8 percent compared to the 2.7 percent growth of national GDP. There is a large glut of property in Georgia, comprised of both residential and commercial properties. It will take a while to recover and absorb this inventory.
 - In 2007, 110,000 new homes were built in Georgia. In 2009, fewer than 18,000 were built, while in 2010 the number is estimated between 32,000 and 33,000.
- Macro Economic/International Issues to consider:
 - Globalization of business models will be critical in coming years. China and India are the main players. China has 400 million middle class citizens. (The United States has only 310 million total in population.) That's huge purchasing power. This is the largest future market for electronics and automobiles. Nineteen million students are in Chinese colleges today, which will double to 40 million in 20 years. China will become the education leader. China and India are becoming the largest market for businesses that understand the possibilities and exploit the opportunities.
 - From 1998 to 2007, China's GDP grew by 9 percent, India's by 6.5 percent and the United States' by 3.7 percent. China and India's economic expansion will dominate global economic activity for the next 20 years. It is critical for United States businesses to figure out how to engage these expanding markets.
- Long-term forecast:
 - The long term forecast is excellent with positive population growth. Georgia will exceed national growth rate by 50 percent or more. Georgia is only one of 11 states that will show strong economic growth. (GA, FL, NC, TX, AZ, NV, UT, ID, OR, WA, AK)
 - Georgia's competitive advantages: good weather, natural resources, pro-business climate, varied population, skilled workforce, low costs of labor and land, and good infrastructure.
 - Georgia will add 1 million people by the end of 2015. It will become one of the top five or six states in terms of economic growth by 2030.
 - With the opening of the Kia plant and the plans for NCR, Georgia is being favorably positioned for manufacturing.
 - Hartsfield/Jackson International Airport is a big plus in Georgia's future.

In summary, Dr. Niemi is predicting another 12 to 18 months of difficult economic times. Federal policies are a wild card that could exacerbate the problems of a positive economic recovery.

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