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SETTLEMENT DOCUMENTS: LESSONS TO LEARN

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I. INTRODUCTION

Employment law cases present unique challenges to both the plaintiff (usually an individual) and the defendant (usually an entity). In addition to the various economic, equitable, and injunctive relief technically available under the law, the often personal nature of a workplace claim presents special challenges and opportunities, not unlike family law matters. Much like a divorcing couple arguing about who gets the toaster, employment law settlements bring into play conflicts that may seem trivial to the outside observer, but which carry a great deal of weight with one or both parties. Knowing and understanding the parties' underlying motivations, concerns, priorities and goals, some of which are more emotional than business-related, is key to facilitating an employment law settlement. A lawyer approaching settlement discussions in an employment law case must be equal parts counselor, psychologist, artist and mind-reader, in addition to knowing the law and advocating for the client.

To that end, the most important thing an employment lawyer can do when it comes to resolving disputes is to get to know both the client and the opposing party in order to gain the most complete understanding of what factors will motivate or limit each party in obtaining a settlement. Every decision made in approaching settlement discussions should incorporate this personalized knowledge: how to open the door, whether to mediate, who is the right spokesperson for the company, and of course, what elements of a settlement will be successful.

This discussion will incorporate various types of economic consideration, and non-economic consideration typical in employment settlements, as well as highlighting unique tax and other legal checkpoints that lawyers should consider. This presentation is not intended as a thorough discussion of damages available in employment law cases, as that subject is worthy of its own paper, but will provide a general overview of the types of consideration typically involved in the typical employment law case.

II. ECONOMIC CONSIDERATION

A typical employment law case usually involves allegations of economic loss of some kind, and depending on the type of claim, more than one type of economic consideration can be implicated. Lost wages and benefits are the most obvious and common type of economic loss, for example, in a case where a person alleges that he or she has been wrongfully denied a job or a promotion, let go from their job, or claims constructive termination. Individuals with employment contracts that require "cause" for termination may have breach of contract claims. A case involving unpaid overtime has unique waiver issues. Pattern and practice discrimination or harassment cases may be difficult to value. Undocumented workers may not be eligible for back pay as their immigration status does not allow them to accept employment in the United States.[1] Some of these elements, and others, can be present in the same case. Getting to know your client and the employee's unique circumstances is critical to knowing how to value the case, and therefore knowing how to approach settlement.

[1] Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984).

While this paper is not intended to be an overview of employment law damages, a "traditional" employment law wrongful termination case will likely involve the following elements: back pay, front pay[2], benefits/retirement loss, and compensatory damages. Mitigation and offset are also crucial aspects of employment cases where a job loss has occurred. Employees have the duty to seek alternative employment, and employers are entitled to an offset for amounts earned or that should have reasonably been earned, including the former employee's receipt of unemployment benefits. Some types of claims have damages caps depending on the size of the employer, and others (for example, wage and hour claims) have no punitive damages, but mandatory liquidated damages. Some claims may award attorneys fees to the "prevailing party," while others may leave that to the judge's discretion.

Prior to opening settlement negotiations, a prudent lawyer who is not intimately familiar with the unique aspects of employment law damages will take the time to read key cases[3] on the type of damages relevant to his or her client's claim.

Another factor to consider is the impact of Employment Practices Liability Insurance (EPLI) on a settlement. If your case is well underway, whether you are plaintiff or defendant, you probably know whether EPLI is in play and whether the coverage available contributes to the available resources for an economic settlement. Any attorney who has dealt with legal claims for which insurance coverage may be available is aware of the usual concerns, such as coverage questions, deductibles, and so forth.

However, with employment claims, many times an employer will want to try and resolve a matter very early on, and prior to a formal demand letter or claim being filed, coverage analysis, determination of whether a conflict is or might be a covered loss, or notification of the carrier. For that reason, it is particularly important for attorneys on the employer side of a dispute to make certain that their client is aware very early on of the potential impact of settlement discussions on EPLI coverage. Some smaller companies may not even know that they have EPLI, as it could be an overlooked rider to a general liability policy.

In addition to back pay, front pay and compensatory damages, employment claims also may implicate stock options or other types of equity, the employee's insurance benefits (if that individual participates in the company's health plans), retirement plans, profit-sharing and/or bonuses, and other fringe benefits such as company car, health club memberships, tuition assistance, and beyond. It is important to discuss these items with your client up front and determine which of them are most important to the client. For example, an employee who is a year away from vesting in her stock options, or whose options are underwater may not care as much about those as an individual who is on the cusp of a vesting date or who works for a company that is about to go public. Similarly, whether a company would be willing to accelerate

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[2] In a wrongful termination case, "reinstatement" is available as a measure of damages. However, in many employment cases, reinstatement is neither desirable nor feasible for either party. In litigation, the unavailability of reinstatement as equitable relief leads to the availability of front pay.

[3] The National Employment Lawyers Association (NELA), an association of lawyers representing employees, may be a good source for an initial damages overview. www.nela.org. Additional collateral sources: *see* Goodman & Bello, "Employment Rights Litigation and Practice," (Matthew Bender).

Title search: Settlement Documents: Lessons to Learn

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