

Drafting Clear and Enforceable Settlement Agreements

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Bargaining Strategies

- “Won’t do”
 - Determine why
 - Use argument, facts, or precedence to overcome objection

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Bargaining Strategies (cont.)

- “Can’t do”
 - Basic idea or process, method, etc.
 - Get explanation
 - Problem solve
 - Ensure reasoning based on correct information
 - Check each aspect/component
 - Talk with person who says it cannot be done

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When In Doubt

- Wait, and think about it
- Improvements can be made with more time to consider ramifications
- Make sure agreement solves the problem and does not create problems
- Research case law again

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Present Alternatives

- Alternatives:
 - Minimize feeling that something is being forced on the other side
 - Gives the other side a feeling of power because they think they are choosing
 - May resolve "political" and procedural problems

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Basics

- Knowingly and voluntarily agreed to
- Any stage of the complaint process
- Shall be binding on both parties
 - 29 C.F.R. § 1614.504(a)

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What is Wrong?

"The sum of \$6,250.00 be awarded to the Complainant (Mr. Thomason) as the result of the mediation on 12/14/2000 conducted at the Trenton P & DC. This will constitute a final settlement of all allegation (sic) in this complaint. This award is pending the authorization and approval by the appropriate authority of the U.S. Postal Service. The complainant understands that an award will be subject to any/all taxes by State & Federal (IRS) Government."

Thomason v. USPS, Appeal No. 01A13298, 6/7/02 7

Void for Lack of Consideration

"Pending Approval" is too speculative and vague to be enforced.

Agency is not obligated to incur any legal detriment at all.

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Anything Wrong?

If the need for a part-time flexible (PTF) arises on Tour 2 and if it's a new hire, management will consider moving the new PTF to Tour 1 and moving [complainant] to Tour 2. If it would be a downgrade for [complainant], then [he] will have the option to take the transfer or not.

Muhammad v. USPS, EEOC No. 1A14145, 10/5/01 9

How About This One?

- We will make a concerted effort to improve our working relationship and day to day dealings and respect for each other; and
- Strive not to assume the worst of any situation.

Estock v. USPS, EEOC No. 01A15048, 1/10/02 ¹⁰

Plain Language

- Avoid legalese
 - Whereas, to wit, null and void, etc.
- Use active voice

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Intent of parties



Plain Meaning Rule

Hyon v. USPS, Request No. 05910787 (12/2/1991) ¹²

- Plain and unambiguous
- Four corners of the instrument
- No extrinsic evidence of any nature

*Montgomery Elevator Co. v. Building Eng'g
Servs. Co.*, 730 F.2d 377 (5th Cir. 1984)

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Define Terms

- Priority consideration
- Clean record
- Destroying all negative documents
- Neutral reference

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Removal

- Back pay
- Time on the rolls
- "Clean" record
- Retirement/Annuity

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Promotion

- Retroactivity
- Back pay
- Current promotion
- Next promotion
- Priority consideration

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Job Assignment

- 1999 settlement agreement provided:
 - [Named agency official] will give [complainant] a job offer that includes the following:
 - 12-8:80 p.m. time slot
 - Saturdays and Sundays off
 - Pay location 321 (SPBS)

(continued)

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- [Complainant's] duties will include the following:
 - Mail transportation equipment (set up SPBS)
 - Un-cancelled letter pickup
 - Un-cancelled priority pickup
 - Un-cancelled flats pickup
 - Non-machinable mail piece pickup
- [Complainant] will let [Named agency official] know whenever he is unable to continue a task as soon as the problem occurs.

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Specificity

- Settlement agreement did not specify job assignment was to be permanent, or for any length of time.
- “[W]here an individual bargains for a position without any specific terms as to the length of service, it would be improper to interpret the reasonable intentions of the parties to include employment in the exact position *ad infinitum*.”

Jackson v. USPS, Appeal No. 01A32581 (8/8/03) 19

Avoid Illegal Terms

- Agency will approve any outside employment
- Agency will pay liquidated or punitive damages
- Agency will pay compensatory damages for age discrimination case
- Agency will provide back pay beyond what the back pay act allows

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Neutral Reference

- Not favored by courts/MSPB
 - *Pagan v. DVA*, 170 F.3d 1368 (Fed. Cir. 1999)
- Pitfalls of promising a “clean record”
 - Expectations of employee
 - Employer may have to lie or be evasive

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If You Must

- Use single point of contact
- Get employee's approval of reference content
- Don't use a script

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Expungement

- Identify specific documents and files
- Timeframe
- Obtain appropriate authority to expunge
- Provide for employee's acknowledgement that agency complied

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Be Precise

- Settlement agreement provided:
 - ... the letter of warning dated April 5, 1996 shall be removed from his [Official Personnel File] OPF.
 - ... the 7 day suspension dated April 30, 1996 shall be removed from his OPF.

Cabone v. USPS, Appeal No. 01A24819 (8/7/03)

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Voluntary Clause

- Complainant has read and understands agreement
- Agreement is voluntary and not product of coercion or deceit
- Representation by attorney presumes knowledge and voluntariness
 - *Phipps v. USPS*, EEOC No. 01821994 (1982)
- Avoid rush to “close” deal prematurely

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Confidentiality Provision

- Not a requirement -- *Kevin Harris v. Rochee*, 01A02093 (2002)
- Hard to maintain
- Often breached by agencies
- Breach can destroy entire agreement
- Avoid them

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Lump Sum Payment

- Amount should be reasonably related to, but not exceed, amount of back pay, damages, attorney's fees court could award successful plaintiff
 - MD -110, Chapter 12
- Finding/Admission of discrimination not required

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Attorney's Fees

- Address attorney's fee
- "Reasonable fees"
- Time frames for when required information must be submitted

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Taxes

- Back pay taxable
- Compensatory damages
 - Emotional distress/pain suffering -- taxable
 - Personal physical injury or sickness -- not taxable
- Withholding is not required
 - Include provision: "Complainant bears full responsibility for all appropriate taxes."

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Waiver

- Clear language that employee withdraws **all** current claims and waives future claims for **all** past issues
- Employee cannot waive future claims for issues arising **after** settlement agreement

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Older Workers Benefit Protection Act

- Waiver written to be understood by individual
- Specifically refers to rights/claims under the ADEA
- Cannot waive rights/claims that arise after date of waiver
- Rights/Claims waived only in exchange for consideration

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OWBPA Waiver (cont.)

- Advised to consult with attorney prior to signing the agreement
- Has 21 days to consider the agreement
- Has 7 days after signing to revoke the agreement
- Agreement is not enforceable until the revocation period has expired

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Must Haves

- Consideration
- Identification of parties
- Effective date
- Signatures
- Waiver/Release
- Voluntary clause
- Breach procedures (good to have)

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Unnecessary Clauses

- Avoid boilerplate clauses
 - Agency agrees not to retaliate
 - Agency will provide workplace free of harassment
- Violated provision creates unnecessary noncompliance issue
 - Appropriate forum is new complaint

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THE END
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