Bench&Bar OF MINNESOTA

Effective drafting for employment settlement agreements

Posted JUL 1 2017 by CHRIS JOZWIAK AND SARAH BUSHNELL in ARTICLES, CURRENT ISSUE with 0 COMMENTS

Work to eliminate miscommunication up front, and don't make the agreement more complex or convoluted than necessary

What does an employee's lawyer have in common with an employer's lawyer? A mutual interest in a concise, effective settlement agreement that will not invite new disputes. In a litigation era where only a small percentage of civil cases proceed to trial and the vast majority are settled, the ability to efficiently negotiate and draft settlement agreements that work for both parties is an important skill for employment practitioners. Many experienced litigators spend disproportionate amounts of time on clauses to settlement agreements that add little or no value for their clients. The result is lengthy, convoluted, and unnecessarily complex agreements that many clients without a legal background struggle to understand, which can create roadblocks to resolution. In many cases, a concise agreement that contains only the terms and conditions essential to any settlement will suffice to allow the parties to resolve the dispute and move on with their lives.

ELIMINATE MISCOMMUNICATION: WRITE IT DOWN

It is easy for parties to make assumptions during a negotiation about what a final settlement agreement will look like without discussing each issue during the negotiation or mediation. To prevent would-be agreements from blowing up on the tail end, it's best to enumerate the most essential terms at the time the agreement in principle is reached. If you are with your client at a mediation and can craft the definitive agreement while the parties negotiate, perfect. If that is not possible, write or print up the critical points of agreement in a "term sheet" and have the parties sign it before leaving.

Include the following:

- any settlement payment(s) that will be made and directions about how and to whom payments will be made and delivered;
- the timing of payment(s);
- the characterization of what the payment(s) are for (settlement of disputed claims, injuries, wages) and whether withholding will be made or an IRS Form 1099 will be issued;

- whether the existence and/or terms of the agreement will be confidential and, if so, what the parties may say, to whom, and under what circumstances;
- whether the parties agree to a mutual or unilateral non-disparagement promise;
- the scope and mutuality or unilateral nature of releases and, in the definitive agreement, address statutory waiting and rescissionary periods;
- the plan and timing for stipulating to the dismissal of pending lawsuits; and
- the handling of any critical, non-monetary terms like reference letters, what will be said in response to reference inquiries, the wording of press releases or statements to employees, or the official coding of the reason for the employment separation.

DRAFTING THE CLAIMS RELEASE

Employment cases frequently involve situations where both parties have claims against the other. Whistleblowers, for example, may have retained documents or materials for which the employer may threaten or assert claims. Lawyers on both sides may think it necessary to flesh out every possible claim the other may have and explicitly mention them in a settlement agreement's release clause. But, particularly in employment cases, a settlement agreement that uses broad mutual release language is often both more efficient and more desirable than trying to release a laundry list of possible claims that either party may or may not have available to them.

Broad general releases are beneficial to both parties in employment cases. For employers, they offer the peace of mind and security that comes with resolving a potentially expensive or embarrassing public dispute. Plaintiff employees also benefit from general releases because, while they provide the opportunity to quickly resolve an employee's existing claims, federal and Minnesota law generally dictate that they can do so without waiving their right to bring future claims or to make a charge to a regulatory agency or participate in a government investigation.[1] An effective employment release should specifically state that it does not purport to waive prospective claims or an employee's right to bring or participate in an agency investigation, but does waive the employee's right to benefit financially from any agency proceeding against the employer.

There are a few contexts in which general releases are not the most effective way to go about drafting a settlement agreement. Claims under the Fair Labor Standards Act[2] often require court or Department of Labor approval, and special care before a release of claims can be effective. Similarly, if the plaintiff employee filed a charge with the Equal Employment Opportunity Commission (EEOC) or the state-level equivalent, the parties may also need to include a separate arrangement for notifying the agency of the settlement.

Outside of these situations, clauses that release the parties' claims against one another are a place where many practicing lawyers can simplify the language they use when drafting settlement agreements and achieve a broad and, hopefully lasting, peace. While the release of claims is arguably the most essential part of any settlement agreement, it can usually accomplish its purpose without adding unnecessary complexity to the process or to the agreement itself.

STATUTORY DRAFTING, WAITING PERIOD, AND RESCISSION REQUIREMENTS

Some settlements of employment claims are subject to statutory requirements. In Minnesota, the following requirements are the most common:

- Settlements releasing Age Discrimination in Employment Act claims must be clearly written, must specifically state that ADEA claims are being released, must notify the employees of the right to consult with counsel, and must give the employee at least 21 days to consider the agreement before (s)he is required to sign it.[3]
- Settlements releasing ADEA claims must give employees seven days after signing the agreement to rescind the release.[4]
- Settlements releasing Minnesota Human Rights Act claims that were not asserted in the proceeding that resulted in settlement must give employees 15 days after signing the agreement to rescind the release.[5]

CONFIDENTIALITY CLAUSES: DRAFT FOR REAL-LIFE LIKELIHOODS

Another bare necessity for most settlements is a confidentiality agreement. Confidentiality agreements are important for defendants because they prevent alleged wrongdoing from becoming public information, discourage copycat litigants, and manage expectations for future plaintiffs who may want to use the facts and settlement amount to their advantage in negotiations. Plaintiffs often desire confidentiality agreements for similar privacy reasons.

There's no need for confidentiality clauses to be particularly complicated. An effective confidentiality clause simply clarifies that the terms of the agreement and of the negotiations that led to the settlement, are confidential.[6]

The critical terms for most confidentiality agreements will include some assurance that confidentiality will be mutual, a restriction on communications regarding the terms of the settlement and direction about what parties may say (i.e., that their disputes have been resolved to their satisfaction), and usually exceptions that allow the parties to discuss the settlement terms with their tax and professional advisors and spouses and as may be otherwise legally required.[7]

There are a few instances in which the confidentiality clause in a settlement agreement needs to be more complex. In some cases, settlement terms may have been discussed with third parties, like a close friend of the plaintiff or a non-management employee of the defendant, before the settlement agreement was executed. In such instances, it may be important for the confidentiality clause to go into greater specificity regarding to whom it applies. As long as the agreement is explicit about when the restriction applies, and clarifies that communications prior to the signing of the agreement are not in breach of the same, miscommunications can be avoided.

NON-DISPARAGEMENT AGREEMENTS: NECESSARY OR PROBLEMATIC?

In employment cases, both parties may be concerned about what the other might say to third parties following resolution of the dispute. Plaintiffs often worry that potential future employers may seek their prior employment information from the defendant, in which case the defendant may provide disparaging

information regarding the plaintiff. Conversely, defendants are often concerned that former employees who believe they were treated unfairly may publicly criticize one of the company's products or denounce the company as a poor employer. Both parties, therefore, may be interested in a non-disparagement clause in the settlement agreement.

Before including a non-disparagement clause in the settlement agreement, think about whether placing more restrictions and agreements onto the parties is indeed necessary or if it's asking for trouble down the road. In most cases, the dispute may have burned bright and been the subject of gossip for a blip in time, but has now become yesterday's news—or perhaps all the vitriol has already been disseminated, and putting restrictions and consequences on continued gossip may invite further entanglements and lawyer fees, but account for much ado about nothing.

A non-disparagement clause can be effective under the right circumstances, even necessary to push the parties to move on. If so, the clause should include particularized language that allows the plaintiff to discuss things like prior job responsibilities or that specifies what information the defendant may share to other prospective employers—for example, should another employer inquire about the plaintiff's employment history, the defendant will only reveal the plaintiff's previous job title and dates of employment and nothing more. Similarly, the clause may direct the parties on exactly what can be said if a third party makes an inquiry about the dispute at issue. For example, to all inquiries, the parties can be directed to use specific phrasing like "the matter has been resolved and is confidential."

PREPARE YOUR CLIENT FOR TAXATION

Money received from settlements in employment cases is generally not tax-exempt.[8] Counsel should be prepared to discuss with their clients and with one another whether and how to characterize settlement payment(s) in the settlement documentation, whether tax withholding is appropriate as to all or part of the payment(s) characterized, and whether an IRS Form 1099 will be delivered to the person receiving payment (for most employment settlement payments). If a Form 1099 will be issued, the party making the payment will need to receive a Form W9 identifying the recipient's name, address, and Social Security number or federal tax ID number. Most agreements will require a simple indemnification clause, which requires the persons or entities receiving the payments to bear all responsibility for the taxes resulting from the payments.

CONCLUSION

The ability to draft effective and concise settlement agreements is an important skill for employment lawyers. Because it is in the parties' best interest to resolve disputes as efficiently and effectively as possible, every litigator should be able to craft the essential terms of a settlement agreement without reaching a point where the agreement cannot be understood by most clients. Many of the critical clauses of a good settlement agreement can be drafted using a few sentences and simultaneously achieve their essential purposes. Shortening and simplifying terms such as releases of claims, confidentiality agreements, and agreements regarding tax reporting and responsibility can make settlement agreements more palatable to clients and lawyers alike.

CHRIS JOZWIAK is a partner of Baillon Thome Jozwiak & Wanta LLP and represents individuals in employment, consumer fraud, and class action litigation. He currently serves as chair of the MSBA's Labor and Employment Law Certified Specialist Board.

SARAH BUSHNELL is a shareholder of the Minneapolis law firm of Arthur Chapman Kettering Smetak & Pikala PA. She focuses her practice in the areas of business, employment (employer side), and professional liability litigation.

NOTES

[1] 29 C.F.R. § 825.220(d) (2016); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974); Minn. Stat. § 363A.31, Subd. 1.

[2] 29 U.S.C. § 201 *et seq.*

[3] *See* https://www.eeoc.gov/policy/docs/qanda_severance-agreements.html#IV.

[4] *Id.*

[5] Minn. Stat. § 363A.31, Subd. 2.

[6] Gregg Stevens & Lorin Subar, *Confidentiality in Settlement Agreements Is a Virtual Necessity*, ABA, http://www.americanbar.org/publications/gp_solo/2012/november_december2012privacyandconfidentiality/confidentiality_settlement_agreements_is_virtual_necessity.html(Nov. 2012).

[7] *See* Robert B. Fitzpatrick, *Settlement of Employment Disputes: A Checklist*, SM097 ALI-ABA 1345 (2007).

[8] *Commissioner of Internal Revenue v. Schleier*, 515 U.S. 323 (1995).

CATEGORY: Articles, Current Issue