

2019 LEGISLATIVE REVIEW

and

MEDIATING EMPLOYMENT CASES

ISB Employment and Labor Law section

May 22, 2019

Presented By

Grant T. Burgoyne

Grant T. Burgoyne
2203 Mountain View Drive
Boise, Idaho 83706
208-859-8828
Grant@ADRIIdaho.com
www.ADRIdaho.com

Grant T. Burgoyne

Grant T. Burgoyne has a solo alternative dispute resolution practice in Boise, Idaho. He has over 30 years of experience litigating, arbitrating and mediating employment, civil rights, commercial, personal injury and other cases, and is an AV rated attorney. His past affiliations include service as a full time hearing officer with the Idaho Department of Employment, practice with Mauk & Burgoyne where he was the Managing Partner from 1997 to 2013, and service as an adjunct professor of employment law at Boise State University (2002 – 2007). Mr. Burgoyne received his B.A. from the University of Idaho and his J.D. from the University of Kansas. He is a member of the Idaho State Bar (Employment and Labor Law Section Chair, 1997 – 1998; Dispute Resolution Section Governing Board Member 2016 -- present), the Federal Bar Association and the Idaho Trial Lawyers Association. He is admitted to practice law in Idaho, the Federal District Court for Idaho and the Ninth Circuit Court of Appeals. He has lectured and written widely, and is a co-author of the *Idaho Employment Policies Handbook* (Idaho Law Foundation, 1998; rev. eds. 2001, 2012). He has mentored and supervised internships of law students at the University of Idaho College of Law and Concordia University School of Law.

Mr. Burgoyne has been a member of the Idaho Legislature since 2008 (House of Representatives 2008 – 2014, and Idaho Senate 2014 – present), and has served in legislative leadership since 2012 (House Assistant Minority Leader 2012 – 2014; Senate Minority Caucus Chair January 2015 – 2016; and Legislative Council 2014 – present). He serves on the Senate Judiciary and Rules Committee, the Senate Local Government and Taxation Committee, the Senate Commerce and Human Resources Committee, the Joint Legislative Economic Outlook and Revenue Assessment Committee, the Joint Legislative Millennium Fund Committee, the Idaho Criminal Justice Commission, and the Idaho Supreme Court's Guardianship and Conservatorship Committee.

2203 Mountain View Drive
Boise, Idaho 83706
(208) 859-8828
Grant@ADRIDaho.com
www.ADRIdaho.com

Part I: 2019 Legislative Review

1. Observation: It ended ugly (administrative rules, hemp and other fiascos), ignored the impossibility of creating a new K-12 school funding formula without it costing more money, sent an unfortunate message about how the Legislature views the gap population, but funded Medicaid expansion and didn't try to override the Governor's veto of the initiatives bill (SB 1159).
2. Causes of fiascos:
 - Power corrupts the process
 - Exempting legislative leadership from deadlines
 - Omitting necessary deadlines
 - Failing to understand that process issues (like initiatives) require consensus to achieve legitimacy
3. Employment Related Bills Passed
 - HB 177 PUBLIC EMPLOYEE RETIREMENT SYSTEM - Allows local school districts to hire retired law enforcement officers to support school security without requiring such individuals to suspend their PERSI benefits.
 - SB 1028 WORKER'S COMPENSATION - Provides that psychological injuries suffered by first responders shall be compensable.
 - SB 1071 CIVIL ACTIONS - Revises the definition of a "licensing authority", enabling the prevailing party in an administrative procedure between a licensee and a licensing authority to recover reasonable investigative and defense costs, subject to judicial review if requested.
 - SB 1204a MEDICAID - Establishes several provisions of law regarding Medicaid. First, the Director of the Department of Health and Welfare must include questions regarding substance use disorders on a health risk assessment for Medicaid participants, so that participants may be referred to appropriate treatment if necessary. Second, the Director must research federal waivers that would allow Medicaid funds to cover the treatment of adults in institutions for mental disease; under federal law, Medicaid funds are prohibited from being used in such institutions, even if the treatment is medically necessary. Third, the Director, in cooperation with the Director of the Department of Insurance, must seek a waiver that would allow persons eligible for Medicaid under Medicaid expansion (Proposition 2) to stay on the Idaho health insurance exchange, unless they request a transfer to Medicaid. Fourth, the Director of the Department of Health and Welfare must seek a waiver imposing work requirements on persons participating in Medicaid through Medicaid expansion, unless a person qualifies for an exemption. Fifth, eligibility for Proposition 2 will not be delayed while the Department is seeking or negotiating any waivers, and the

Department will not implement any waivers that would result in a reduction in federal funding for Medicaid expansion. Sixth, the Legislature shall nullify Medicaid expansion if expansion is held unlawful or unconstitutional by the United States Supreme Court. Seventh, if federal funding for Medicaid expansion is reduced, the Senate and House of Representatives Health and Welfare Committees shall review the effects of the reduction and make a recommendation as to whether Medicaid expansion should remain in effect. Eighth, Medicaid participants eligible for the program through Medicaid expansion must be placed in managed care to the extent possible. Ninth, Medicaid participants with a medical home under a managed care plan must have a referral to obtain family planning services and supplies from a provider outside the participant's medical home. Tenth, a legislative review of the health and financial impacts of Medicaid expansion must be conducted during the 2023 session. Finally, a task force will be appointed by the Legislative Council to study the effects of Medicaid expansion on county and state programs serving indigent persons, including the county medically indigent program and the catastrophic health care costs program.

- SCR 117 MEDICAID - Authorizes the Legislative Council to appoint a committee to undertake and complete a study and to make recommendations regarding the effects of Medicaid eligibility expansion on existing programs that serve medically indigent individuals, including the County Medically Indigent Program and the Catastrophic Health Care Costs program. Funding for these programs has been identified as a potential source of funding for the state's share of Medicaid expansion. The purpose of the committee is to study whether the programs should continue in light of Idaho's Medicaid expansion, since the programs serve many of the same people who will now be eligible for Medicaid.

4. Employment Related Bill That Did Not Pass

- SB 1038 (NOT PASSED) – This bill would have amended the firefighter collective bargaining law on mandatory fact finding. Current law requires public employers and firefighter unions to submit impasses over factual issues to a panel of three neutral fact finders. The fact finding panel's decision is merely advisory. The bill would have made the panel's decision final and binding. Opposition to the bill centered on claims that it unconstitutionally bound local units of government to spend money.

5. Change in Employee Compensation (State Employees)

For benefit costs, every agency's budget bill maintains the current appropriated amount for health insurance at \$11,650 per eligible FTP; provides a 5.5% increase for the employer's share of PERSI contributions; and temporarily reduces the rate agencies pay the Division of Human Resources for its services. The bills also provide funding for the equivalent of a 3% change in employee compensation for permanent employees, with a minimum increase of \$550 for each employee and the remaining amount to be distributed based on merit, based on the recommendations of the Legislature's Change in Employee

Compensation (CEC) Committee. Total compensation for state employees continues to lag behind market rates by approximately 10%.

Part II: Mediation

1. Special Considerations in Employment Cases
 - a. The emotional component
 - Emotional harm
 - Accusations of wrongful conduct
 - You work for me; how dare you question/accuse me
 - Work
 - issues of identity and self-worth
 - Limited employment options in region
 - b. EEOC and IHRC as mediators or parties to mediation
 - c. Overcoming impasse
 - Tax treatment of consideration
 - Remedying systemic discrimination and retaliation
 - Protecting the employee after reinstatement
 - References
 - Other non-monetary benefits
 - Etc., etc.
 - d. Settlement terms
 - Avoiding retaliatory terms
 - Non-waivable statutory rights
 - Special considerations in releasing ADEA claims
 - Non-disparagement clauses
 - Intellectual property and non-competition
2. Mediator as a Facilitator, Evaluator or Both
3. Common Mistakes Made by the Attorneys
 - a. Not preparing the clients for mediation
 - b. Not negotiating seriously prior to mediation
 - c. Mediating too early
 - d. Mediating only to meet a court-imposed deadline
 - e. Not providing the Mediator requested information (strengths and weaknesses)
 - f. Not providing a calculation/estimate of all damages

- g. Not disclosing and quantifying all subrogated interests
 - h. Misleading the opposition about what to expect at mediation
 - i. Making unreasonable opening offers and counter offers
 - j. Hiding the ball from the mediator and the other side
 - k. Breaching duty to mediate in good faith
4. Some Mistakes Made by Mediators
- a. Not holding pre-mediation conferences when needed
 - b. Not delaying the mediation when the time isn't right
 - c. Not assessing attorneys' degree of client control and aiding in that control
 - d. Not insisting on 2(a), (b), (e), (f) and (g) before commencing the mediation
5. The Duty of Good Faith in Mediations
- a. D. Id. L. Rule 16.4 (F)

(F) Attendance at the Mediation Session(s). All parties and their counsel must participate in the mediation process fully, reasonably, and in good faith. The attorney(s) who will be primarily responsible for handling the actual trial of the matter, and all parties, and insurers, if applicable, with authority to settle, must attend the session(s), unless otherwise excused by the mediator upon showing of good cause.

b. IRCP Rule 37.1

(a) Definition of Mediation. Mediation under this Rule is the process by which a neutral mediator assists the parties in reaching a mutually acceptable agreement. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and finding points of agreement. An agreement reached by the parties is to be based on the decisions of the parties, and not the decisions of the mediator.

(b) Matters Subject to Mediation. All civil cases governed under these rules are eligible for referral to mediation.

(c) Authority of the Courts. The referral of a civil action to mediation does not divest the court of the authority to exercise management and control of the case during the pending mediation.

(d) Referral to Mediation. In its discretion a court may order a case to mediation, as follows:

- (1) upon motion by a party;
- (2) at any [Rule 16](#) conference;
- (3) upon consideration of request for trial setting, pursuant to [Rule 16\(b\)](#), if all parties indicate that mediation would be beneficial; or
- (4) at any other time upon 7 days' notice to the parties if the court determines mediation is appropriate.

(e) Selection of the Mediator. If, within 28 days from entry of the mediation order or such other time as the court orders, the parties do not select a mediator and report their selection to the court, the court must appoint a mediator from the judicial district's list of mediators.

(f) Scheduling of First Mediation Session. Unless the court otherwise orders, the first mediation session must take place within 42 days of the reporting of the selection or the appointment of the mediator.

(g) Reports. Within 7 following the last mediation session, the mediator or the parties must advise the court, with a copy to the parties, whether the case has, in whole or in part, settled.

(h) Compensation of Mediators. Mediators must be compensated at their regular fees and expenses, which must be clearly set forth in the information and materials provided to the parties. Unless other arrangements are made among the parties or ordered by the court, the interested parties must be responsible for a prorata share of the mediator's fees and expenses. If a mediator is not paid, the court, upon motion of the mediator may order payment.

(i) Impartiality. The mediator has a duty to be impartial, and has a continuing duty to advise all parties of any circumstances bearing on possible bias, prejudice or partiality.

(j) Attendance at Mediation. The attorneys who will be primarily responsible for handling the actual trial of the matter, and all parties, or insurers, if applicable, with authority to settle, must attend the sessions, unless otherwise excused by the court, the agreement of the parties, or the mediator upon a showing of good cause.

(k) Confidentiality. The mediator must abide by the confidentiality rules agreed to by the parties. Confidentiality protections of [Rules 408 and 507, Idaho Rules of Evidence](#), extend to mediations under this Rule.

(l) Sanctions. The mediator is subject to sanctions, including referral for removal from the roster of mediators, if the mediator fails to assume the responsibilities provided herein.

- c. Remedies (motion & order, sanctions, breach of contract, other)
- d. Exceptions to mediation confidentiality

Disclaimer: These materials and the accompanying presentation are for your general knowledge and do not constitute legal services or advice.