

HOW TO DRAFT CLEAR AND EFFECTIVE SETTLEMENT AGREEMENTS

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OBJECTIVES OF SETTLEMENT

SETTLEMENT AS A BETTER APPROACH TO
PROBLEM RESOLUTION THAN LITIGATION

THE PARTIES CREATE THEIR OWN
SOLUTIONS

PROBLEMS ARE ADDRESSED THAT ARE
COLLATERAL TO BUT NOT PART OF THE
LITIGATION

WHEN A CASE MAY NOT BE APPROPRIATE FOR SETTLEMENT

POLICY ISSUES

EXTREMELY SEVERE MISCONDUCT

DON'T SETTLE TO AVOID FUTURE NUISANCE
LITIGATION

KEEP IT SIMPLE

AVOID JARGON

PLAIN ENGLISH

BRIEF BACKGROUND OF SETTLEMENT

WHAT THE AGENCY WILL DO

WHAT THE COMPLAINANT WILL DO

WHAT BOTH SIDES WILL DO

ENFORCEMENT/EFFECTIVE DATE/SIGNATURES

KEEP IT SIMPLE, CONT.

HAVE PARITY OF TERMS

IF AGENCY AGREES THAT SETTLEMENT
DOESN'T MEAN IT COMMITTED WRONG-
DOING, COMPLAINANT SHOULD AGREE
THAT CLAIMS ARE NOT WITHOUT MERIT

OBJECTIVES OF THE APPELLANT OR COMPLAINANT

RESTORATION OF EMPLOYABILITY

FINANCIAL

SUBSTITUTION FOR INCOME

BENEFITS

AUGMENTATION OF RETIREMENT

FINALITY

OBJECTIVES OF THE AGENCY

CONCLUSION OF LITIGATION

POSSIBLE LIMITATION UPON RETURN TO WORK OF THE APPELLANT OR COMPLAINANT

CONTROL OF DAMAGES

CONTROL OF COUNSEL FEES

REPAIR WRONGDOING

RESTORE EMPLOYMENT RELATIONSHIP

POINTS TO BE THINKING ABOUT IN A SETTLEMENT AGREEMENT

GLOBAL SETTLEMENT IS DESIRABLE

SETTLE EVERYTHING

PAST AND PRESENT

CANNOT DO TOO MUCH ABOUT THE
FUTURE

- Can only settle disputes through date of settlement.

Alexander v. Gardner-Denver,
415 U.S. 36 (1974)

WHAT IF CANNOT RESOLVE EVERYTHING?

IF YOU ARE PRETTY SURE THAT WHATEVER THE APPELLANT WANTS TO AVOID SETTling CAN BE RESOLVED THROUGH LITIGATION AGAINST THE APPELLANT,

WEIGH THE TIME IT WILL TAKE TO LITIGATED AGAINST THE ADVANTAGES OF SETTling EVERYTHING ELSE

NO VERBAL AGREEMENTS [EVER]

NOTHING BUT TROUBLE

NOT AN ISSUE IN MOST EEO CASES

MAKE SURE IT DOES NOT HAPPEN IN

MSPB

ARBITRATION

GRIEVANCE SETTLEMENTS

SIGNATURE BY A MANAGER [ALWAYS]

ALWAYS HAVE A MANAGER OR EXECUTIVE SIGN

DON'T SIGN ALONE AS A REPRESENTATIVE OR
ATTORNEY

Minimum Agreement Requirements -- EEOC

Signature Requirement:

EEOC regulations specifically require that the agreement be signed by the parties, *i.e.*, the complainant and someone at the agency authorized to commit the agency to executing the terms of the agreement.

29 CFR § 1614.603

Minimum Agreement Requirements -- EEOC

- Signature Requirement --
- Agency may only repudiate agreement with:
 - Showing that representative did not have authority or apparent authority;
 - No detrimental reliance by complainant.

Jacobsohn v. Secretary of Health and Human Services,
EEOC Request No. 05930689 (1994)

GLOBAL RELEASES

WITHDRAW, FOREGO AND WAIVE ALL PRESENT AND PAST CLAIMS, OF ANY NATURE

AGAINST THE UNITED STATES, THE AGENCY, ANY OFFICER, EMPLOYEE, CONTRACTOR, PAST OR PRESENT.

PROCEDURES AND FORMS FOR WITHDRAWAL OF PENDING LITIGATION

IDENTIFY SPECIFICALLY WHAT WILL BE WITHDRAWN, AND HOW AND WHEN IT WILL BE WITHDRAWN, BUT DO NOT LIMIT TO WHAT IS KNOWN TO YOU

RELEASES, CONT'D.

RELEASE ANY LIABILITY IN LAW OR EQUITY FOR ANY AMOUNT OF CLAIM AGAINST UNITED STATES, THE AGENCY, ANY OFFICER, EMPLOYEE, CONTRACTOR, PAST OR PRESENT.

IDENTIFY PRESENT CLAIMS, BUT DO NOT LIMIT THE AGREEMENT TO WHAT IS KNOWN TO YOU.

OWCP CLAIMS CANNOT BE WAIVED

MUST HAVE CONSIDERATION

Settlement agreement without benefit to which complainant not otherwise entitled lacks consideration.

Agreements to treat complainant with “dignity and respect,” “not to retaliate” lack consideration.

Dubois v. Social Security Administration,
EEOC Request No. 05950808 (1997)

OWBPA RIGHTS WHERE APPLICABLE

PURPOSE: EFFECTIVELY WAIVE ADEA CLAIMS

SPECIFICALLY REFERENCE ADEA

INCLUDE ADVICE TO SEEK ADVICE
FROM COUNSEL

KNOWING AND VOLUNTARY WAIVER

CONSIDERATION PERIOD: 21 DAYS

REVOCAION PERIOD: 7 DAYS

CONFIDENTIALITY

YES OR NO?

ALLOW FLEXIBILITY

EMPLOYEE NEEDS TO DISCLOSE
TO SPOUSE AND ATTORNEY
FUTURE EMPLOYMENT
TAXES
SECURITY CHECKS

EMPLOYER DISCLOSURES

PEOPLE WHO NEED TO KNOW TO ENFORCE
GOVERNMENT OR OTHER OFFICIAL INQUIRIES

ALLOW PARTIES TO MENTION SETTLEMENT

EMPLOYMENT REFERENCES

LETTER OF REFERENCE AND CALL IT A DAY?

EVERYTHING ELSE TO HR OFFICE?

OR,

IDENTIFY SOME PEOPLE WHO WILL RESPOND TO REFERENCE,
AND IDENTIFY PEOPLE TO BE EXCLUDED [WHO WILL MAKE
REFERRALS]

DECIDE WHAT THEY WILL SAY OR WHAT THEY WILL
NOT SAY

PUBLIC POLICY ISSUES

CANNOT AGREE TO FOREGO REPORTING CRIMINAL
ACTIVITY

OWCP CLAIMS

FUTURE EEO CLAIMS (EXCEPT AS TO PAST EVENTS)

RESPONSES TO CONGRESS

RESPONSES TO OPM OR EXECUTIVE BRANCH
OFFICIALS

COMPENSATION

SPELL IT OUT

BACK BAY

WHAT WILL BE RECEIVED, WHAT WILL BE PAID
OUT, BENEFITS, DEDUCTIONS, INTEREST

COMPENSATORY DAMAGES

BE SPECIFIC

ATTORNEYS FEES

BE SPECIFIC, BUT GET BACKUP
DOCUMENTATION FIRST

TAX ISSUES

SPECIFY WHO PAYS TAXES ON DAMAGES

PROVISION FOR ACCOUNTING

SUBSTITUTED PERSONNEL ACTIONS

RESIGNATION, DEMOTION, LWOP, RETIREMENT,
SUSPENSION, REASSIGNMENT

BE SPECIFIC

WHEN, HOW DOCUMENTED

OTHER POSSIBILITIES

CONTRACT WORK, IPA ASSIGNMENT;
VIRTUAL WORKSITE; TELEWORK

PROVIDE FOR SUBSTITUTED PAPERWORK

CLEAN PAPER AGREEMENTS

ADVANTAGE TO EMPLOYEES?

AGENCIES:

IDENTIFY EXACTLY WHAT IS GOING TO BE
CHANGED

AVOID BROADLY-STATED
OBLIGATIONS

FORECLOSE FUTURE EMPLOYMENT

HOW LONG?

FEDERAL GOVERNMENT?

AGENCY?

PARTICULAR LOCATION OR OPERATING
DIVISION?

LAST CHANCE

WHAT IS IT?

JUST ONE MORE TIME?

REMOVE

NO APPEAL, COMPLAINT OR
GRIEVANCE

CLOSE RELATIVE: ABEYANCE AGREEMENT

HOLD OFF ON PENALTY

STATED PERIOD OF TIME

AVOID TAIN'T ON RECORD IF SURVIVE

NO APPEAL FROM IMPOSITION OF
PENALTY IF DON'T SURVIVE

ABEYANCE OR LAST CHANCE PROBLEM AREA

DEFINING TRIGGERING EVENT

TOO BROAD AND UNFAIR TO EMPLOYEE

PROBLEM OF THE EMPLOYEE WITH A HABITUAL
PROBLEM

PERSONALITY DIFFICULTIES
MEDICALLY-RELATED ISSUES

EMPLOYER RELEASE EMPLOYEE OF PAST TRANSGRESSIONS?

KNOWN?

UNKNOWN?

CONDITIONS OF REINSTATEMENT

MEDICAL EXAM

DOCTOR'S CERTIFICATE

CERTIFICATE AS TO REHABILITATION

ACCOMMODATIONS

BE SPECIFIC

WHEN, WHAT OCCURS, WHO IS TO DO
WHAT

FULL COOPERATION OF COMPLAINANT

DISPUTE RESOLUTION PROCESS

TRAINING?

BE SPECIFIC

WHAT, WHEN, WHERE

OR,

HOW TRAINING WILL BE CHOSEN

PAYMENTS

LUMP SUM?

HOW DO YOU NEGOTIATE?

RESTORE OVERTIME

SICK AND ANNUAL LEAVE ISSUES?

METHODS OF PAYMENT

CHECK; ELECTRONIC DEPOSIT

TIME OF PAYMENTS

BE REALISTIC ON HOW LONG IT WILL TAKE

“REASONABLE TIME” WILL BE INFERRED IF NO SPECIFIC TIMEFRAME

RETIREMENT

ENSURE ACCURATE ADVICE AND BENEFITS
INFORMATION TO THE COMPLAINANT

GET OPM APPROVAL IN ADVANCE FOR
AGREEMENTS THAT CREATE OR ADVANCE
IN TIME RETIREMENT ENTITLEMENTS

FIGURE OUT WHAT TO DO IF RETIREMENT IS
NOT APPROVED

COOPERATION CLAUSE

GOOD FAITH

EFFORTS TO RESOLVE MATTERS
INFORMALLY BEFORE ENFORCEMENT
LITIGATION

DOCUMENTS PREPARED AS NEEDED TO
IMPLEMENT THE AGREEMENT

NON DISPARAGEMENT

WORKS BOTH WAYS

ENFORCEMENT PROCEDURES

EEOC OR MSPB?

ADVANCE OPPORTUNITY FOR AGENCY TO
CURE DEFECTS

TENDER BACK AGREEMENTS?

WHEN?

Interpretation of Agreements

Settlement agreements are contracts and follow general rules for contract interpretation.

The EEOC follows similar rules for interpretation of settlement agreements.

Interpretation of Agreements

Plain English Language Rule:

- “In ascertaining the intent of the parties with regard to the terms of a settlement agreement, the Commission has generally relied on the plain meaning rule. This rule states that if the writing appears unambiguous on its face, the meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature.”

Martin v. Secretary of Defense,
EEOC Appeal No. 01934244 (1994)
(citations omitted)

Interpretation of Agreements

Interpreting Language in Context Rule:

- “Where interpreting express terms in a contract, ‘an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.’”

Crutcher v. Postmaster General,
EEOC Appeal No. 01A06032 (2002),
quoting *Restatement (2d) of Contracts*, § 203(a)

Interpretation of Agreements

Drafter is Responsible Rule:

Ambiguities in the plain English language meaning of settlement clauses will be construed against the party drafting the language.

Bohelska v. Postmaster General,
EEOC Request No. 05950389 (1996)

Interpretation of Agreements

- Void for Vagueness Rule:
- When the language in a settlement agreement is so vague that the intent of the parties cannot be determined, the agreement is null and void and the complaint/appeal will resume processing from the point of settlement.

Goodwin v. Postmaster General,
EEOC Appeal No. 01831956 (1983)

Interpretation of Agreements

Time for Compliance Rule:

Where a settlement agreement does not provide for a time limit within which to perform obligations, it “is generally understood to require compliance within a reasonable amount of time.”

Gomez v. Secretary of Treasury,
EEOC Request No. 05930921 (1994)

INTEGRATION CLAUSE

NOTHING OUTSIDE OF AGREEMENT

EXPRESS OR IMPLIED

EFFECTIVENESS PROVISION

WHEN AND HOW IS THE AGREEMENT EFFECTIVE

WHO SIGNS?

ATTACHMENTS

REFERENCE LETTER

SF-50 OR SF-52 FORMS

RESIGNATION LETTER

SUBSTITUTED DISCIPLINARY LETTERS

WITHDRAWALS OF LITIGATION